

Commercial Defence Actions and Other International Trade Developments in the European Communities II: 1 July 1989 - 30 June 1990

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Introduction

This is the second in a series of annual reports on developments in the area of EC international trade law.¹ It covers developments that occurred during the period 1 July 1989 to 30 June 1990.

Like its predecessor, the report is organized by subject matter, according to the following template:

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¹ The first report was published in 1 *EJIL* (1990) 337-364.

1. Dumping

1.1. General Developments

The GATT Panel Report on Article 13 (10) of Regulation 2423/88

In 1988, Japan requested the formation of a GATT panel to decide whether Article 13(10) of Council Regulation (EEC) 2423/88² and the measures taken pursuant to that provision were contrary to GATT. In October 1988 a GATT panel was established. On 22 March 1990, the GATT panel officially communicated to the GATT Contracting Parties that it had found that the EC measures taken pursuant to that provision were in violation of GATT.³ The arguments of the EC and Japan and the findings of the panel are summarized below.⁴

The GATT panel examined successively the GATT compatibility of:

- (1) the imposition of duties under Article 13(10);
- (2) the acceptance of undertakings under Article 13(10);
- (3) Article 13(10) itself; and
- (4) the non-publication of criteria for accepting parts undertakings and the administration of the rules of origin for parts and materials.

On the first point, the panel stressed the importance of determining the exact nature of the EC anti-circumvention duties in view of the differences between Articles II(1) and III(2).⁵

The EC argued that the anti-circumvention duties should be considered as customs duties imposed 'in connection with importation' within the meaning of Article II(1)(b). First, the

² See the first report, note 1, *supra*.

³ See for press reports, Buchan, 'GATT Upholds Japanese Complaint Against EC', *Financial Times* (12 March 1990); 'EC Mum on Press Report That It Lost GATT Case', *Wall Street Journal/Europe* (12 March 1990); Thomson, 'Japan Hopes GATT Ruling Ends EC "Discrimination"', *Financial Times* (13 March 1990); Dullforce, 'Japan Scores Victory Over EC on Duties', *Financial Times* (29 March 1990); Buchan, 'Brussels Attacks "Narrow" GATT Dumping Ruling', *Financial Times* (30 March 1990); Wolf, 'EC May Amend "Screwdriver" Legislation After GATT Upholds Japanese Complaint', *Wall Street Journal/Europe* (30 March 1990); Montagnon, Kellaway, 'EC Refuses to Adopt GATT Report on Dumping', *Financial Times* (4 April 1990); Dullforce, 'Brussels At Odds with GATT over Judgment', *Financial Times* (4 April 1990); 'EC Commissioners Criticize GATT Panel in Anti-dumping Case', *Wall Street Journal* (6 April 1990); EC Blocks GATT Adoption of Report on 'Screwdriver' Anti-dumping Case', (2) *1992 The External Impact of European Unification* (6 April 1990) at 2; Montagnon, Kellaway, 'The "Predators" and the Investors', *Financial Times* (9 April 1990).

⁴ Excerpts of the GATT Panel Report have been published in *Inside U.S. Trade, Special Report*, at 2-7 (30 March 1990). The summary of the GATT panel's findings which follows is based on this publication. A more extensive discussion of the findings of the GATT Panel and their repercussions for the anti-circumvention debate in GATT can be found in Vermulst, Waer, 'Anti-Diversion Rules in Anti-Dumping Proceedings, Interface or Short-Circuit for the Management of Interdependence?', 11: 3 *Michigan Journal of International Law* (1990) 1119-1194.

⁵ According to Article II(1)(b) the imposition of 'ordinary customs duties' for purposes of protection is allowed unless they exceed tariff bindings. All other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of products for which there are binding tariff schedules. By contrast, Article III(2) provides that internal taxes that discriminate against imported products are prohibited, whether or not the products are bound by tariff schedules. The question therefore was whether the anti-circumvention duties qualified as 'customs duties' or as 'internal taxes.' In this respect Japan argued that the anti-circumvention duties could be considered to be *either* duties imposed on or in connection with importation within the meaning of Article II(1)(b) *or* internal taxes within the meaning of Article III(2). The EC argued that the anti-circumvention duties could not be considered to fall under Article III(2).

purpose of these duties was to eliminate circumvention of anti-dumping duties on finished products and, therefore, these duties are by nature identical to anti-dumping duties. Second, the duties, which are collected by customs authorities under procedures identical to those applied for the collection of customs duties, similarly formed part of the resources of the EC, and related to parts and materials which were considered not to be 'in free circulation' within the EC.⁶

The panel disagreed. The panel determined that since Articles I, II, III and the Note to Article III refer to charges 'imposed on importation,' 'collected ... at the time or point of importation' and applied 'to an imported product and to the like domestic product,' *the policy purpose of a charge is not relevant.*⁷ What matters is whether the charge is due on importation or at the time or point of importation or whether it is collected internally.⁸ The panel also noted that the policy purpose of charges is frequently difficult to determine and, therefore substantial, legal uncertainty would be created if this factor were to be considered relevant.⁹

Second, the panel ruled that the *mere description or categorization* under the domestic law of a Contracting Party of 1) a charge or 2) the product subject to a charge, cannot be decisive either. If the Contracting Parties could establish the 'connection with importation' by the mere description or categorization in their domestic law of the charge, or the product subject to a charge, and thus determine which GATT provisions apply, the basic objectives of Articles II and III could not be achieved. The Contracting Parties could then impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue to their customs revenue.¹⁰

The panel concluded that the anti-circumvention duties cannot be considered to be levied 'on or in connection with importation' within the meaning of Article II(1)(b).

The panel then examined whether the anti-circumvention duties are contrary to Article III(2), first sentence.¹¹ The panel noted that the EC had applied anti-circumvention duties in accordance with Article 13(10)(c) of Council Regulation (EEC) No. 2423/88 stipulating that:

[t]he amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported.

Hence, the panel concluded that the anti-circumvention duties are inconsistent with Article III(2), first sentence.¹²

⁶ Note 4, *supra*, at 3.

⁷ The panel in particular quoted the GATT panel Report in *United States – Taxes on Petroleum and Certain Imported Substances (Superfund taxes)*, where the GATT panel held that: '... [t]he tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products, they *do not distinguish between taxes with different policy purposes.*' (Emphasis in original) GATT, BISD, 34th Supp., 136, at 161 (1988). Note 4, *supra*, at 3.

⁸ The panel noted that the anti-circumvention duties are imposed, not on imported parts or materials, but on the finished products assembled or produced in the EC.

⁹ Note 4, *supra*, at 3.

¹⁰ Note 4, *supra*, at 3.

¹¹ This Article provides that: '[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.'

¹² Note 4, *supra*, at 3.

The panel proceeded by examining whether the anti-circumvention duties could be justified under Article XX(d).¹³ The panel identified the issue as being whether the anti-circumvention duties ('measures') could be considered necessary in order to secure compliance with the regulations imposing a definitive anti-dumping duty on the importation of the finished product ('laws or regulations'); which regulations it decided to consider as not inconsistent with GATT for purposes of this case.¹⁴

In this respect, the EC argued that the term 'secure compliance with' should be broadly construed to cover not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations.

The panel did not accept this broad interpretation. It noted that the *text* of Article XX(d) does not refer to objectives of laws or regulations but only to laws or regulations.¹⁵ As for the *purpose* of Article XX(d), the panel found that acceptance of such a broad interpretation would mean that:

[w]henever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement would then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in view of the Panel, be the purpose of Article XX(d): *each of the exceptions in the General Agreement – such as Article VI, XII or XIX – recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective.* These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.¹⁶ (Emphasis added).

The panel noted that only the individual EC regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specific amount of anti-dumping duties, and that, consequently, the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties.

13 This Article provides that:
'[n]othing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures: ...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement....'

14 Although Japan had expressed doubts whether Council Regulation (EEC) No. 2423/88 and the regulations imposing definitive anti-dumping duties on finished products were 'not inconsistent' with GATT, the Panel noted that its terms of reference and the submissions by both parties had been limited to the anti-circumvention provision and its application. Note 4, *supra*, at 4.

15 The panel further stated that:
'[t]he examples of the laws and regulations indicated in Article XX(d), namely "those relating to customs enforcement, the enforcement of monopolies... the protection of patents... and the prevention of deceptive practices" also suggest that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations. This conclusion is further supported by the fact that the provision corresponding to Article XX(d) in the 1946 Suggested Charter for an International Trade Organization used the terms "to induce compliance with" while Article XX(d) of the General Agreement uses the stricter language "to secure compliance with." (Emphasis added).

