

The International Practice of the European Communities: Current Survey (1 July 1991 – 30 June 1992)

Summary

I. Commercial Defence Actions and Other International Trade Developments in the European Communities (Edwin Vermulst and Folkert Graafsma)

1. Dumping
 - 1.1. General Developments
 - 1.2. Administrative Determinations
 - 1.3. Court Cases
2. Other Trade Protection Laws
 - 2.1. Countervailing Duties
 - 2.2. Safeguards
 - 2.3. Commercial Policy Instrument
 - 2.4. Unfair Pricing Practices in Maritime Transport
 - 2.5. Counterfeiting
3. Miscellaneous
4. Appendix: Anti-Dumping Decisions and Regulations

II. Decisions of the European Court of Justice: Opinions 1/91 and 1/92 are discussed in the contribution by Brandtner, *this volume* at page 300.

Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1991 – 30 June 1992

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This is the fourth in the series of annual reports on developments in the field of EC international trade law.¹ This report will cover developments that occurred during the period 1 July 1991 to 30 June 1992.

1. Dumping

1.1. General Developments

Uruguay Round

Only the GATT Anti-Dumping Code will be discussed under Section 1. For an overall evaluation of two other agreements reached in the Uruguay Round, which would most substantially affect the Common Commercial Policy, see below.

On 20 December 1991, the definitive version of the revised GATT Anti-Dumping Code was presented to the GATT Contracting Parties. The draft Code is an improvement compared to the 1979 Code in that the latter left too much room for discretion in the hands of importing country authorities, which led to diverging and unilateral interpretations. This, in turn, resulted in uncertainty and unpredictability.

In view of the serious consequences that anti-dumping action may have on the development of enterprises and, indeed, industries, it is imperative that anti-dumping laws enable possible victims to assess dumping liability in advance. Business community members must have the opportunity to avoid such findings on the basis of conscious cost and pricing strategies.

This predictability factor is perhaps even more important than the actual substance of the rules. For example, experience in the EC with amended Article 13(10) showed that once the

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¹ The first report was published in 1/2 *EJIL* (1990) 337-364. The second report was published in 1 *EJIL* (1991) 166-199. The third report was published in 2 *EJIL* (1991) 146-176.

'rules of the game' were clearly established by the EC,² it became possible to abide by such rules. On the other hand, it is obvious that fair rules will create more incentive to comply. From that perspective, it is in the interests of all parties, including importing country industries, that the rules and the interpretation thereof are perceived to be fair and unbiased.

While the increased predictability value of the draft Code can be applauded without reservation, a more careful conclusion is appropriate with respect to the substance of the changes. The definitive draft of the Code has become more 'user-friendly' than its predecessors. For victim countries, this is unfortunate. Compared to the 1979 Code, however, the Code can be characterized as an improvement on many substantive and procedural points which, if implemented fully by user countries, will force a roll-back of some dubious national practices that have developed since 1979.

Remaining uncertainties are likely to be challenged and may therefore be clarified in the course of the improved dispute settlement proceedings. In view of the present unsatisfactory appeal possibilities in the EC, this is a welcome development for foreign companies which have been treated unfairly by the EC Commission in administrative proceedings.

Compared to, for example, US anti-dumping proceedings, EC anti-dumping proceedings are characterized by enormous discretion on behalf of the EC case handlers and it is necessary to subject such discretion to a system of meaningful checks and balances. It is to be hoped that any improved GATT dispute settlement mechanism can fill this gap in legal protection in the European Communities. A number of individual Code provisions have been criticized elsewhere, and such critique will not be repeated here.³

What the draft Code does not do is bring into question whether or not anti-dumping laws make sense as such, for example from an economic or competition law perspective. In fact, it could be said that the Code does the contrary in legitimizing concepts such as dumping based on findings of sales below cost and circumvention. While this may be regrettable, it was clear from the outset of the negotiations that the time for such fundamental discussion had not yet come. For the time being, anti-dumping laws do perform a, probably necessary, outlet for domestic protectionist pressures and as such they are preferable over alternatives such as selective safeguards or other forms of targeted import protection.

Summary of Dunkel Text

The draft Anti-Dumping Code is a compromise between the interests of main users of anti-dumping laws, such as the United States and the European Communities, and those of the defendants in anti-dumping actions, such as Japan, Korea, and Hong Kong. As a result, in comparison with the 1979 Anti-Dumping Code, the draft Code is likely to both strengthen and weaken present anti-dumping laws of the United States and the EC. In light of the breadth of the proposed Anti-Dumping Code, a detailed study would be necessary to analyze the effect of all the changes contemplated.⁴ Nevertheless we believe the following review of the most significant changes should be highly useful.

In this review we will summarize the changes under three headings:

1. the determination of dumping;
2. the determination of injury; and,
3. the procedural changes.

² These were established, however, more in practice than in the basic EC Regulation itself.

³ These changes have been analyzed in detail by Vermulst in a 1992 study for the United Nations Conference on Trade and Development [UNCTAD].

⁴ Ibid.

1. *The Determination of Dumping*

The draft Code makes significant changes in the following areas:

- *Sales below cost of production.* The draft Code provides more stringent conditions for basing a dumping finding on sales below cost than the 1978 understanding between the United States, the EC, Australia, and Canada. The draft Code contains special rules on the amortization of non-recurring items such as R&D and on allocations of start-up costs.
- *Symmetrical comparison between normal value and export price.* The main user countries utilize certain methods of calculating dumping margins which are biased in favour of domestic industries. The draft Code would first oblige importing country authorities to compare normal value and export price on either a weighted average to weighted average basis or on a transaction by transaction to transaction basis. Second, the draft Code would require the authorities to make adjustments for all differences in terms and conditions of trade in cases in which a foreign producer under investigation sells in both his home market and in the importing country market through related sales subsidiaries.
- *Viability of domestic sales.* The draft Code requires that sales in the home market of the foreign producer constitute at least 5% of the export sales of the producer concerned to the importing country market for such sales to be considered a basis for the determination of the normal value.
- *Exchange rates.* The draft Code provides detailed rules on exchange rates, *inter alia*, entailing that a dumping finding should normally not be based on exchange rate fluctuations alone.
- *Treatment of anti-dumping duties as a cost in refund proceedings.* The draft Code provides that in principle payment of anti-dumping duties should not be treated as a cost of related importers in refund proceedings. This provision is of importance mainly for EC anti-dumping practice.

2. *The Determination of Injury*

The Dunkel text proposes significant changes from current practice only with respect to the following:

- *Injury factors.* The draft Code explicitly provides that the size of the dumping margins found is one of the factors that ought to be taken into account in the determination of injury. This would appear to mandate the so-called ‘margins analysis’ that is performed by some USITC Commissioners.
- *De Minimis Dumping Margins and De Minimis Import Volumes.* The draft Code requires immediate termination of anti-dumping proceedings if dumping margins found are less than 2% or if import volumes from any particular country have a market share of less than 1%, provided, however, that the total market share of all countries under investigation, each with less than 1% market share, is not more than 2.5%. This provision works to the advantage of producers with small dumping margins and producing countries with low market shares. As the joint market share of 2.5% is still fairly low, the provision seems reasonable from the perspective of an importing country seeking to defend its home industries.

3. *Procedure*

- *Complaint on Behalf of a Domestic Industry.* The draft Code imposes more stringent requirements on a domestic industry filing an anti-dumping petition. In particular, the draft Code would require the importing country authorities to examine, *before initiation*, the degree of support for or opposition to the complaint within the domestic industry, and to

determine, *before initiation*, whether the complaint is indeed brought on behalf of a domestic industry, i.e., on behalf of either all domestic producers or on behalf of those producers whose collective output of the like product constitutes a major proportion of total domestic production thereof. This change appears directed in particular at the United States.