16 Note 4, *supra*, at 4.

Therefore, the panel concluded that the anti-circumvention duties do not 'secure compliance with' obligations under the EC Anti-Dumping Regulation and cannot be justified under Article XX(d).¹⁷

On the second point,

[t]he panel considered that the comprehensive coverage (in Article III(4) of *all* laws, regulations or requirements *affecting* the internal sale etc. of imported parts suggests that not only requirements which an enterprise is legally bound to carry out ... but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute 'requirements' within the meaning of that provision. The panel noted that the EEC made the grant of an advantage, namely the suspension of proceedings under the anti-circumvention provision, dependent on undertakings to accord treatment to imported products less favourable than that accorded to like products of national origin in respect of their internal use. The Panel therefore concluded that the decisions of the EEC to suspend proceedings under Article 13(10) conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III(4).¹⁸ (Emphasis added)

Japan argued that not only the measures taken under Article 13(10) but also Article 13(10) itself constituted a violation of GATT. The Panel noted that Article 13(10) does not mandate the imposition of anti-circumvention duties or other measures by the Community authorities; it merely authorizes the Commission and Council to take certain actions. The Panel held that the GATT provisions which Japan invoked impose upon Contracting Parties the obligation to avoid certain measures, but not an obligation to avoid legislation under which the executive authorities may possibly impose such measures.¹⁹ Hence, the Panel concluded that, although it would be desirable if the EC were to withdraw Article 13(10), the mere existence of Article 13(10) was not inconsistent with the EC's obligations under GATT.²⁰

Finally, the Panel held that in view of its ruling that the anti-circumvention duties and the acceptance of parts undertakings are contrary to Article III(2) and (4), the issue whether the administration of the anti-circumvention provision is contrary to Article X was no longer relevant.²¹

When the news of the GATT panel's findings leaked, the panel report was announced in the press as a major victory for Japan.²² This was the first time Japan had resorted to a GATT

¹⁷ Note 4, *supra*, at 5.

¹⁸ Note 4, *supra*, at 5.

¹⁹ The panel referred again in particular to the GATT panel report in *United States – Taxes on Petroleum and Certain Imported Substances (Superfund Taxes)*, where the Gatt panel had stated that: '[f]rom the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement.' GATT, BISD, 34th Supp., 136, at 163 (1988). Note 4, *supra*, at 6.

²⁰ Note 4, *supra*, at 6.

²¹ Note 4, *supra*, at 6.

²² 'Dispute Panel Finds in Favour of Japan on Complaint about EC "Screwdriver" Law', 7 *International Trade Reporter*, 367 (14 March 1990); 'Japanese Win GATT Dispute over EC "Screwdriver" Law', 1992 *The External Impact of European Unification*, 5 (23 March 1990); see also Buchan, 'GATT Upholds Japanese Complaint Against EC', *Financial Times* (10 March 1990); Thomson, 'Japan Hopes GATT Ruling Ends EC "Discrimination"', *Financial Times* (13 March 1990); Dullforce, 'Japan Scores Victory Over EC on Duties', *Financial Times* (29 March 1990).

dispute settlement proceeding, and the positive result obtained in this proceeding by Japan was seen as likely to encourage Japan to bring more cases and play a more assertive role in GATT.²³

The EC initially declined to comment on the panel's findings.²⁴ However, in a press release of 29 March 1990, the EC stated:

[t]he report has now been issued in definitive form to Contracting Parties to the GATT. The findings do not appear to condemn the principle of the taking of measures to prevent circumvention of anti-dumping duties by assembly of the product concerned in the Community, and indeed, do not address the question of the compatibility of the Community's legislation with the provisions of the GATT in general. The panel appears to limit itself to an extremely narrow interpretation of Article III and Article XX(d) of the GATT.

The result has been that the Panel has found the Community's application of its anti-circumvention legislation not to be in conformity with these Articles.

The Community is now examining the Report in detail and, following this examination, it will decide what further attitudes or steps it should take.²⁵

Behind the scenes, in an unusual, though not unprecedented, move, the EC had contested the reasoning of the findings in a letter to the panel, asking it to reconsider its conclusions. The panel had refused to do so and in an equally unusual move responded by defending its findings in a special statement to the GATT Council.²⁶

When the panel report was up for adoption at the GATT Council meeting of 3 April 1990, the EC blocked the adoption stating that it had not yet finalized its position.

Although, since then, the EC's criticism of the GATT panel report has become even more outspoken,²⁷ in the GATT Council meeting of 16 May 1990, the EC gave up its resistance and allowed the GATT Council to adopt the report.²⁸

²³ Indeed, the *Wall Street Journal* reported on 25 April that Japan was considering to lodge a complaint in GATT against the U.S. 'Super 301' if it were to be named an unfair trader under that provision. See 'Japan Says It May Take U.S. to GATT Over Super 301', *Wall Street Journal* (25 April 1990).

²⁴ 'EC Mum on Press Report That It Lost GATT Case', *Wall Street Journal/Europe* (12 March 1990).

²⁵ Press release, Commission of the European Communities, Spokesman's Service (Brussels, 29 March 1990).

²⁶ Dullforce, 'Brussels at Odds with GATT over Judgment', *Financial Times* (4 April 1990). The panel is reported to have stated that it is unrealistic to believe that the current review body, the GATT Council, can substantially amend the findings of the panel. The Council could only decide either to adopt the conclusions or to block them, with all the resulting political consequences, see 'Trade Policy: The European Commission's Objections to the Conclusions of the GATT Panel on the "Screwdriver" Aspects of the Anti-dumping Policy', 3235 *Agence Europe* (13 April 1990).

²⁷ Mr. Christoph Bail, the EC delegate to GATT reportedly stated that '[a]t this preliminary stage, the report gives us cause for serious concern and a series of questions,' and '[i]f the adoption of panel reports by the Council has any meaning beyond a blind rubber stamp, then I am sure we can expect serious consideration of these concerns and questions.' In particular, Mr. Bail criticized the panel for not satisfactorily addressing the distinction between a duty levied in connection with importation and an internal tax. Furthermore, Mr. Bail reportedly stated that the panel seemed to '... fundamentally misrepresent the very nature of GATT and ignore the well-established principles of interpretation of international agreements,' and '[t]he panel's reasoning seems to amount to saying that since the GATT does not provide for measures to counter the circumvention of the purposes of GATT norms, such measures cannot validly be taken.' See 'EC Blocks GATT Adoption of Report on "Screwdriver" Anti-dumping Case', 1992 *The External Impact of European Unification*, (6 April 1990).

Seventh annual report of the Commission on the Community's anti-dumping and anti-subsidy activities

In June 1990 the Commission submitted its seventh annual report on the Community's anti-dumping and anti-subsidy activities to the European Parliament. The report focuses on actions taken during calendar year 1988.

For the first time, the report provides more than a dry statistical summary of the Community's anti-dumping and anti-subsidy activities. In particular, the Commission defends itself in detail²⁹ against the charges³⁰ that 'the Community's anti-dumping activity is being used as a tool in the construction of a "Fortress Europe".'³¹

After a thorough analysis, the Commission arrives at the 'inescapable'³² conclusion that any such allegation 'must be regarded as a pure figment of the imagination, the reality being rather that it is applied impartially to protect Community industries against isolated instances of injurious dumping, a practice which is condemned by the GATT.'³³

Whether or not one agrees with the Commission's analysis and its conclusion,³⁴ the Commission's serious efforts to explain its position in any event seem laudable.

The EC's position in the GATT negotiations on the reform of the 1979 Anti-Dumping Code

The EC has submitted two relatively modest proposals with packages for reform of the GATT Anti-Dumping Code. Practically all elements of these proposals relate to suggested procedural changes in the 1979 Code, the major exception being the proposal to multilateralize the multinational corporation clause in the U.S. 1974 Trade Act in the form of a GATT provision.

The EC is constrained in its action by sharp differences of opinion among the EC Member States concerning the substance of possible revisions in the 1979 Code. As a result of its being a divided house, the role of the EC in the Anti-Dumping Code negotiations may be more limited this time than it was during the Tokyo Round.

1.2. Administrative Determinations

*Compact disc players from Japan and Korea, OJ (1989) L 205/5 (provisional); OJ (1989) L 331/45 (extension provisional); OJ (1990) L 13/21 (definitive)*³⁵

²⁸ See Dullforce, 'EC Defers to Screwdriver Ruling', *Financial Times* (17 May 1990). The EC reportedly stated, however, that it would not amend its anti-dumping circumvention rules 'until it has seen the outcome of the talks on dumping and circumvention in the Uruguay Round trade talks.' *Id.* On the other hand, the EC Commission seems presently reluctant to receive new parts complaints. The Commission furthermore does not seem in any hurry to conclude the only pending parts investigation even though the case has not formally been terminated.

²⁹ Seventh annual report of the Commission on the Community's anti-dumping and anti-subsidy activities, 21-27 (1990). For a press report, see Kellaway, 'Commission Defends Policy on Dumping', *Financial Times* (15 June 1990).