- *Notification to the Exporting Country Government.* The draft Code requires importing country authorities to inform the government of the exporting country *before* an anti-dumping proceeding is officially initiated. This would require the EC to change its current practice.
- *Sunset Clause.* The draft Code provides that anti-dumping duties imposed should normally lapse after five years. This is essentially the current rule and practice in the EC.
- *Sampling.* The draft Code contains very detailed rules on the sampling of producers and provides that non-sampled producers should be subjected to the weighted average dumping margin found with respect to sampled producers, excluding producers with zero or *de minimis* margins or producers whose margins have been determined on the basis of the best information available.
- *Newcomers.* The draft Code opens the possibility of an expedited review for newcomers, i.e., unrelated producers that did not export during the original investigation. Such producers can ask for an immediate review and should not be subjected to anti-dumping duties in the meantime.
- *Dispute Settlement.* The draft Code streamlines dispute settlement procedures.⁵
- *Retroactivity.* The draft Code facilitates retroactive (90 days) imposition of anti-dumping duties. This is likely to affect EC practice. This is because the present EC anti-dumping law strictly follows the wording of the 1979 Code and the conditions for retroactivity in the 1979 Code are so restrictive that it is practically impossible to ever consider them as having been fulfilled. Indeed, the EC thus far has never imposed anti-dumping duties retroactively.
- *Undertakings (Settlement Offers).* The draft Code states explicitly that undertakings offered by exporters may be rejected by the importing country authorities for reasons of general policy. This change was presumably the result of EC pressure and is potentially dangerous because it may be used by the EC against exporting countries for general commercial policy reasons.
- *Consumer Organizations.* The Code opens the door for consumer organizations to be heard to a limited extent in anti-dumping proceedings.
- *Duration of Provisional Measures.* The Code provides that provisional anti-dumping duties may have a limited duration of six months or nine months where injury margins are calculated. This means that the Code would allow the EC to impose provisional duties for nine months (and not six months as is presently the case).
- *Total Duration Anti-Dumping Proceedings.* The draft Code would appear to impose an 18-month deadline for the total duration of an anti-dumping proceeding. This would have a significant effect on EC practice where proceedings often take much longer.
- *Importing Country Circumvention.* The draft Code provides in operative part that importing country circumvention of anti-dumping duties may be found to exist where the value of exporting country parts exceeds 75 % of the total value of parts *and* where the value added in the importing country is less than 25% of the ex-factory cost. If these conditions are found to exist, anti-dumping duties may be imposed on parts and components used in the importing country assembly operation without a full-fledged investigation into dumping and injury.

⁵ See also the explanation of the Dunkel text's proposed revisions to GATT dispute settlement procedures in Section 3.2., *infra*.

- *Third Country Circumvention and Country Hopping*. It would appear that anti-dumping duties may be imposed on a third country, not covered by the original proceeding, only following a fully fledged investigation into dumping and injury. However, under certain circumstances, anti-dumping duties may then be imposed retroactively for 150 days if there is evidence of third country circumvention or of country hopping. The possibility of imposing anti-dumping duties retroactively for 150 days is likely to create significant uncertainty in the market in actual cases. It must furthermore be borne in mind that at least one jurisdiction, the EC, presently judges the occurrence of third country circumvention through application of its non-preferential origin rules.⁶

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

On 25 May 1992 the Commission presented its Annual Report on anti-dumping and anti-subsidy activities to the Parliament for approval. The report gives an overview of the main activities during 1991. It also provides comparative statistics for the period 1987-1991.⁷ It is interesting to note that the report mentions the three main target countries of anti-dumping proceedings of the last five years; they are Japan (21 proceedings), China (20 proceedings), Korea (19 proceedings).

New decision-making procedure in EC anti-dumping cases

According to the EC Commission the current proceeding for taking *definitive* measures is rather slow. Other acts, such as consultations, initiation of investigations, termination of proceedings without measures, provisional measures and acceptance of undertakings are not subject to the proposed changes.

On 17 June 1992 the Commission approved the draft Regulation proposing changes in the decision-making procedure.

The proposed Regulation is called '*on the harmonisation and streamlining of decision-making procedures for Community instruments of commercial defence and modification of the relevant Council Regulations.*' The proposed changes would, in the first place, preclude the Council from not taking a decision. Secondly, where there is no disagreement between the Commission and the Member States, they would result in decisions being taken at least one month earlier than at present.

The most significant change is the insertion of a new article, Article 12 bis, which lays down the rules for the new decision-making procedure. Its importance merits reproduction *in toto*:

Article 12 bis

Decision-making procedure

1. The decision to impose definitive anti-dumping or countervailing duties shall be taken according to the following procedure.
2. The Commission shall be assisted by a committee composed of representatives of the Member States and chaired by the representative of the Commission.

⁶ See Vermulst, Waer, 'European Community Rules of Origin as Commercial Policy Instruments?', 24 *Journal of World Trade* (1990) 55-99. See also Section 3.1., *infra*.

⁷ Tenth annual report of the Commission on the Community's anti-dumping and anti-subsidy activities, 5 (1992).

3. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.
4. The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith.
5. In that event, the Commission shall defer application of the measures which it has decided for a period of twenty days from the date of communication.
6. The Council, acting by a qualified majority, may take a different decision within the time limit referred to in the previous paragraph.

In summary, the basic features of the new decision-making mechanism would be as follows:

- the decision whether or not to impose definitive duties would be taken by the Commission, after consultation with the Member States, in all cases;
- insofar as Member States would be entitled to refer the Commission decision to the Council, a qualified majority would be needed in the Council to overturn the Commission decision.

The principal changes and criticisms thereof are as follows.

The representative of the Commission shall submit a draft to the Anti-Dumping Committee of the definitive duties to be imposed (and provisional duties to be collected). The Committee must deliver its opinion on the draft Regulation. The time limit in which the Committee must deliver its opinion is laid down by the chairman according to the urgency of the matter. This means that the EC Commission has the power to determine that a case is 'urgent' and that, therefore, quick action (short deadline) is necessary.

The Committee must deliver an opinion by qualified majority, the votes being weighted according to Article 148(2) of the EEC Treaty (54 out of 76 votes). The Commission can then impose definitive duties which apply immediately. Only if the definitive duties (and collection of the provisional duties) which the Commission wants to impose are not in accordance with the opinion of the Committee, shall they be communicated to the Council: the Council is therefore in principle excluded from the decision-making procedure unless the Committee delivers by qualified majority a negative opinion on the Commission proposal.

Once the Council comes into play the Commission shall defer application of the definitive duties for twenty days. The Council can then only stop the definitive duties by a *qualified majority* (54 votes out of 76) within the twenty day limit.

Under the current procedure definitive duties must be *imposed* by the Council acting by a qualified majority. This means that *currently* a '*blocking minority*' (or also called *qualified minority*) can prevent the imposition of definitive duties. For a blocking minority 23 votes are needed. However, under the new proposed system a *qualified majority* (54 votes out of 76) is needed to oppose the imposition of definitive duties (or the definitive collection of provisional duties). This qualified majority must furthermore be able to reach its dissenting opinion within twenty days.

Adoption of the new proposal would be detrimental for foreign exporters. Up to the present, the EC Member States have sometimes been effective through interventions. However, under the new proposal, Member States' intervention is made more difficult. First of all the Council is in principle excluded from the decision-making process. The Council only comes into play if the Commission wants to impose definitive duties which are not in

accordance with the qualified majority opinion of the representatives of the Member States. Second, the Council can only stop the Commission by a qualified majority where currently only a qualified minority is required. Third, this qualified majority must be reached within twenty days. This gives the Commission too much power and almost closes the door for foreign exporters to influence the decision through convincing the Member States.

It should be noted that similar draft Regulations proposing changes to streamline the decision-making procedure have been approved for the other commercial policy Regulations, i.e. the commercial instrument Regulation, and the safeguard Regulations (on common rules for imports; on common rules for imports from State trading countries; and on common rules for imports from China).

Judicial Review

The EC Single Act provided for the creation of a European Court of First Instance. The purpose thereof was to alleviate the workload of the European Court of Justice by creating a new lower Court which could handle a first review of certain types of cases which typically involve complex facts such as competition, anti-dumping, and staff cases.

However, when the Court of First Instance was effectively established in October 1989, anti-dumping proceedings were excluded from its jurisdiction. The EC Commission was apparently concerned about an increased appeal by foreign manufacturers against EC anti-dumping measures to the new Court of First Instance, which would probably more carefully scrutinize the facts of the proceeding than had been the practice of the European Court of Justice.

The issue is now again being considered. The European Court of Justice is of the opinion that the Court of First Instance should be given jurisdiction over anti-dumping proceedings. Apparently, the EC Commission is now willing to agree to submit anti-dumping cases to the Court of First Instance assuming that the administrative decision-making procedure would be amended in the above described manner.

This could be a positive development for foreign exporters. The Court of First Instance would probably more carefully examine appeals by foreign exporters against EC anti-dumping measures. On the other hand, in its case-law, the European Court of Justice has already approved most of the controversial calculation methods used by the EC Commission in anti-dumping cases. Therefore, the Court of First Instance does not have much room to adopt new and more liberal interpretations of the EC anti-dumping laws. It remains to be seen whether and to what extent the Court of First Instance will eventually be more critical of the EC Commission's anti-dumping practice.

1.2. Administrative Determinations

Certain compact disc players from Japan and Korea, OJ (1991) C 173/3 (initiation partial review Accuphase Laboratory)

The review was requested by the Japanese producer Accuphase which invoked changed circumstances in claiming that its actual dumping margin was substantially lower than the residual duty of 32% imposed in 1990. Accuphase's claim was supported by previous refund applications, investigation of which had already shown that its margin was small.

Compact disc players from Japan and Korea, OJ (1991) C 174/15 (initiation Article 13(11) investigation)

The EC producers Philips, Grundig and Bang & Olufsen submitted evidence to the Commission that anti-dumping duties imposed in 1990 had been borne by Japanese and Korean producers, in other words, that the resale prices to the first independent customers had not been increased by the amount of the anti-dumping duties. Such evidence was based on the average retail prices in the Community which according to the EC industry had either not increased or had manifestly decreased.

Certain magnetic disks (3.5' micro disks) from Japan, Taiwan, and China, OJ (1991) C 174/16 (initiation)

The EC industry suggested Taiwan as a surrogate country for China.

Certain asbestos cement pipes from Turkey, OJ (1991) L 309/37 (undertakings; termination)

An interesting aspect of the case was that the Commission used the regional industry concept. This concept allows limitation of the investigation to a regionally limited market, i.e. a market smaller than the complete EC market, if certain restrictive conditions are fulfilled. Such use is fairly uncommon in the EC and, thus far, has occurred only nine times. The Commission found that the three Italian producers which brought the complaint sold almost all of their production of asbestos cement tubes in Italy and that the Italian demand for the product was not to any substantial degree supplied by producers located elsewhere in the EC (actually the market share was 5.5%). Furthermore, the allegedly dumped products from Turkey were concentrated in the Italian market. The Commission therefore decided that Italy could indeed be considered as a regional market within the meaning of the basic Anti-Dumping Regulation.

In view of the high inflation rate in Turkey, the Commission decided to calculate normal value on a monthly basis. The dumping margin found was 5.12%.

The Commission further found a substantial increase in Turkish exports to Italy, such exports representing 8.1% of the Italian market during the investigation period, as well as price undercutting of 9.35% at the CIF Italian border level. Although other causal factors such as Italian overcapacity and environmental problems might also have caused injury, the Commission concluded that the dumped imports, taken in isolation, had caused material injury. The Commission explicitly noted that material injury may be caused by dumping even if such injury is merely a part of a more extensive injury attributable to other factors. However, in view of the concurrence of several injury factors, the Commission then decided to base the injury margin calculation on the price undercutting method rather than on the price underselling method.

Despite objections from one Member State, the Commission accepted the undertakings offered by the Turkish producers.

Dihydrostreptomycin from China, OJ (1991) L 187/23 (provisional)

Although little noted, this is an extraordinary case because it is the first time ever that the Commission took into account input dumping. According to the Commission, DHS was produced only in China, Japan and France (Rhone Poulenc). The Japanese producer Meiji Seika sourced some raw materials at prices which, again according to the Commission, were below the comparable costs of the only other market economy producer Rhone Poulenc. The Commission therefore concluded that it was

Commercial Defence Actions

... reasonable to adjust the constructed normal value to take account of the fact that Japanese producers buy these raw materials at a price which is lower than their production cost in a market economy.

Serious questions may be raised about such adjustment. First of all, GATT law does not allow action against input dumping. Secondly, the Commission is effectively punishing the Japanese producer for buying the raw materials at the cheapest price available and for the dumping, if any, of his unrelated Chinese suppliers. Apparently, however, even after such adjustment, Japanese prices were still profitable because the Commission used prices in Japan as the normal value for the Japanese producer.

With respect to China, the Commission used Japan as a surrogate but declined to use Japanese domestic prices on the ground of the monopolistic structure of the Japanese market which allowed Meiji Seika to reap high profits. For China, the Commission therefore used the cost of production of the Japanese producer, adjusted per the above, plus a 5% profit margin, which was reasonable in view of the fact that DHS was a first generation and hence already dated antibiotic.

The dumping margins found were 76% for the Japanese producer and 47.6% for the Chinese industry. The Commission considered it appropriate to calculate one margin for the entire Chinese industry (one country/one duty rule)⁸ because the exporters were controlled and represented by a single organization and the Chinese administration was able to influence export prices.

With respect to injury, the Commission decided to decumulate Japan from China:

... the exporters' conduct differs widely. The Chinese exporters adopted an aggressive attitude, charging prices very much lower than the Community market prices, in order to acquire a substantial part of the Community market. The Japanese producer, although he had reduced his prices as a reaction to the Chinese exporters' conduct, in turn lost major shares of the Community market as a result of the Chinese producer's [sic] practices, but he did not at any time charge prices lower than the Community industry's prices and therefore charged prices much higher than those charged by the Chinese exporters. The Commission therefore concluded that the effects of the imports from China and the imports from Japan should not be considered on a cumulative basis.

For Japan, the case was then terminated on the basis of no injury. With respect to China, a duty of 47.6% was imposed as the injury margin was higher than the dumping margin.

Small screen colour television receivers from Hong Kong and China OJ (1991) L 195/1 (definitive)

For the Sino-Japanese producers Hitachi and Sanyo the Commission used constructed export prices. In the construction of the export prices for these two companies, a profit margin of 10% was imputed to the related importers.

The Commission decided to establish one dumping margin for the three cooperating Chinese exporters on the grounds that:

... even if they appear as independent companies which invoice their customers directly [they] have in fact a very limited, if any, degree of independence in their relationship with

⁸ See for more detail on the one country/one duty rule and on EC anti-dumping law with respect to China in general Vermulst, Graafsma, 'A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China', 26 *Journal of World Trade* (1992) 5-60, at 31-32.

importers in other countries as they lack the possibility of establishing export prices and any other conditions or terms of sales by themselves.

However with respect to the two Sino-Japanese producers, individual dumping margins were established because:

... they were able to import components and export finished products without control from the Chamber or from any other body. Furthermore, the fact that these companies were able to transfer their profits, subject to certain administrative requirements, out of the People's Republic of China, ensured that these profit oriented companies enjoyed a sufficient degree of independence which justified their individual treatment.