³⁰ The Commission seems to refer to the press debate, discussed in detail in my first report, note 1, *supra*.

³¹ Note 29, *supra*, at 21.

³² Note 29, *supra*, at 27.

³³ *Ibid.*

³⁴ This author is inclined to think that the Commission's explanations will fuel the debate rather than put it to rest.

The *CDP* proceedings was not only one of the largest cases in the history of EC anti-dumping enforcement, but also one of the more interesting ones in that it introduced a number of innovations that may have repercussions for future cases as well. The proceedings led to imposition of duties ranging from 8.3 to 32 percent after EC refusal to accept undertakings in view of the number of exporters, the number of models exported by them, the number of possible features of the product concerned and the frequent renewal of models.

The major innovations of the case relate to two aspects of the case, the so-called Sony-methodology³⁶ and the calculation of the injury margin.

In order to understand the importance of the Sony-methodology, it must be recalled that in cases involving companies which sell both in the domestic and the EC market through related sales companies, the Community Institutions establish both normal value and export price at the level of the sale to the first independent customer. In the process of netting back the home market sales price, the Institutions then deduct all direct selling expenses, but leave in all indirect selling expenses (overheads), both those incurred by the manufacturing entity and those incurred by the sales organization. However, on the export side, the export price is, at a first stage, constructed at the level of the Community frontier price by the deduction of all selling expenses (direct and indirect) incurred by the EC subsidiary. This constructed export price essentially establishes a price at the level of trade of a sale to an unrelated distributor. At a second stage, this price is netted back by the deduction of all direct selling expenses, leaving in all indirect selling expenses – both those incurred by the manufacturing entity and those incurred by the sales organization in the exporting country (sales department of the manufacturing entity or export sales subsidiary in the exporting country). This combination of methodologies, repeatedly upheld by the ECJ,³⁷ results in a comparison at the same level of trade in cases where the constructed export price and the domestic sales to the first independent customers are at the same level of trade. It would *de facto* establish two sets of prices at different levels of trade in cases where the two prices of sales to independent customers were at a different level of trade.

After the OEM-allowance,³⁸ the Sony-methodology represents a second situation in which the Community Institutions accept an exception to the above calculation, thus recognizing that the constructed export price is not at the same level of trade with some of the domestic sales to the first independent customer. On the export side, Sony showed evidence that it effectively sold to distributors. On the normal value side, Sony claimed that a distinction had to be made between categories of first independent customers. It had sold both to unrelated distributors and to unrelated retailers and end-users. The Commission verified in Japan that these sales channels must be distinguished in terms of quantities sold, pricing policy and prices charged. In view of this evidence the Commission (and the Council) accepted that

... sales to independent distributors were made at a level of trade different to the sales made to other categories of clients ... [and] that domestic sales to distributors was the most

³⁵ The analysis of the *CDP* case has benefitted from the valuable comments of Angelos Pangratis, the EC Commission official who was in charge of the proceeding.

³⁶ The methodology was applied in the provisional Regulation with respect to Sony only. It was extended in the definitive Regulation to Yamaha, Pioneer and Matsushita.

³⁷ For example, in the *Ballbearings* cases: cases 240/84, *NTN Toyo Bearing Company Ltd.*; 255/84, *Nachi Fujikoshi Corporation*; 216/84, *Koyo Seiko*; 258/84, *Nippon Seiko KK* and 260/84, *Minebed Company Ltd. v. Council EC*, judgment of 7 March 1987, not yet reported. See for a critical analysis, Vermulst, Waer, 36 *Sociaal Economische Wetgeving* (1988) 106-117.

³⁸ This allowance is discussed in more detail in Bellis, Vermulst, Waer, 'Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies', 23: 2 *Journal of World Trade* (1989) 21-34, at 27.

appropriate level of trade for comparison with export sales and that, accordingly, the normal value for this exporter should be established selectively on the basis of the weighted average domestic prices of its sales to independent distributors.³⁹

The result was that the Community compared Sony's export sales to distributors with Sony's domestic sales to distributors (selective normal value) rather than with Sony's overall domestic sales which would have included (higher-priced) sales to retailers and end-users.

It should be noted that the scope of the Sony-methodology for the time being is unclear. In the *CDP* case, it was applied in the form of a selective normal value, based only on sales to unrelated distributors. However, what will be the Commission's position if domestic sales are made only to related distributors? The *CDP* logic would suggest that the Commission would then determine that there are no domestic sales at the same level of trade as the export sales to distributors. Presumably, the Commission would then proceed to construct the value at the level of trade of sales to unrelated distributors (and not include direct and indirect expenses incurred by such distributors). This, however, would be a reversal of the Commission's previous 'economic entity' theory, as expounded, for example, in *Typewriters*. While such choices will have to be made in future cases, it seems fair to say that the Sony-methodology is potentially a major Commission effort to take level of trade arguments seriously into account.⁴⁰

The second innovative feature concerns the calculation of the injury margin. Again, it seems useful briefly to recollect the relevant background. In the EC, anti-dumping duties are imposed by reference to the lower of the margin of dumping or the margin of injury.⁴¹ In practice, the EC authorities first determine whether or not there is injury. If the answer is affirmative, the authorities then proceed to calculate either on a global basis⁴² or on a company-by-company basis⁴³ the margins of injury. Traditionally, for this purpose the Commission compares the export prices of the foreign producers with the prices of exactly similar models/products of the EC producers or, if the latter have been depressed or suppressed, with target prices covering Community producers' costs of production plus a reasonable profit. The difference between the two is the amount of the injury, the comparison of the prices of foreign and EC producers being one for identical models/products. As a percentage of the CIF export price, it represents the injury margin. This methodology implies that if a foreign producer sells above the target price of an identical model/product the EC producers, his injury margin is zero.

In the *CDP* case, the Commission did not follow this method, as the following excerpt of the provisional determination shows:

The Commission ... calculated for the complainant Community industry ... the increases in prices which would be required to enable them to cover their total cost and earn a 10% profit before tax.

³⁹ OJ (1989) L 205/8.

⁴⁰ For a different perspective, see Didier, 'EEC Anti-Dumping: The Level of Trade Issue After the Definitive CD Player Regulation/Japanese proposal to GATT on the Level of Trade Issue', 24: 2 *Journal of World Trade* (1990) 104-109.

⁴¹ The EC thereby follows the recommendation in Article 8 (1) of the GATT Anti-Dumping Code that the anti-dumping duty be less than the dumping margin if such lesser duty would be adequate to remove the injury to the domestic industry. In this respect, the EC is more liberal than the U.S. where anti-dumping duties must be equal to the margin of dumping.

⁴² E.g., in *Photocopiers from Japan*, OJ (1987) L 54/12 (definitive).

⁴³ E.g., in *Dot matrix Printers*, OJ (1988) L 317/33 (definitive), see Section 1.2. of the previous report, note 1, *supra*, and in *CDPs*.

Commercial Defence Actions

In order to allow the Community industry to proceed to these necessary price increases to remove the injury, the prices of the directly competing models have also to increase by the same amount. All significant models of each exporter were thus allocated an amount of the necessary increase to remove the injury suffered by the most directly competitive Community-produced models.⁴⁴

This new method is based on the concept of 'directly competing models,' i.e. models with similar enough physical characteristics to be considered highly interchangeable from the consumer's point of view. For the same reason which prevented the Commission from accepting undertakings (number of exporters, models, options), the Commission considered it impossible to establish precise comparisons of Japanese/Korean and EC models which could have allowed the direct underselling method to be applied.

The new method in practice will have repercussions especially for situations in which the foreign exporter does not undercut the prices of the EC industry. While, under the traditional method, such exporter would have a zero injury margin, he will now still have a margin as the following fictitious example shows:

	EC producer X	Foreign producer Y
sales price	100	130*
cost	110	
profit 10%	11	
target price	121	
increase price	21	21
non-injurious price		151
injury margin		16%

* It is assumed that this is also the CIF price.

This new injury margin calculation apparently reflects the Commission's view that even relatively higher-priced products can be a contributing cause to injury suffered by the domestic industry on products which despite some minor physical differences are in direct competition with the imported products from the customer's point of view.

Other interesting issues: OEM-profit margin set at 30 percent of the profit margin realized on branded product sales; product definition (only stand-alone CDPs); allowance rebates-in-kind.

Calcium metal from China and the Soviet Union, OJ (1989) L 208/1 (extension provisional); OJ (1989) L 271/1 (definitive)

Using U.S. domestic prices as the basis for normal value, the Commission found dumping margins of 21.8 percent for China and 22 percent for the Soviet Union. Duties were imposed accordingly.