With the exception of Hitachi, the duties were in all instances based on the level of the dumping margin. For Hitachi, the duty was based on the injury margin.

Parts of gas fuelled, non-refillable pocket lighters from Japan, OJ (1991) C 202/4 (initiation)

Since the GATT panel has held that the application of Article 13(10) by the EC Commission was illegal, neither the EC Commission nor the EC industry have commenced so-called parts proceedings. However, there has been an increasing trend in the EEC to file anti-dumping cases against parts. The present case is a good example thereof. The strategy behind the filing of cases against parts is to hit foreign-owned facilities within the EEC. Faced with an anti-dumping duty on the finished product, foreign producers/exporters will often decide to set up a factory in the EEC or to expand production in existing production facilities. One way of making life difficult for such factories was the Article 13(10) amendment. An alternative is the filing of cases against imported parts. If dumping and resulting injury are found, a duty will then be levied also on the imported parts, which clearly makes it more complicated for the foreign-owned production facilities in the EEC to sell at competitive prices.

Pig iron from Turkey and the Soviet Union, OJ (1991) C 246/9 (initiation)

The allegation of dumping was based on a comparison of basic import prices, published by the EEC Commission, with the prices charged for export to the EEC. One may wonder such a flimsy allegation fulfils the requirements of the GATT Anti-Dumping Code and of the EC basic anti-dumping Regulation.

Thermal paper from Japan, OJ (1991) L 270/15 (provisional)

The complaint was lodged by Wiggins Teape Thermal Papers Ltd. which represented a major proportion of the EC production of thermal paper. The investigation period ran from 1 April to 31 December 1990, which is relatively short. Thermal paper can be used both in telefax machines and for stickers. The Commission decided to include only the fax paper. On the other hand, two types of fax paper, namely jumbo reels and coils, were decided to constitute one like product.

In cases where normal value was based on constructed value, the Commission used a profit margin of 18%. Where export prices were constructed a profit margin of 6% was used. Dumping margins found varied between zero and 24.8%.

As only four out of nine known Japanese producers cooperated in the proceeding, the Commission considered that it would constitute a bonus for non-cooperation if the 24.8% found with respect to the cooperating Japanese producer Tomoegawa Paper were to be used for non-cooperating producers. With respect to the non-cooperating producers, the Commission

Commercial Defence Actions

considered that the data contained in the complaint provided the most reasonable basis for establishing the dumping margin. The dumping margin was therefore fixed at 55.3%.

In the calculation of injury margins, the Commission used the price underselling method and therefore constructed the target prices in which a profit margin of 18% was used. This 18% profit margin was considered reasonable in view of the relatively short technical life cycle of fax paper, the minimum necessary to cover, *inter alia*, investments in manufacturing facilities and research and development. The profit margin of 18% was furthermore in line with that realized by the Japanese producers on their domestic sales. As a result, the injury margins in all cases exceeded the dumping margins and duties were therefore based on the dumping margins. With respect to the injury margin for the non-cooperating Japanese producers, the Commission, again as best evidence available used the highest underselling margin found, i.e. 54.9%.

With respect to the non-cooperating producers, the duty imposed was therefore 54.9%.

It should be noted that it is becoming increasingly common in the EEC to impose a residual duty higher than the highest duty imposed with respect to any cooperating producer in cases where a substantial portion of the foreign producers elects not to cooperate. This is a modification compared to previous practice of the EEC Commission under which the residual duty tended to be equal to the highest duty imposed with respect to any cooperating producer. As a result of the new policy it is becoming more important for foreign producers to cooperate in EEC anti-dumping proceedings.

Cotton Yarn from Brazil, Egypt, Turkey, India, Thailand, OJ (1991) L 271/17 (provisional)

The cotton yarns case has been one of the few cases thus far where the Commission resorted to sampling. In general it is the policy of the EC Commission to investigate all foreign producers who file a questionnaire response unless this is practically impossible. In the cotton yarns case, it proved to be practically impossible to verify all foreign producers and the Commission therefore resorted to sampling for Brazil, Egypt, India and Turkey. The Commission made the selection of the foreign companies on the basis of their volume of production, the volume of their exports, their product range and the volume of their domestic sales. The criteria of the selection and the names of the companies chosen were discussed and agreed in advance during meetings between the Commission and the foreign trade associations. These associations were simultaneously informed that the sampling would have the following consequences:

- 1) any dumping margins would be based on the individual figures for each company actually selected for verification purposes;
- 2) the weighted average of the margins found would be attributed to the cooperating companies which were not selected for verification purposes;
- 3) the use of the best information available for non-cooperating producers.

The foreign trade associations agreed with this logic.

With respect to the calculation of normal value the Commission used monthly normal values for Brazil and Turkey. With respect to the normal value of Egypt, the Commission made several interesting moves. First of all the Commission found that all cotton yarn spinning companies in Egypt were directly or indirectly state-owned. Second, it was found that domestic prices of cotton and cotton yarn in Egypt were fixed by the government. Third, the Commission found that raw cotton was sold in the domestic market at a price considerably lower than the price of raw cotton exported to Egypt. On the basis of these three findings, the Commission came to the following provisional conclusion:

... both domestic cotton yarn and raw cotton prices were influenced by non-market forces to such an extent that their artificiality prevented them from being considered as made in the ordinary course of trade.

Consequently, the Commission considered it appropriate to determine the normal value of cotton yarn on the basis of constructed value. The constructed normal value was based on Egyptian production costs with the exception of the cost of the raw cotton. The cost of raw cotton was calculated by reference to the price of a similar quality of raw cotton when bought by the producers concerned in the ordinary course of trade on the international market. The Commission therefore effectively used the 'ordinary course of trade' concept to counter *upstream subsidization*.

With respect to Brazil, the provisional dumping margins established varied between 7% and 15.8%. With respect to Egypt, dumping margins varied between 4.9% and 12.5%. For India, three *de minimis* dumping margins and one dumping margin of 9.5% were found. For Thailand one *de minimis* margin and one margin of 7.9% were found. Finally with respect to Turkey the dumping margins varied between 5.6% and 15.8%. The weighted average for the sampled countries was respectively 12.9% (Brazil), 8.1% (Egypt), 1.8% (India) and 10% (Turkey). With respect to non-cooperating producers, the Commission used the highest dumping margin found with respect to any cooperating producer for India, Egypt, Thailand and Turkey because the level of cooperation of the exporters from these countries was reasonably high. With respect to Brazil, however, the Commission found that only a limited number of exporters had cooperated and therefore considered it inappropriate to use the highest duty imposed with respect to any cooperating producer for the non-cooperating producers; rather, therefore, the residual duty for Brazil was based on the Eurostat figures and set at 25.3%.

With respect to injury the Commission decided to *decumulate* India and Thailand. Because of the small market shares held by the export from India and Thailand, it was found that exports from these countries could not possibly have caused injury to the EEC industry. With respect to the other countries, imports were assessed on an cumulative basis and it was found that material injury had been caused. In virtually all cases, the duties were based on the dumping margins.

Urea from Venezuela and Trinidad & Tobago, OJ (1991) L 272/10 (amendment definitive Venezuela, termination Trinidad & Tobago)

These Article 14 reviews were requested by the Trinidad & Tobago and Venezuela exporters concerned. In both cases normal value was based on constructed value in view of the fact that urea was sold in the home market at prices below cost of production. In the constructed normal value the profit margin of 7% was used. This margin was considered reasonable:

... given that, in the current economic climate, it represents the minimum necessary to allow Urea producers to run their plants under normal operating conditions while producing an acceptable return on capital employed and securing the investment financing required to continue operating at a profit.