Hydraulic excavators from Japan, OJ (1989) L 249/71 (termination)

The proceeding was terminated on the basis of absence of injury. Despite the growth of Japanese imports into the Community and the existence of some price undercutting (on average

⁴⁴ OJ (1989) L 205/20.

1.2 percent!), the European producers were able to increase production, capacity, capacity utilization and share of the Community market and to sell at profitable price levels.

Barium chloride from China, GDR, OJ (1989) L 227/24 (provisional); OJ (1989) L 349/1 (extension provisional)

Using the U.S. as surrogate, the Commission found dumping margins of 46.11 percent for crystallized barium chloride from the PRC, 18.49 percent for crystallized barium chloride from the GDR and 16.98 percent for anhydrous barium chloride from the GDR. However, on injury grounds, the Commission limited the duties to 25.43 percent, 3.52 percent, and 13.25 percent respectively.

Potassium permanganate from the USSR, OJ (1989) C 192/8 (initiation); OJ (1990) L 145/9 (provisional)

A variable duty calculated by reference to the dumping margin of 42.3 percent was imposed. Although all imports had been made through Austria, the Commission decided nevertheless to base normal value on the country of origin (USSR) as the products had been merely transshipped.⁴⁵

Although significant imports had been made from Taiwan and Hong Kong, the Commission decided to exclude their impact from the investigation as there were indications that these products originated from countries with respect to which anti-dumping duties were in force.

Potassium permanganate from Czechoslovakia, OJ (1989) C 216/7 (notice of reopening); OJ (1989) L 245/5 (provisional); OJ (1990) L 42/1 (definitive)

The Commission re-opened this proceeding after finding evidence that a previous undertaking given by the Czech exporter had been violated and immediately imposed provisional duties. A variable definitive duty was imposed by the Council by reference to the dumping margin of 19.6 percent.

Serial-impact dot-matrix printers (assembly), OJ (1989) L 340/25, OJ (1989) L 340/5, OJ (1989) L 291/52, OJ (1989) L 291/57 (undertakings, termination)

The most interesting feature of the case was the Commission determination that PCBs constitute 'single parts.'⁴⁶

Welded Tubes from Yugoslavia and Rumania, OJ (1989) L 294/10 (provisional); OJ (1990) L 91/8 (definitive; acceptance undertakings)

An interesting, although not unusual, aspect of the case was the Commission determination to establish Yugoslav normal values on a monthly basis in view of the high inflation rate in Yugoslavia.

The duties imposed of 18 percent for Yugoslavia and 22 percent for Rumania were based on the injury margins. The Commission accepted undertakings from two cooperating producers.

⁴⁵ This is authorized by Article 2(6) of Regulation 2423/88.

⁴⁶ For a more detailed analysis of the parts cases, see Vermulst, Waer, note 4, *supra*, and literature references cited there.

Mica from Japan, OJ (1989) L 284/45 (termination)

The case was rather unusual in that it was launched by one Belgium producer who complained mainly of injury occurring in the Italian market. The Commission determined that any such injury was not material. The alleged threat of injury, mainly based on telexes by one Japanese producer in which it had threatened to retaliate against the Belgian company by selling huge quantities of mica at very low prices in the Community, was also considered unfounded.

Other interesting feature: Product definition (exclusion special type of mica paper, Ar-Mat, because the complainant neither produced nor intended to produce this type).

Polyester film from Korea, OJ (1989) L 305/31 (termination); OJ (1990) C 24/7 (initiation)

The Commission decided that Korean exports had not caused injury to the film sector and had caused no material injury to the thin film sector (defined as film from 12 to 36 microns). After having been informed of this finding, the Community industry withdrew its complaint and the proceeding was closed. An interesting note is that the Community industry filed a new complaint *a mere eight days later*, alleging that thin polyester film (this time defined as film below 25 microns) was dumped and causing injury.

Small screen colour televisions from Korea, OJ (1989) L 314/1 (provisional); OJ (1990) L 41/1 (extension provisional); OJ (1990) L 107/56 (definitive)⁴⁷

The *SCTV* proceedings epitomizes some of the more perplexing problems that anti-dumping law administrators may confront in concrete cases as the result of the ever-increasing globalization and specialization of the world economy. In this case, such problems pertained mainly to the definition of the domestic industry and to the sculpting of the remedy so as to avoid unfair results.

The Commission distinguished between complainant Community producers who represented some 50 percent of total Community *SCTV* output (for purposes of the anti-dumping law 'clearly a major proportion of Community production') and non-complainant 'non-Community, mainly Japanese, controlled production which has moved into the Community...'⁴⁸

The Commission did not find it necessary to inquire into the value-added in the EC of such Japanese-owned EC production, presumably because in any event the complaining EC producers represented 50 percent.

My second point necessitates a brief background explanation. The Commission had first initiated an anti-dumping proceeding with regard to televisions originating in South Korea.⁴⁹ Following a supplementary complaint by the European Association of Consumer Electronics Manufacturers, the Commission decided some nine months later to extend the proceeding to encompass small screen colour televisions produced in Hong Kong and China.⁵⁰ By the time the Commission had completed its provisional investigation and was ready to publish its provisional results in the *Korean* proceedings, it had become apparent that some of the Hong Kong manufacturers purchased colour picture tubes and other important components from

⁴⁷ The analysis of the *SCTV* case has benefitted from the valuable comments of John Dunmall, the EC Commission official in charge of the proceedings. The origin aspects of the case are discussed in more detail in Vermulst, Waer, 'European Community Rules of Origin as Commercial Policy Instruments?', 24: 3 *Journal of World Trade* (1990) 55-99.

⁴⁸ Apparently, the Japanese-owned producers constituted some 28% of total EC production.

⁴⁹ *Small screen colour televisions from Korea*, OJ (1988) C 44/2 (notice of initiation).

⁵⁰ *Small screen colour televisions from Hong Kong and China*.

Korea for their production of colour televisions in Hong Kong. Consequently, there was a risk that such Hong Kong production might be treated by the customs authorities in the EC Member States as being of Korean origin and be subjected to the residual duty of 19.6% to be imposed in the *Korean* provisional determination.

This result would effectively have penalized the Hong Kong producers concerned for the dumping of their Korean suppliers. It would also have deprived such producers (who had already decided to cooperate in the *Hong Kong* proceeding and incurred significant costs in the process) of the opportunity to have their own dumping and injury margins, based on an investigation into *their* pricing policies and costs. Finally, it inadvertently would have discriminated against such producers *vis-à-vis* other Hong Kong and Chinese producers who had sourced their colour picture tubes from other countries such as Japan.

Faced with the likelihood of imposition of the residual duty to be imposed in the Korean case on Hong Kong exports before facts concerning Hong Kong exporters' practices were available from the investigation, the Commission took the remarkable step in the Regulation imposing *provisional* duties on Korean exports to bar from the scope of application of the *Korean* determination SCTV exports of – specifically mentioned – Hong Kong producers who had decided to collaborate in the *Hong Kong and China* proceeding, *irrespective of the origin* of such products:

... [A] supplementary proceeding has been opened in respect of SCTVs from Hong Kong and from the People's Republic of China. During the investigation doubts have been raised as to the origin for Community customs purposes of this product when manufactured and exported by Hong Kong companies. In response to requests by certain exporters and their representatives, and in view of the fact that the abovementioned proceeding is still open and findings are not complete, the Commission has decided that the Hong Kong exporters currently cooperating with its investigation should – in the event that Korean origin should be attributed to any of their exports of SCTVs to the Community – be excluded from the application of the present provisional duty. It is emphasized that this exclusion is strictly temporary and provisional, and without prejudice to any determination of the origin for customs purposes of SCTVs manufactured in Hong Kong. The scope of this exclusion is subject to revision in the light of the outcome of the investigation at present being carried out or in any other procedure which may be undertaken relevant to this question.⁵¹

This derogation was discontinued in the Regulation imposing definitive anti-dumping duties following objections of a Korean producer and the EC industry. The present situation is unclear. If the customs authorities in EC Member States were to take the position that Hong Kong-produced televisions, incorporating Korean CPTs, are to be considered as being of Korean origin and, consequently, ought to be subjected to the residual duty of 19.6 percent, the refund procedure might perhaps offer a possibility to redress this situation.

Other interesting issues: OEM-concept (5 percent profit margin), product definition (SCTVs incorporating a clock or a radio broadcast receiver included, 6' SCTVs excluded), level residual duty (higher than the highest margin found with respect to any cooperating producer),⁵² discussion of the effect of the existence of quantitative restrictions (double

⁵¹ Consequently, Article 1(3) of the Regulation provided that the residual duty of 19.6% shall not apply to small screen colour televisions manufactured and sold for export by the following Hong Kong companies, even if such products are determined to be of Korean origin: Cony, Far East United Electronics, Hanwah Electronics, Hong Wah Electronic Enterprises, Koyoda, Luks, Tai Wah and Universal Appliances.