Comparison of this constructed normal value with export prices showed no dumping for the Trinidad & Tobago exporter. On the other hand, it was not possible to calculate a dumping margin for the Venezuelan exporters as there had been no exports to the Community during the investigation period. While the Commission could therefore terminate the proceeding with respect to Trinidad & Tobago, the same was not possible for Venezuela because it was not possible to verify the claim of the Venezuelan producers that no dumping had taken place. Under these circumstances the Commission considered it fair to abolish the *ad valorem* duty of

21.5% which was in force at that time and replace it with a variable duty based on the new normal value for the exporter as established in the proceeding. It should be noted that the variable duty was applied only to the two cooperating Venezuelan producers. With respect to other possible producers the old *ad valorem* duty of 21.5% remained in force.

Small screen colour televisions from Korea, OJ (1991) L 275/24 (amendment definitive)

In 1990 anti-dumping duties varying between 10.2 and 10.5% were imposed on colour televisions exported by the three Korean producers, Samsung, Goldstar and Daewoo. A residual duty of 19.6% was imposed as a residual duty and applied in particular to one exporter who refused to cooperate in the investigation and who was known to have exported large quantities of colour televisions to the Community. In November 1990, the Commission received information from the Electronic Industries Association of Korea (EIAK) that the non-cooperating exporter was no longer exporting colour televisions to the EEC. EIAK alleged that this changed situation removed the justification for the 19.6% residual duty and suggested that the residual duty should be set at the level of the highest duty imposed on imports of cooperating exporters, i.e. at 10.5%.

The Commission decided that this information justified the initiation of a partial review which was therefore opened on the initiative of the EC Commission. EIAK and other Korean bodies could show to the satisfaction of the EC Commission that the exporter in question indeed had not exported colour televisions to the Community since 1988 and that it had no plans to do so in the future. Under these circumstances the Commission agreed to impose a 10.5% residual duty.

Artificial corundum from the Soviet Union, Hungary, Poland, Czechoslovakia, China, Brazil and Yugoslavia, OJ (1991) L 275/27 (undertakings Soviet Union, Hungary Poland, Czechoslovakia, China, Brazil, Yugoslavia)

This sunset review was the result of a request made by the European Council of Chemical Manufacturers Federation (CEFIC). A fairly unique aspect of this proceeding was that two different investigation periods were chosen: for Czechoslovakia, China, the Soviet Union and Poland the investigation period ran from 1 January 1989 to 31 December 1989. However, for Brazil and Yugoslavia, a prolonged period from 1 January 1989 to 30 April 1990 was chosen '*in order to be in a better position to take into account the effect of extremely high inflation rates in these countries.*' For the same reason normal value for these two countries was established on a monthly basis.

Dumping margins were found of 39.1% for Czechoslovakia, of 47.4% for China, of 9.8% for the Soviet Union, of 31.3% for Hungary and of 24.5% for Poland. For the Brazilian companies investigated the dumping margins varied between 4.5 and 53.4%. Injury margins found were 25.7% for Czechoslovakia, 30.8% for China, 32% for the Soviet Union, 12% for Hungary, 29.4% for Poland and injury margins varying between 10.6 and 25.9% with respect to the Brazilian exporters. All exports were cumulated for purposes of assessing the injury. All exporters offered undertakings which were accepted by the EC Commission. The basis was the lower of the dumping margin or the injury margin.

As two Member States i.e. France and the United Kingdom, raised objections to undertakings, the Commission was forced to submit a proposal to the Council for approval of the undertakings. As the Council did not decide otherwise, acting by a qualified majority, within one month, the Commission proposal was accepted.

Polyester yarn from Mexico, OJ (1991) L 275/21 (amendment definitive)

This Article 14 review was the result of a request by Mexican exporters alleging changed circumstances. In particular, it was alleged that Mexican exports to the Community were now being made at non-dumping prices. No dumping was found for the Mexican exporters with the exception of one exporter of PTY whose dumping margin of 0.53% was considered *de minimis*. The anti-dumping measures previously introduced were therefore repealed.

Certain polyester yarns (man-made staple fibres) from Taiwan, Indonesia, India, Turkey, Korea, OJ (1991) L 276/7 (provisional Taiwan, Indonesia, India, China, Turkey, termination Korea)

The Commission decided to exclude sewing thread from the scope of the case as the EC industry did not represent a majority of EC production of sewing thread, as is required by Article 4(5).

The Commission resorted to sampling both with respect to the EC producers and with respect to the Indian producers. With respect to the EC producers, the Commission decided to make a representative selection of firms on the basis of their size and geographic situation. A certain number of large, medium and small sized firms located in ten Member States were therefore sent questionnaires.

With respect to India the Commission forwarded questionnaires to all 43 Indian exporters known to be concerned. Most of the Indian exporters replied to the questionnaires. The Commission selected, on the basis of criteria such as their production and sales both in India and in the Community, seven small, medium and large sized firms. The Commission informed the trade association concerned, SRTEPC, which represented virtually all the exporters of the product concerned in India, of the criteria used for choosing the selected companies and of its intention to apply the weighted average findings established for the seven companies to the rest of the cooperating exporters. No objections were raised by the trade association to the methodology proposed by the EC Commission.

Although the Commission found that the product under investigation could be divided in three categories: pure polyester yarn, polyester/viscose yarns and polyester/cotton yarns, the Commission decided that all three types constituted one like product. With respect to China, the Commission followed its previously discussed one country/one duty rule. However, in the case of *Guangyeng Spinning*, the Commission established a separate dumping margin as evidence was submitted which established that this company is a joint venture formed by Chinese and Hong Kong partners, the latter being related to a Community group, which was free to establish its export prices and which could transfer profits obtained to its foreign shareholders subject to certain administrative requirements. Dumping duties other than *de minimis* varied between 2 and 29.69%.

With respect to non-cooperating producers the Commission found that while for Korea, India and China the cooperating producers' exports covered almost the totality of imports into the Community, for Taiwan, Indonesia and Turkey the statistics showed a large degree of non-cooperation. It was therefore decided that two different approaches were required for the establishment of dumping margins for non-cooperating producers so that cooperating exporters would not be discriminated against and, at the same time, measures to be taken would constitute an effective protection for the EEC industry. Therefore the Commission decided that the most reasonable assumption for countries with a high coverage of exports such as India, Korea and China, was that the dumping margins for non-cooperating producers were equal to the highest dumping margins found for a cooperating producer in the same country. However, with respect to countries with a low coverage of export, i.e. Taiwan, Indonesia and Turkey, it was considered that the information obtained from cooperating exporters was not representative. Other information was therefore used, in particular that contained in the

Commercial Defence Actions

complaint (for the determination of normal value) and in Eurostat statistics (with regard to export prices).

On the basis of these two different methodologies, the following residual dumping margins were determined: Korea 15.8%, Taiwan 24.5% (as opposed to the highest margin found of 2.24%), Indonesia 21.1% (as opposed to the 0.26% found for a cooperating producer), India 11.8%, China 29.6%, Turkey 52.1% (as opposed to the 10.14% found with respect to any cooperating producer).

With respect to injury, all exports with the exception of Korea were cumulated. Not surprisingly, Korea was *decumulated*, given the small and distinctly lower market share held since the end of 1987 by Korea compared to the other five countries concerned. Thus the market share of Korea in the investigation period was only 0.5%.

The Commission also examined, but rejected, the argument that, because of the existence of quantitative restrictions or quotas applied to the imports of the products in question from some of the countries concerned, no injury could be caused to the Community industry by these imports. The Commission's logic was that quantitative restrictions protect the Community industry from excessive volume of imports but do not necessarily prevent injury resulting from unfair trading practices such as dumped imports at very low prices.

Injury margins were based on the underselling method and a profit margin of 5% was used. However, in all cases dumping margins found were below the injury margins and all duties were therefore imposed on the basis of the dumping margins. With respect to India where a sample had been used, the weighted average duty for cooperating producers was 3.76%.

Bicycles from Taiwan and China, OJ (1991) C 266/6 (initiation)

With respect to China the EC industry suggested Taiwan as a surrogate country.

Video cassettes from Hong Kong OJ (1991) C 266/7 (newcomer review)

The Hong Kong company BICO Magnetics requested a newcomer review.

Silicon Metal from China OJ (1991) C 273/20 (Article 13(11) investigation)

This is the second Article 13(11) investigation that was requested by the EC industry.

Silicon Carbide from Soviet Union, Norway, Poland and China OJ (1991) C 279/11 (initiation review)

This sunset review was requested by the EC industry.

Certain imports of compact disc players from Japan OJ (1991) L 298/16 (refund applications of Analog and Digital Systeme GmbH)

These refund applications were made by a German importer of compact disc players manufactured by the Japanese producer Asahi Corporation. The Commission found that Asahi's dumping margin for the period relating to the refund applications had been 5.2%. As a result the difference between the rate of duty collected and the actual dumping margin was 26.8%. This amount had to be reimbursed.

Electronic typewriters from Japan, exported by Nakajima All Precision Company, OJ (1991) C 283/13 (notice)

This notice must be seen in connection with the review proceeding of the Electronic typewriters proceeding in 1990. In that review proceeding Nakajima had been excluded. However, the European industry made an additional complaint alleging that Nakajima's exports were also dumped. The Commission therefore published a notice in order to clarify that export by Nakajima of the products concerned would be investigated together with those of the other exporters concerned in the review proceedings.

Monosodium glutamate from Indonesia, OJ (1991) C 287/5 (review/newcomer review)

The Commission received letters from Indo Miwon and Cheil Samsung Astra, two unrelated Indonesian manufacturers of monosodium glutamate, stating their intention to export the product concerned to the Community in the near future. The companies provided information proving that they did not export the products to the Community during the original investigation period. Cheil Samsung Astra had exported to the Community since then and stated that it had the intention of continuing exporting in the future. Indo Miwon also stated its intention to export to the Community in the future. The Commission found, however, that Indo Miwon was in fact indirectly related to another Indonesian company, Miwon Indonesia. This company had cooperated with the Commission in the original proceeding but had not exported monosodium glutamate during the original investigation period. Because of the indirect relationship the Commission decided that the review for Indo Miwon would also have to cover Miwon Indonesia. Under these circumstances, Miwon Indonesia also agreed to cooperate.

Gas fuelled, non-refillable pocket flint lighters from Japan, China, Korea, Thailand, OJ (1991) L 326/1 (definitive, definitive collection provisional)

The definitive findings by and large mirrored the provisional findings. However the Thai exporter, Merry Company, raised the interesting point that lighter imports already dispatched before the date that provisional measures came into effect (but customs cleared after that date) should be released free of collection of provisional duties. This request was refused by the EC Commission on the grounds that the basic anti-dumping Regulation does not provide for any exceptions to the rule providing that anti-dumping duties are applied to the product concerned at the moment they enter into free circulation in the Community. Moreover, the Commission pointed out that it had made considerable efforts to keep the parties concerned informed. Therefore, the importers could not reasonably claim to have been unaware of the proceedings or of the stage to which the investigation had progressed during the period between the initiation of the proceedings and the imposition of the provisional duty.

Commercial Defence Actions

Oxalic acid from India, China, OJ (1991) L 326/6 (definitive)

The definitive findings essentially follow the provisional findings.

Urea from Saudi Arabia, OJ (1991) L 334/1 (amendment definitive)

As a result of the judgment of the European Court of Justice in the *Al-Jubail*⁹ case, the Commission considered it appropriate to repeal the anti-dumping duty imposed on Saudi Arabia in 1989.

Certain seamless tubes and pipes, of iron or non-alloyed steel, from Hungary, Poland Czechoslovakia, Yugoslavia, OJ (1991) C 321/7 (initiation)

The EEC industry suggested to use Yugoslavia as a surrogate for Hungary, Poland and Czechoslovakia.

Certain iron or steel coils from Algeria, Mexico, Yugoslavia, OJ (1991) L 350/11 (repeal definitive)

The repeal was the result of an Article 14 review request by the Mexican producer Sidermex. Sidermex claimed changed circumstances. The Commission considered that the evidence submitted by Sidermex concerning the changed circumstances was sufficient to justify the need for a review. As the circumstances applied equally to imports of iron or steel coils from Algeria and Yugoslavia, with respect to which definitive anti-dumping duties had also been imposed, the Commission considered it appropriate to also extend the review to these countries. With respect to Algeria, the Commission found a *de minimis* dumping margin of 0.67%. With respect to Yugoslavia, the Commission found a dumping margin, again *de minimis*, of 0.13%. Finally, with respect to Mexico, normal value was based on domestic prices charged by the Mexican producer in Mexico. However it was not possible for the Commission to calculate export prices as Sidermex had not exported to the Community since the imposition of the definitive anti-dumping duties in July 1988. The Commission held that the absence of exports as such is not sufficient to determine whether the anti-dumping duties imposed may be lifted. It therefore took account of other considerations, in particular, of the development of the Mexican steel market. It found that the strong and increasing demand for hot rolled coils on the Mexican market, the limited production capacities and the expected flow of exports to non-Community markets, indicated that there was no clearly foreseeable threat that imports of the product concerned from Mexico to the Community would resume to a sizeable market share after the repeal of the measures in force. The Commission added that under these circumstances the recurrence of injurious dumping was not imminent. The Commission decided therefore to repeal the duties in view of the *de minimis* dumping with regard to Algeria and Yugoslavia and the absence of imminent injurious dumping or threat thereof with regard to Mexico.

Paint, distemper, varnish and similar brushes from China, OJ (1991) C 332/5 (notice)

This notice followed in the footsteps of the judgment of the European Court of Justice of 22 October 1991 in the *Nölle* case. As a consequence of that ruling, the Regulation imposing

⁹ See Vermulst, Hooijer, 'Recent European Court of Justice Judgments in the Field of Anti-Dumping', 29 *Common Market Law Review*, at 388-396. See also Vermulst, Graafsma, 2 *EJIL* (1991) at 163-164.

definitive duties of 1989 was no longer applicable. The Commission pointed out that with respect to provisional and definitive duties collected, importers could request refunds from customs authorities in accordance with applicable custom legislation.

Compact disc players from Japan, Korea, OJ (1991) C 334/8 (notice)

This notice was published to inform interested parties that the partial review previously indicated with respect to the Japanese company Accuphase and the initiation of the article 13(11) anti-absorption investigation, would be merged and converted into a full Article 14 review. Although not explicitly stated in the notice, it seems likely that an important factor for the Commission's change in position was the argument made by a number of foreign exporters that Article 13(11) was possibly in violation of GATT.

Dihydrostreptomycin from China, OJ (1991) L 362/1 (definitive, definitive collection provisional)

The definitive findings closely followed the provisional findings.

However, the Commission decided to change the form of the duty in view of the fact that:

... the structure of a state-controlled economy gives the Chinese exporters considerable room for manoeuvre to further decrease their export prices. This concern of the Commission has been confirmed by the considerable price undercutting which has taken place in the Chinese export transactions. In such a situation, a fixed duty amount or an ad valorem duty by itself would not guarantee the elimination of the injurious effect of the dumping.

The Commission therefore found it necessary to impose a mixture of a minimum price combined with the imposition of a set amount of duty.

Although a request was made by the Community industry that the definitive anti-dumping duty be imposed retroactively, no evidence of the legal requirements as set out in Article 13(4)(b)(i) was provided and the claim was consequently rejected.