⁵² In the EC, residual duties are normally set at the level of the highest duty imposed on any cooperating producer.

Commercial Defence Actions

jeopardy) for purposes of the injury analysis, refusal to make an allowance for start-up costs of EC subsidiary.⁵³

Certain acrylic fibres from Mexico, OJ (1989) L 301/1 (definitive)

This review proceeding led to the acceptance of undertakings offered by five producers and to imposition of residual duties ranging from 12.6 to 19.2 percent. It is noteworthy that an important reason for the Commission's acceptance of the undertakings was apparently that such acceptance constituted a 'constructive measure which takes into account Mexico's situation as a developing country.'

⁵³ OJ (1990) L 107/60.

Certain synthetic fibre hand-knitting yarn from Turkey, OJ (1989) L 309/42 (termination)

This sunset review received only limited support of the EC industry and the Commission accordingly determined that it was justified to let the 1984 measures expire.

Dicumyl peroxide from Taiwan (termination) and Japan (termination, acceptance undertakings), OJ (1989) L 317/49

With respect to Taiwan, the Commission did not find any dumping. The sunset review, initiated with respect to Japan, led to findings of dumping (52 percent), and threat of injury. The Commission therefore determined that it was in the interests of the Community industry to maintain protective measures, but accepted the undertaking offered by the Japanese producer.

Mechanical wrist-watches from the USSR, OJ (1989) L 331/44 (amendment)

This amendment corrected a rather bizarre mistake made in the original determination, issued one and a half year before.

Dynamic random access memories (DRAMs) from Japan, OJ (1990) L 20/5 (provisional, acceptance undertakings); OJ (1990) L 131/6 (extension provisional)⁵⁴

The proceeding, initiated in July 1987 following a complaint by the EC industry including Siemens, SGS, Thomson and Motorola, was terminated on the basis of acceptance of price undertakings covering both existing and future generation DRAMs and offered by eleven major Japanese DRAM producers: Fujitsu, Hitachi, NEC, Toshiba, Mitsubishi, Matsushita, NMB, Sharp, Sanyo, Oki and the Japanese subsidiary of Texas Instruments.

The press release issued by the EC Commission⁵⁵ reports that the undertakings provide for minimum prices per density based on weighted average cost of production for the cheapest device type, whereby the weighting is done on the basis of each producer's sales volume in the EC, plus a 'modest' profit margin of 9.5. percent on cost. With regard to new generation DRAMs, the Commission also decided to apply price undertakings based on cost of production, with the proviso that new generation products could be imported into the Community for a certain period of time following their first introduction in the market.

A provisional⁵⁶ residual duty of 60 percent (lower than the highest dumping margin found with respect to any cooperating producer and lower than the injury margins) was imposed on all other imports.

As was the case in *SCTVs*, the *DRAMs* case again raised interesting problems resulting from the internationalization of the world economy, as is clear from the definition of the like product and the domestic industry. The Commission decided to treat processed wafers and dice (the principal inputs for DRAM manufacture) on the one hand, and assembled DRAMs on the other, as being 'alike'. This technical 'like product' definition allowed the Commission to bring processed wafers and dice within the scope of the proceeding of the finished product, i.e. the DRAM. The question then arose what to do with DRAMs assembled in third countries from processed wafers and dice, produced in Japan:

The Commission also requested information in respect of DRAMs assembled in third countries from processed wafers and dice produced in Japan for subsequent importation into the Community EC [sic]. The information gathered revealed that the quantities of such

⁵⁴ The analysis of the *DRAM* case has benefitted from the valuable comments of Raimund Raith, the EC Commission official in charge of the proceeding.

⁵⁵ Press release, Anti-dumping proceeding concerning DRAMs from Japan (23 January 1990).

⁵⁶ The definitive determination will be discussed in the next report.

products imported into the Community at the time were relatively small. The Commission decided, therefore, for the purpose of its preliminary findings, not to investigate the assembly operations of such imports.

As the proceeding had been opened⁵⁷ with respect to Japan only, this *request for information* could be construed as an implicit decision by the Commission that DRAMs assembled in third countries from Japanese processed wafers and dice are to be considered as originating in Japan.⁵⁸ The preliminary decision not to further investigate such third country production operations, on the other hand, seemed to be fuelled more by practical considerations. The Commission also decided to include all future generation DRAMs within the scope of the proceeding.

As far as the definition of the domestic industry in DRAMs is concerned, the Commission first of all analyzed the manufacturing processes of DRAM production and separated the production of wafer diffusion and sorting (front-end operations) and assembly and testing (back-end operations). This distinction was potentially portentous because five Japanese-owned EC production facilities existed where DRAMs were assembled from wafers and dice imported from Japan. If assembly could be appraised as not constituting EC production, such facilities could be excluded. While the Commission noted that although 'wafer diffusion is from a technological and capital investment point of view more significant than the assembly and testing operations ... assembly and testing operations can account for a significant part of cost of manufacture,' and that 'as a ratio of total cost of production, assembly costs are generally significant, and may even exceed in some cases wafer diffusion costs,' the Commission in the end did not directly decide on the origin of the DRAMs produced by the Japanese producers in the EC, but rather relied on the related party provision to eliminate the Japanese-owned Community production facilities from the scope of the domestic industry.

As far as the Community complainants were concerned, it is unclear whether any of the complainants commercially manufactured DRAMs during the investigation period. In any event, the Commission decided that the complainants made up the domestic industry because of the significant investment costs incurred in setting up DRAM production facilities. The Commission then decided that either there was an EC industry producing DRAMs, in which case such industry had suffered material injury, or such industry was *a nasciturus*, in which case its establishment had been materially retarded by reason of the dumped imports. It should be noted that this is the first time that the concept of material retardation of a domestic industry was invoked to justify (in part) an affirmative injury finding.⁵⁹

Ferrosilicon from Iceland, Norway, Sweden, Venezuela, Yugoslavia, OJ (1990) L 38/1 (acceptance undertakings, definitive)

⁵⁷ It should be noted that at the time of initiation of the anti-dumping proceeding (9 July 1987), it was not clear how the origin of DRAMs was to be determined. In the meantime (on 3 February 1989), the Commission has adopted a regulation on the origin of integrated circuits which holds that determinative for the origin of ICs is the process of diffusion, i.e. 'the process whereby integrated circuits are formed on a semiconductors substrate by the selective introduction of an appropriate dopant.' See also the first report, note 1, *supra*.

⁵⁸ The Commission was perhaps inspired by a previous U.S. Commerce Department determination in the similar U.S. proceeding on 'Dynamic random access memories of 256 kilobits and above from Japan', 51 *Federal Register* (1986) 28, 396 where Commerce had also decided to include third country assembly of DRAMs from processed wafers and dice produced in Japan. The issue is succinctly discussed in Horlick, 'The United States Antidumping System', in Jackson, Vermulst (eds), *Antidumping Law and Practice* (1989) 99-166, at 119.

⁵⁹ Another interesting issue in this context is the treatment of costs resulting from plant shut-down. See OJ (1990) L 20/12.

The Commission accepted claims made by foreign producers for a decrease in the cost of production equal to the cost of a by-product. The Commission accepted undertakings from the cooperating producers and imposed residual duties on the rest. An interesting aspect of the undertaking is that it contains an automatic revision clause in case certain circumstances arise.

Vinyl acetate monomer from the USA and Canada, OJ (1990) L 53/1 (repeal)

The Commission decided to repeal the previous determination on the basis of absence of dumping during the investigation period. Claims by the EC industry that the measures should remain in force as the situation during the investigation period was abnormal since prices in the market had increased following a shortage of raw materials, were understandably rejected.

Glutamic acid and its salts from Indonesia, Korea, Taiwan and Thailand, OJ (1990) L 56/23 (provisional, acceptance undertakings); OJ (1990) L 167/1 (definitive)

This investigation was essentially terminated following acceptance of undertakings given by all cooperating producers. Definitive duties were only imposed in the form of residual duties. An interesting aspect of the case was the Commission determination to exclude glutamic acid from the scope of the proceeding as this product had not been exported during the investigation period.

Glass textile fibres (rovings) from Czechoslovakia and the GDR, OJ (1990) L 59/45 (termination; expiry)

This sunset review was terminated on the basis of no injury.

Ferroboron from Japan, OJ (1990) L 73/6 (provisional)

Dumping margins of 11.4 percent and 23.3 percent were imposed on Yahagi and Nippon Denko and the rest of the industry respectively.

Certain diesel engines from Finland and Sweden, OJ (1990) L 76/28 (termination, acceptance undertakings)

The Commission used an investigation period of 20 months to determine the existence of dumping.

As application of Article 2(3)(b)(ii) of Regulation 2423/88, the profit element of the constructed value was based on the weighted average profit margin realized by the exporters on their profitable export sales to third countries.

Silicon metal from China, OJ (1990) L 80/9

The Commission used the price payable in the Community for the determination of the normal value. This was the second time that the Commission had to use the last resort possibility of Article 2(5)(c).⁶⁰

A dumping margin of 18.7 percent, based on the injury margin, was imposed.

The Commission also decided to terminate the proceeding concerning Hong Kong as silicon metal is not produced in Hong Kong.

Tungsten products: Tungstic oxide and tungstic acid from China, OJ (1990) L 83/29 (provisional); Ammonium paratungstate from China and Korea (termination; no injury); Tungsten metal powder from China and Korea, OJ (1990) L 83/124 (termination; no injury); Tungsten carbide and fused tungsten carbide from China (provisional) and Korea (termination; no injury), OJ (1990) L 83/36; Tungsten ores and concentrates from China (provisional) and Hong Kong (no production), OJ (1990) L 83/23

In all cases, the Commission used an investigation period of nine months.

In the case of *Tungstic oxide and acid*, the Commission imposed a duty of 35 percent, based on the injury margin.

In the case of *Ammonium paratungstate*, the Commission terminated the proceeding despite the existence of significant dumping and underselling margins on the ground that any injury suffered by the EC industry had not been caused by the dumped imports.

Tungsten metal powder was again terminated on the basis of no injury.

Perhaps most interesting was the *Tungsten carbide and fused tungsten carbide* case where the Commission made the unusual decision to *decumulate* Korea from China for purposes of the injury analysis in view of the radically different injury trends between the two:

... the Commission examined how far the imports concerned had contributed to the material injury suffered by the Community. It looked at the volume of imports, the market shares of the Chinese and Korean exporters, the upward or downward trend of those market shares, and the exporters' pricing policies.

The Commission found that the import volume and market shares held by each had been at comparable levels during the reference period.

It ascertained, however, that the figures were in fact the result of diametrically opposed progressions, since while Chinese imports had tripled in 1986 to 1987 and further increased by over 80% in 1987 to 1988, Korean imports had remained steady between 1985 and 1987, and had fallen by approximately 20% in 1987 to 1988.

Similarly, the Commission found that the Chinese exporters had pushed their share of the market up by a factor of 3.4 in 1986 to 1987, and that it had risen by another 35% in 1987 to 1988, while the Korean exporter had lost over 40% of its share between 1987 and the reference period. Compared to the 1985 figures, the figures for the reference period (on an annual basis) showed that the Korean exporter had lost over 30% of its market share, i.e. KTMC suffered a loss of market held for several years.

With regard to the pricing policies ... the Commission found market [sic] differences:

– first, in terms of the behaviour of prices between 1984 and 1988, as the Korean exporter's selling prices in the Community had remained virtually steady, while those of the Chinese exporters had decreased considerably,

⁶⁰ The first time had been the *Oxalic acid* case, discussed in the first report, note 1, *supra*.

– second, in terms of the undercutting during the reference period, since the price differential in the Korean exporter's case had been 3.5% on average and that of the Chinese exporters as a whole over 35%.

The Commission consequently concluded that consideration of the prices showed that the Chinese and Korean products could not be regarded as competing with each other, and that the marketing strategies of the Chinese and Korean exporters differed from one another.

In the light of these considerations, the Commission took the view that injury to the Community industry from imports of tungsten carbide and fused tungsten carbide from China and Korea should be evaluated separately.⁶¹

The Commission then decided to terminate the Korean case on the basis of no injury as there had been no heavy price undercutting by the Korean producer and its imports had shown a very marked downward trend in the volume and market share.

In *Tungsten ores and concentrates*, the Commission decided to impose duties of 37 and 42.4 percent on China, based on the injury margins found. No duties were imposed on Hong Kong as the product concerned did not originate in Hong Kong.

Methenamine from Hungary and Yugoslavia (termination), Bulgaria, Czechoslovakia, Poland and Rumania (acceptance undertakings), OJ (1990) L 104/14

The Commission terminated the proceeding as far as Hungary and Yugoslavia were concerned on the basis that market shares of 0.3 and 0.1 percent respectively could not have had a discernible impact on the Community industry. This seems to be an application of the *de minimis* rule.⁶²

Injury from the other countries was assessed on a cumulated basis.

Fibre building board (hardboard) from Finland, Argentina, Switzerland and Yugoslavia, OJ (1990) L 138/44 (termination)

This case followed an earlier review proceeding, initiated in 1988 with respect to Czechoslovakia, Poland, USSR, Rumania, Brazil and Sweden. It was initiated by the EC Commission itself in order to ensure non-discrimination. As could be expected in view of the outcome in the previous review, the Commission here also terminated the proceeding on the basis of no injury.

Photo albums from Korea and Hong Kong, OJ (1990) L 138/48 (termination, acceptance undertakings)

The Commission made a distinction between three categories of albums (traditional bookbound, self-adhesive (whether bookbound or not), and flip-in and slip-up albums), but decided to treat them all as one like product.

The Commission refrained, however, from taking protective action with respect to non-bookbound self-adhesive albums and slip-in and flip-up albums on Community interest grounds. It determined that with respect to these products the interests of EC consumers outweighed the interests of EC industry as

⁶¹ OJ (1990) L 83/41-42.

⁶² See for more detail, E. Vermulst, *Antidumping Law and Practice in the United States and the European Communities* (1987) at 217.

[a]n analysis of the current situation reveals that the market supply by the Community industry of cheap non-bookbound photo albums of both categories 2 and 3 is insufficient and that therefore a shortage in overall supply would have to be expected if protective measures were taken with respect to these products.

This is one of the very few times in the history of EC anti-dumping enforcement that the interests of consumers are deemed to prevail over those of the producers.

A second interesting feature of the proceeding was the Commission refusal to apply the OEM-concept that had been invoked by the Korean producers. The Commission rejected this claim by *ex post facto* limiting such an adjustment to cases involving the 'commercialization of technologically advanced electronic products with high brand profiles.'⁶³

Ballbearings with a greatest external diameter not exceeding 30 mm from Thailand, OJ (1990) L 152/24 (provisional)

The Commission found dumping margins of 6.7% and injury margins of 34.8%. The normal value was based on constructed value,⁶⁴ including a profit margin of 32%.⁶⁵ Japanese production facilities within the EC were excluded from the definition of the domestic industry as an application of Article 4(5).

Other interesting issues: the discussion of cumulation of anti-dumping and countervailing duties.⁶⁶

1.3. Court Cases⁶⁷

*Continentalen Produkten-Gesellschaft Erhard-Renken GmbH*⁶⁸

The Finanzgericht München asked for a preliminary ruling concerning the validity of the Regulation imposing definitive anti-dumping duties on *Cotton yarns from Turkey*.⁶⁹ All grounds of appeal, relating *inter alia* to the one year time period, the selection of the producers investigated by the Commission, and the applicability of the Regulation to old contracts performed after the duty was published, were rejected. The validity of the Regulation was therefore upheld.

*The magnesite cases*⁷⁰

⁶³ OJ (1990) L 138/51.

⁶⁴ The Commission used an SGA rate of 7% on turnover according to the companies' submission. As the companies had hardly sold on the domestic market, one may wonder whether this was the domestic or the export SGA.

⁶⁵ This profit margin was an application of Article 2(3)(b)(ii) as there had been insufficient domestic sales and there were no other producers/exporters operating in the same business sector. It seems to be based on a combination of the profit realized by one of the companies, Pelmec, on Thai-produced bearings exported to Singapore and Singapore-produced bearings sold in Singapore. See OJ (1990) L 152/26.

⁶⁶ Discussed in Section 2.1., *infra*.

⁶⁷ See for a recent analysis of the jurisprudence of the ECJ in the anti-dumping area, Rabe, Schütte, 'EC Anti-Dumping Law: Current Issues in the Light of the Jurisdiction of the Court', 26 *CML Rev.* (1989) 643-674.

⁶⁸ Case 246/87, Judgment of 12 May 1989, not yet reported.

⁶⁹ OJ (1982) L 90/1.

⁷⁰ Cases C-121/86, C-122/86, C-129/86, Judgments of 28 November 1989, not yet reported.

These cases were brought by four Greek producers and the Greek Government under Articles 178 and 215 EEC Treaty against the 1986 determination of the Council to terminate an anti-dumping proceeding against *Magnesite (dead-burned) from China and North Korea*. The European Court of Justice (ECJ) rejected all appeals. Although the Court confirmed that it had the right to review determinations of the Council and the Commission even in areas where the Community Institutions have been granted discretionary powers, it held that in this case, the Community Institutions had not abused such powers nor made manifest errors in their appraisal of the facts.