Finally the Commission again imposed a residual duty higher than the highest duty imposed with respect to the two cooperating Chinese producers in view of the finding that a significant portion of Chinese exporters had not cooperated.

Electronic weighing scales from Singapore, OJ (1992) C 6/2 (initiation)

This case was essentially an extension of a sunset review case previously initiated with respect to electronic weighing scales from Japan. The Commission stated in the notice of initiation that:

... any party which has not received a questionnaire should request such a questionnaire within two weeks of the present publication. All questionnaires so requested (or requested subsequent to that date) should be sent, in completed form ... not later than 45 days after the publication of this notice).

This is a new element in the formulation of deadlines which normally are set at 37 days.

Commercial Defence Actions

Pure silk typewriter ribbon fabrics from China, OJ (1992) C 12/5 (initiation review)

This review request was made by the Chinese exporter National Silk Import and Export Corporation – Zhejiang Branch on the basis of changed circumstances, in particular the fact that the only Community producer of pure silk typewriter ribbon fabrics allegedly had shifted production from pure silk typewriter ribbon fabrics to mixed polyester and silk fabrics. In the view of the Chinese exporter, both products were different and as a result the Chinese exporter of silk fabrics could no longer injure any Community production of silk fabrics.

Unwrought manganese containing more than 96% by weight of manganese from China, OJ (1992) C 15/12 (initiation)

The EC industry suggested to use the United States as a surrogate for China. The complaint was lodged by the Chambre Syndicale de l'Electrometallurgique et de l'Electrochimie, Paris, France, on behalf of the sole Community producer of unwrought manganese.

Paint, distemper, varnish and similar brushes from China, OJ (1992) C 24/3 (notice)

The Commission reported its intention to resume the investigation as the original investigation had not been concluded in accordance with Article 7(9)(a) of the basic anti-dumping Regulation. In order for the Commission to conclude the investigation on the basis of the most up to date information, the Commission announced that it would collect new data concerning dumping and injury.

Dihydrostreptomycin from Japan, OJ (1992) L 28/23 (termination)

The Commission terminated the anti-dumping proceeding against Japan on the grounds of no injury.

Audio tapes on reels from Japan, Korea, Hong Kong, OJ (1992) L 28/25 (termination)

In July 1991 the Commission was informed by the EEC industry that it had decided to withdraw the complaint with regard to audio tapes on reels, owing in particular to the imposition of definitive anti-dumping duties on audio tapes in cassettes.

The Complainant stated, however, that it withdrew its petition without prejudice to a future action. The Commission had no reason to believe that the termination of the proceeding would not be in the interest of the Community and considered that the anti-dumping proceeding with respect to audio tapes on reels should therefore be terminated.

Radio broadcast receivers of a kind used in motor vehicles from Korea, OJ (1992) L 34/8 (provisional)

The Commission noted that the 18 cooperating Korean exporters represented roughly 63% of all quantities of car radios exported from Korea to the Community. The Commission held that all car radios including those combined with a compact disc player and/or an audio cassette player constituted one like product and were therefore covered by the proceeding. However, car radios which were also capable of receiving radio telephoning or radio telegraphy were excluded as they possessed different basic features.

In the car radios case the Commission faced an important trade problem. In the Korean market, Korean producers mostly sold their car radios to car manufacturers, either related or

unrelated. The reason is that automobiles in Korea come pre-equipped with a car radio. This means that the remaining market in Korea is essentially limited to the so-called replacement market. In the EC, on the other hand, automobiles are generally sold without a car radio and the car radio is therefore an option. Most Korean exports of car radios to the EC were made to unrelated distributors who sold them to the options market. The result was that the Commission, on the one hand, could compare similar quantities sold in Korea to car manufacturers and in the EC to independent distributors. Alternatively, the Commission could compare sales made to unrelated distributors in both Korea and the EC, it being understood that the sales to unrelated distributors made in Korea were made in much smaller quantities. The Commission decided to exercise the latter option. This had an important impact on the level of dumping margins found with respect to the Korean producers as the Commission had established that the profit made on sales to unrelated distributors in Korea was substantially higher than the profit made on sales to car manufacturers in Korea. The Commission decided to use the higher profit generated on sales to unrelated Korean distributors. The Commission justified its logic as follows:

... any fair comparison requires prices to be compared at comparable levels of trade. The functions of the Korean distributors and the Community importers are comparable while the function of car manufacturers is totally different. Prices must therefore be compared at distributor level. As regards the argument concerning the difference between the quantities sold at distributor level on each of two markets which, it was claimed, resulted in differing economies of scale, it must be borne in mind that the normal value of the models sold for export was determined on the basis of the manufacturing costs for the said exported models. This method accordingly takes full account of the economies of scale secured with the export products which, moreover, were necessarily greater than those secured through the sales on the domestic market since the quantities sold for export were significantly greater than those sold in Korea. As far as selling expenses are concerned, all differences in direct costs were taken into account...With regard to general expenses, it was felt that there was no difference according to the nature of the customer. Lastly, with regard to profits, the investigation clearly showed that they vary depending on the commercial function of the customer concerned. As a result, it would be wrong to use, in respect of sales to distributors, a profit margin that clearly applied to the other type of customer on the Korean market.

With regard to requests for allowances in respect of warranties provided in Korea, the Commission found that normal practice in Korea was not to provide warranties but rather to indicate on the invoice a percentage of the amount of the invoice corresponding to the supply of spare parts free of charge. The Commission decided to give an allowance to the exporters in respect of these expenses which it treated as equivalent to warranties, as this was held to be in line with the practice in the trade.

Finally, a number of producers/exporters claimed the application of Article 2(10)(e) providing that claims for allowance having an *ad valorem* effect of less than 0.5% may be disregarded. The Commission however refused this request because it found that in this particular case the allowances in question, taken altogether, had an appreciable effect on the prices or the value of the transactions to which they related. All allowances were therefore taken into account. Dumping margins found by the Commission varied between *de minimis* and 33.95%.

In view of the high proportion of non-cooperating producers, the Commission took the view that neither the dumping margin determined in respect of the Korean exporters who cooperated in the investigation nor the information contained in the complaint, constituted an appropriate basis for determining the dumping margin for the non-cooperating exporters. Rather, the Commission decided to use the average dumping margin determined in respect of

the three models most sold for export and which accounted for some 50% of all the quantities exported by one of the three exporters who had exported the largest quantities of car radios during the investigation period and which was also, of the three exporters, the company which had sold the most substantial quantities of the like products on the Korean market during the investigation period. On that basis the dumping margins for non-cooperating producers was 38.3%.

With respect to the Community industry definition, the Commission had found that in addition to the three producers represented by the trade association ALARM, there were at least six other car radio manufacturers in the EC. However, the three Community producers which had lodged the complaint accounted for at least 75% of car radio production in the EC and therefore were held to constitute a major proportion of total Community production of the like product within the meaning of Article 4(5) of the basic anti-dumping Regulation.

As the injury margins were in all cases higher than the dumping margins, anti-dumping duties were imposed on the basis of the dumping margins.

Certain sheets and plates, of iron or steel, from Mexico, OJ (1992) L 35/9 (repeal)

This Article 14 review followed a request by the Mexican exporter Sidermex. The request alleged that following the imposition of definitive anti-dumping duties in 1988, circumstances had changed. As Sidermex had not exported to the EC since the imposition of definitive anti-dumping duties, it was not possible to calculate whether dumping had occurred. The Commission therefore proceeded to assess the injury situation. The Commission determined that in view of the strong and increasing demand for hot rolls, sheets and plates on the Mexican market, limited production capacities in Mexico, the expected flow of exports to non-Community markets and the absence of any exports to the Community since 1988, there was no clearly foreseeable threat that imports of the product concerned from Mexico to the Community would resume to a sizeable market share after the repeal of the measures in force. Under such circumstances, the recurrence of material injury was not imminent.