*C-26/88, Brother International GmbH v. Hauptzollamt Giessen*⁷¹

This case was the result of the 1986 Commission decision to terminate the anti-dumping proceeding concerning *Typewriters from Taiwan*. The justification for the termination had been that the production operations carried out by the Japanese producer Brother in Taiwan were insufficient to confer Taiwanese origin on the typewriters produced there.

Brother Taiwan and Brother UK had in first instance brought a direct action against this decision on the basis of Article 173(2) EEC Treaty. This direct appeal had been declared inadmissible by the Court because the decision did not constitute an act which caused injury to Brother: The actual determination with regard to the origin of the typewriters produced by Brother in Taiwan was in the hands of the Member States.

The customs authorities in Germany verified Brother in September 1986 and determined that the typewriters produced in Taiwan indeed could not be considered as originating in Taiwan. As a result, such typewriters were deemed to originate in Japan and the Japanese anti-dumping duty was applied to the typewriters exported from Taiwan with retroactive effect. Brother appealed this decision on the ground that the typewriters produced in Taiwan should be considered as originating in Taiwan on the basis of application of Regulation 802/68. While most of the parts came from Japan, they were mounted and assembled in Taiwan in a fully equipped factory into ready-for-use typewriters. Furthermore in the opinion of Brother, this was not a case of circumvention because the factory had existed for a long time and typewriters produced there had been exported to the EC since 1982. The Court was summoned through the preliminary ruling procedure to apply the principles of Articles 5 and 6 of Regulation 802/68 to the situation at hand.

The Court alluded to the third standard of Annex D.1. of the Kyoto Convention to contrast 'simple' assembly operations and other types of assembly operations. It demarcated a simple assembly operation as an operation which does not require a specially qualified labour force, precision machinery, or a specially equipped factory. Such an operation could not confer origin. Other types of assembly could confer origin depending on fulfilment of one of two tests. These are, in order of precedence:

- an assembly process representing, from a technical point of view and having regard to the definition of the assembled product, the decisive stage of production in the course of which the parts are assembled into the finished product, and in the course of which the product acquires its specific material qualities; or
- a considerable increase in the value-added in the assembly process.

The Court stressed that the value-added test can be contemplated as a *subsidiary* element *only* in cases where appraisal on the basis of a technical test is inconclusive. The Court refrained from laying down a concrete positive percentage of value-added sufficient to confer origin other than that it should be considerable (this, in turn, should be determined on a

⁷¹ C-26/88, Judgment of 13 December 1989, not yet reported. The case is discussed in more detail in Vermulst, Waer, 'European Community Rules of Origin as Commercial Policy Instruments?', 24: 3 *Journal of World Trade* (1990) 55-101.

case-by-case basis), but confined itself to the statement that in a production process where only two countries are involved, a value-added of less than 10% in the assembly process is insufficient. The Court explicitly repudiated the view that a specific intellectual operation need accompany the assembly in order to confer origin.

The Court interpreted Article 6 as not justifying a presumption of circumvention of anti-dumping duties in cases where the transfer of an assembly process from a country where the parts are manufactured to another country involves factories already in existence. However, according to the Court, an exception to this would be the situation where the entry into force of the regulation imposing the duties and the transfer of the assembly operations coincide; in such a situation the producer should prove that he had good reasons – other than circumventing the anti-dumping duties – for transferring his assembly process.

Although the case technically involved the interpretation of Regulation 802/68 on non-preferential rules of origin, it has been discussed under this heading because it shows that rules of origin are effectively used by the EC to determine whether third-country circumvention of anti-dumping measures has taken place.

*Extramet Industrie v. Council*⁷²

This case concerned the request of a French importer of calcium metal under Article 185 EEC Treaty to have the determination imposing definitive anti-dumping duties on *Calcium metal from the Soviet Union and China* suspended pending the outcome of its Court appeal. The President rejected the request as the plaintiff had not demonstrated the urgency of its request.

*Nashua Corp. v. Commission*⁷³

*Gestetner Holdings PLC v. Council and Commission*⁷⁴

As the first two judgments of the ECJ in a series of appeals launched by Japanese producers/exporters and their related or unrelated importers against the anti-dumping duties imposed in 1987 on *Photocopiers*, the *Nashua* and the *Gestetner* cases provide an indication of what can be expected in the other cases from the ECJ.

Although the Court declared the appeals of the OEM-importers admissible, thereby further limiting the scope of its judgment in the previous *Alusuisse* and *Allied* cases to deny *locus standi* to independent importers, it rejected all substantive grounds of appeal, advanced by the importers, and relating mainly to the calculation of the dumping margins. After the previous judgments of the Court in the second *Ballbearings* and the *Typewriters* cases, this did perhaps not come as a surprise. In those cases the Court had already bowed its head to the expertise of the Commission.

The lesson for parties affected by the outcome of an anti-dumping proceeding is that it is nearly hopeless to attack substantive (as opposed to procedural) determinations of the Commission and the Council before the Court. This applies to foreign producers/exporters and their importers, but also to EC complainants (Fediol!).⁷⁵

⁷² Case C-358/89-R, Order of the President of the Court of 14 February 1990, not yet reported.

⁷³ Cases C-133/87 and C-150/87, Judgment of the Court of 14 March 1990, not yet reported.

⁷⁴ Case C-156/87, Judgment of the Court of 14 March 1990, not yet reported.

⁷⁵ For a different perspective, see Wenig, 'EuGH: Klagerecht gegen Festsetzung von Anti-Dumping Zoll', 5 *EuZW* (1990) 159-163.

*Cartorobica v. Ministero delle Finanze dello Stato*⁷⁶

The Tribunal of Genoa asked for a preliminary ruling concerning the interpretation of the Regulation imposing definitive anti-dumping duties and accepting undertakings on *Kraftliner from the USA*.⁷⁷

The proceeding had led to the imposition of a variable duty set at the difference between the normal value (expressed in USD) and the CIF export price. The Court held first of all that the USD minimum price had to be converted in the Member States' currency on the basis of the exchange rate prevailing at the moment of importation (and not at the exchange rate prevailing at the moment that the original 1983 determination was published). Secondly, the Court determined that the Community Institutions had not exceeded their powers by establishing the duty in the form of a variable duty, essentially based on the normal value. Nor was the fact that this system essentially made the amount of duty to be paid in part dependent on exchange rate fluctuations of such a nature as to make the Regulation invalid.

2. Other Trade Protection Laws

2.1. Countervailing Duties

Ballbearings with a greatest external diameter not exceeding 30 mm from Thailand, OJ (1990) L 152/59 (acceptance undertaking)

The Commission investigated a variety of allegedly countervailable subsidy programmes provided to two Japanese ball bearing manufacturers producing in Thailand.⁷⁸ The Commission decision merits extensive attention because it is one of the few countervailing duty proceedings initiated since 1979 and arguably the best-motivated. It offers valuable information on (1) the identification of subsidies, (2) the quantification of subsidies and (3) the problem of cumulation of anti-dumping and countervailing duty proceedings. As the Community's countervailing duty law and practice is still in an embryonic stage, it gives indications of what domestic and foreign producers can expect in the future.

(1) *The identification of the subsidies*

The Commission held that four types of subsidies were countervailable:

- customs duty and indirect tax exemptions on imports of machinery and essential materials (this programme did not fall under the duty drawback exception to the extent that it applied to imported machinery, machine parts and 'essential materials' as all these products, while used in the manufacture of ballbearings, were not physically incorporated in the exported ballbearings);
- rebates on indirect taxes on domestically purchased inputs;
- exemptions from corporate income tax; and
- rebates on electricity charges to exporters.

All four types of subsidies constituted export subsidies as they were contingent upon the products being exported.

⁷⁶ Case C-189/88, Judgment of 27 March 1990, not yet reported.

⁷⁷ OJ (1983) L 64/25.

⁷⁸ These countervailing duty proceedings were brought in tandem with an anti-dumping proceeding against the same two producers and therefore raised some difficult potential problems of double jeopardy. The anti-dumping case is discussed in Section 1.2., *supra*.

A duty drawback programme on raw materials was not held countervailable because such materials were physically incorporated in the exported ballbearings; regional subsidy programmes were not countervailable because the companies under investigation were not located in the specially designated zones (the Commission would thereby seem to imply that if the companies had been located in the designated areas, the subsidies would have been countervailable); loans at preferential rates were not countervailable because they had been provided at interest rates higher than the cost of long term funds to the Government;⁷⁹ a law exempting dividends transferred back to Minebea in Japan from the normal 15% withholding tax, levied under the terms of the Japan-Thailand Tax Treaty of 1963, was not countervailed because 'it ... [did] not constitute a direct benefit to the companies, but rather to their parent company in Japan.'⁸⁰

(2) The quantification of the subsidies

With regard to the quantification element, special problems were raised by the duty exemption programme on imported machinery, consumables and machine parts and tools.

As far as the duty exemption on machinery was concerned, the Commission noted that such machinery entered the balance sheet of the companies concerned as a fixed asset and, consequently, was depreciated over time. For purposes of the quantification, the Commission therefore decided to spread the subsidy over a period which reflected the normal depreciation of such assets in the industry concerned (approximately 10 years in Europe and Japan).⁸¹ The Commission then simply allocated 10% of the companies' total acquisitions of machinery to the investigation period (thereby ignoring the time value of money).

Consumables were treated as expenses in the companies' accounts and the value of the subsidy was therefore calculated on an expense basis, in other words, the value of the duty exemption received during the investigation period was countervailed. Although machine parts and tools in principle entered the accounts as fixed assets, the Commission decided to treat them on an expense basis for practical reasons.

⁷⁹ This is an application of the EC's position that what matters is the cost-to-the-Government, and not the benefit-to-the-recipient. See for more detail on this fundamental distinction between U.S. and EC countervailing duty law, Vermulst, 'Learning the Hard Way: A Critique on the Report by John Greenwald', in Bourgeois (ed.) *Subsidies in International Trade* (1990).

⁸⁰ OJ (1990) L 152/64.

⁸¹ The claim from the companies that the assets should have been depreciated over 20 years in accordance with their accounts was rejected by the Commission because it was abnormal in the ballbearing industry, OJ (1990) L 152/65.

(3) The problem of cumulation of anti-dumping and countervailing duty proceedings

In accordance with Article VI(5) GATT, Article 13(9) of Regulation 2423/88 mandates that no product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy.

In the *Ballbearings* anti-dumping and countervailing duty cases, the Commission decided that there was no double-counting on the following ground:

It should be remembered that the normal value in this case is constructed and therefore consists of two components – cost of production and a reasonable profit margin.

The effect of the first type of subsidy, the duty and tax exemption on imports, is to reduce the cost of production element of the normal value, and this subsequently leads to a drop in the export price (since it is an export subsidy). Consequently, the fall in the export price cannot be greater than the reduction in the normal value. The effect of this subsidy is therefore neutral as regards the dumping margin.

The second type of subsidy, the corporate income tax exemption, affects the export price and consequently the profits on sales to all third countries. In the present proceeding, the 'reasonable margin of profit' element of the normal value has been calculated on bearings sold in Thailand, but via a first independent customer located in Singapore; it follows that this subsidy affects the 'reasonable margin of profit' part of the normal value by the same amount as the export price.

The Commission considers that the countervailable subsidies found affect the normal value in the same manner as the export price. Conversely, the elimination of these subsidies by the imposition of a countervailing duty or by an undertaking would have no effect on the dumping margin found. It is therefore appropriate to impose an anti-dumping duty in addition to the countervailing measures in this case.⁸²

Other interesting issues: the motivation for imposing a specific duty and for accepting undertakings.

2.2. Safeguards

During the period under review, no safeguard measures were taken. In Geneva, however, the EC continues to maintain its rather solitary position that safeguard actions ought to be possible on a selective basis.

2.3. New Commercial Policy Instrument

During the period under review, no measures pursuant to the new commercial policy instrument were taken.

2.4. Unfair Pricing Practices in Maritime Transport

During the period under review no measures were taken pursuant to this Regulation.

⁸² OJ (1990) L 152/30.

2.5. Counterfeiting

There were no new developments in this area during the review period.

3. Miscellaneous

Changes in the Article 28 procedure

Under Article 28 of the EEC Treaty, customs duties may be temporarily altered or suspended, essentially because of situations of short supply. The adoption of the Single European Act has led to a slightly different decision-making procedure. Article 28, as amended, now provides that 'any autonomous alteration or suspension of duties in the Common Customs Tariff shall be decided by the Council acting by a qualified majority on a proposal from the Commission.' The new procedure in practice involves the following steps:

- request for suspension by the relevant importer to the national authorities concerned;
- transfer of the request, if deemed justified, by the national authorities to the Commission (Directorate-General XXI);
- Commission proposal to the Council;
- adoption of the Commission proposal by the Council (after consultations by the EC Council's Working Group on International Economic Problems – Tariffs and the COREPER). The Council, acting by qualified majority, may decide to exclude a suspension proposed by the Commission. Acting unanimously, it may also decide to grant a suspension that was not proposed by the Commission.

On 18 September 1989 the Commission further communicated to the Council that it intended to apply the substantive rules on temporary suspensions strictly.

EC – Eastern Europe⁸³

The changes in Eastern Europe have had direct effects on the attitude of the EC vis-a-vis trade between the EC and Eastern European countries, as the following summary of developments shows.

The prospect of German unity has been welcomed in all EC fora on a variety of occasions.

On 18 December 1989 the EC and the USSR signed a ten year agreement on trade and economic cooperation which entered into force 1 April 1990. Under the agreement, the EC and the USSR grant each other MFN status; the EC furthermore commits itself to abolish all quantitative restrictions applied to the USSR under Regulation 3420/83 by 1995; finally, the agreement provides for cooperation in a wide range of sectors.⁸⁴

In the Community's GSP for 1990, Poland and Hungary are for the first time listed as beneficiary countries.⁸⁵

On 29 May 1990 the European Bank for Reconstruction and Development in Eastern Europe was officially established.⁸⁶ Its main purpose is to build up the private sector in Eastern

⁸³ See for more detail, e.g., Nello, 'Some Recent Developments in EC-East European Relations', 24: 1 *Journal of World Trade* (1990) 5-24.

⁸⁴ The agreement is similar to agreements previously signed with countries such as Hungary, agreement of 26 September 1988, OJ (1988) L 327/1, Poland, agreement of 19 September 1989, OJ (1989) L 339/1, Yugoslavia, agreement of 24 January 1983, OJ (1983) L 41/1 and the more recent agreements with Czechoslovakia, signed on 7 May 1990, and with Bulgaria, signed on 8 May 1990. Negotiations with Rumania are in progress.

⁸⁵ Yugoslavia and Rumania had been listed in previous years already.

⁸⁶ See 'New East European Development Bank Formally Launched with Paris Signing', 2/5 1992: *The External Impact of European Unification* (1990).

Europe.⁸⁷ The bank will have its headquarters in London and be chaired by the French man Jacques Attali.

The EC and EC Member States have also been active in extending the so-called PHARE program,⁸⁸ established in 1989 to support the process of economic reform in Poland and Hungary, to East Germany, Czechoslovakia, Bulgaria, Yugoslavia and Rumania.⁸⁹

EC – EFTA

Substantially slower moving are the negotiations between EC and EFTA countries towards the establishment of a European Economic Space (EES).⁹⁰ The main objective of the EES is to establish one area in which the four freedoms (goods, persons, services and capital) would apply. Measures relating to competition law and cooperation in certain areas would also be included. The possibility of entering into a customs union is still under consideration.

GSP

The GSP for 1990⁹¹ closely tracks that of 1989.⁹² The most salient features of the 1990 GSP are:

- a five percent increase with regard to industrial products;
- a 50 percent cut in quotas for Group I textile products originating in China, Korea, Hong Kong, Macao, and Rumania, and a corresponding increase in the quotas of other beneficiaries;
- regional cumulation for ASEAN and countries belonging to the Central American and Andean Pact;⁹³ and
- continued graduation in cases where imports of a certain product from a certain country represent more than 20 percent of the total Community importation of that product.⁹⁴

87 The EC Member States together with the EC Commission and the European Investment Bank would have 51 percent of the total capital of ECU 10 billion, the rest to be divided between both Western and East-European countries.

88 See for a description, Bianchi, 'PHARE, Lighthouse for Eastern Europe', 453 *Commerce in Belgium* (1990) at 7-8.

89 The PHARE program coordinates the policies of the Group of 24 (EC Member States, EFTA countries, USA, Canada, Japan, Turkey, New Zealand and Australia) concerning East Europe's access to the G-24's markets.

90 Sir Leon Brittan is spearheading a movement to call it the European Economic Area!

91 OJ (1989) L 383/1. Furthermore, on 4 July 1990 the Commission addressed a communication to the Council outlining its ideas about possible revisions of the GSP. The Commission also indicated that it would not come with a concrete new scheme before the outcome of the Uruguay Round and therefore proposed to the Council to maintain the 1990 scheme for 1991. The text of the Commission communication was reproduced in 1643 *Europe*, 1-10 (3 August 1990).

92 See Section 3 of the previous report, note 1, *supra*.

93 A similar request made by the Latin American Integration Association was refused because the group failed to comply with the EC's conditions on administrative cooperation.

94 This affects mainly the importation of petrochemical products from Saudi Arabia such as methanol, ethylene glycol, diethylene glycol, melamine, linear polyethylene, and other polyethylene with a density not exceeding 0.94 percent.

4. Appendix: Anti-Dumping Decisions and Regulation