Certain merchant bars and rods of alloyed steel from Turkey, OJ (1992) L 35/12 (termination)

This case was closed by the Commission after it was informed on 7 November 1991 by the EC industry that it was withdrawing the complaint because of profound changes in the market place. The Commission consequently found it unnecessary to conduct a further investigation and terminated the proceeding.

Certain types of electronic micro circuits known as DRAMs (dynamic random access memories) from Japan, OJ (1992) C 50/3 (partial review)

This review request was made by Motorola. During the original investigation Motorola formed part of the EC industry and did not produce DRAMs in Japan. Since that time, however, Motorola had entered into a series of agreements with Toshiba, a Japanese producer of DRAMs, which had resulted in the creation of a joint venture Tohoku Semiconductor Corporation. Tohoku commenced production of DRAMs in October 1988 on a sub-contracting basis for the parent companies, each of which was allocated 50% of Tohoku's production capacity. Although the DRAMs produced by Toshiba and exported to the EC were exempt from any anti-dumping duties since Toshiba had offered a price undertaking in the original proceeding, the DRAMs produced by Motorola, were subject to anti-dumping duties since Motorola did not produce DRAMs in Japan during the original investigation period and was therefore not in a position to offer an undertaking. Motorola's claim that, in becoming a

producer of DRAMs in Japan, its circumstances as regards the anti-dumping measures have significantly changed to the extent that a review of the regulation imposing these measures as they concern Motorola, was considered viable. The Commission therefore initiated the Article 14 review.

Gas fuelled non-refillable pocket flint lighters from China, OJ (1992) C 62/2 (initiation review)

This newcomer review request was lodged by four joint venture companies in China. These companies provided evidence that they had not exported lighters to the EC during the original investigation period (calendar year 1989), that they were not directly related to or associated with the Chinese company for which dumping was found during the original investigation period, and that they either had exported or had plans to export since that time. The four companies furthermore showed that they were not state-controlled in their setting of export prices.

Refined antimony trioxide from China, OJ (1992) C 72/6 (initiation)

The EC industry CEFIC suggested that Korea be used as a surrogate for China.

Thermal paper from Japan, OJ (1992) L 81/1 (definitive, definitive collection)

The definitive findings largely mirrored the provisional findings. However, the Japanese producer with the highest dumping margin, Tomoegawa Paper Co., offered an undertaking which was considered acceptable by the EC Commission.

Cotton Yarn from Brazil and Turkey, OJ (1992) L 82/1 (definitive)

Following some objections by certain producers against the selection of the sample made by the Commission for the determination of normal value, the Commission noted its principal position that:

... neither regulation (EEC) No. 2423/88 nor the GATT anti-dumping code requires that the entirety of the producing/exporting companies be investigated for the purposes of establishing normal values. Consequently, the Commission as well as the authorities of other GATT members, signatories to the code, have, in cases involving a great number of exporters, selected companies which together can be considered as representative. In the present case, the selection criteria applied by the Commission ensures representativity as explained in recital (8) of Regulation (EEC) No. 2818/91. Furthermore, the methodology used by the Commission was agreed in advance by all national associations, which acted on behalf of the member companies, including the Turkish association.

The Commission therefore rejected the criticism. With respect to the calculation of the export price, the Brazilian exporters, supported by the Brazilian Government, made an interesting claim concerning exchange rates. They insisted that the application of the official rate of exchange of 1 Novo Cruzado for 1 USD, during the first quarter of 1989, had depressed export prices, with the effect of creating artificial dumping, since at the same time inflation had continuously increased pricing on the Brazilian market. The Brazilian Government confirmed that the exchange rate between the Novo Cruzado and the USD had been frozen in the first quarter of 1989 for the purposes of domestic economic policy. The Brazilian authorities therefore suggested that the exchange rate be adjusted so as to fully reflect the actual

depreciation of the Novo Cruzado in 1989 in accordance with the rate of inflation in Brazil. The Commission held that:

[t]he establishment, by the competent authorities, of the exchange rate of the third country's currency is a decision which cannot be the subject of appreciation by the Community institutions in the framework of an anti-dumping proceeding. It is, therefore, the Commission's constant practice, confirmed in the case-law of the Court of Justice, to use the official exchange rate applied to international commercial transactions. To adjust this exchange rate for the purposes of dumping calculations, would be inappropriate and contrary to the principle of neutrality as regards the monetary aspects of an anti-dumping case.

The Commission and the Council therefore rejected this claim.

A variety of other minor changes were also made.

As a result, the dumping margins for Egypt went down significantly to vary between zero and 0.4%. All four were *de minimis*. With respect to Turkey, the definitive dumping margins varied between 4.9 and 12.1%. The weighted average of the dumping margins of the cooperating producers found was 9%. The dumping margins for Brazil varied between 7 and 15.8% with the weighted average being 12.9%. Duties were in most cases based on the dumping margin.

Certain polyester yarns (man-made staple fibres) from Taiwan, Indonesia, India, China, Turkey, OJ (1992) L 88/1 (definitive, definitive collection)

With the exception of India, the definitive dumping margins were essentially the same as the provisional dumping margins. For India, the definitive margins varied between 2 and 7.8% with the weighted average being 2.9%. Representatives of the Indonesian Government, and those of the exporters in Indonesia and Taiwan and of the Turkish trade association, protested severely against the high residual duty provisionally imposed on the three countries. These representatives did not attack the principle that non-cooperating producers should be subject to a higher duty than cooperating producers but rather the type of data used by the Commission to calculate provisional dumping margins. They argued that more appropriate data were available and submitted such data. The Commission in part accepted these arguments and as a result the residual duties for these three countries became 14.3% for Taiwan, 11.9% for Indonesia and 10.1% for Turkey. By way of comparison, the residual duty for India was set at 7.8% and for China at 23.5%.

Video cassettes from Hong Kong, OJ (1992) C 87/9 (initiation review)

This was a newcomer review request from Inter-cassette (Hong Kong).

Certain electronic weighing scales from Korea, OJ (1992) C 84/14 (initiation)

This proceeding is an extension of the still on-going proceeding against electronic weighing scales from Singapore. It was based on a complementary complaint by the EC industry.

Compact disc players from Japan, Korea, OJ (1992) L 87/1 (amendment)

In 1990 definitive anti-dumping duties were imposed on imports of compact disc players from Japan and Korea falling within CN Code 8519 99 10. The scope explicitly included compact disc players which may be incorporated in a rack but which are nevertheless capable of operating alone, separately from the rack, by means of their own controls and power supply.

Subsequently one EC Member State drew the Commission's attention to the fact that the definition of the scope might have consequences which were not desired by the Council when the regulation imposing definitive duties was adopted. In the first place, compact disc players which are not regarded as conferring its main characteristic on the rack in which they are incorporated, would escape the anti-dumping duty altogether because they are classified in a code other than CN Code 8519 99 10. Conversely, where a rack is assumed to derive its principal characteristic from the compact disc player, the relevant anti-dumping duty is based on the total value of the rack and not, as provided in the Regulation, just on the value of the compact disc player component alone. The scope was therefore both too broad and too narrow. The Regulation was therefore amended on two points. First, a number of CN codes were added and the product definition was changed to:

... stand-alone sound reproducers with laser optical reading system with external dimensions of at least 216 x 45 x 150 mm, equipped to accommodate up to a maximum of ten compact discs, including sound reproducers which may be incorporated in a 'rack' system but can nevertheless operate alone separately from the 'rack', with their own controls and power supply, functioning with AC mains supply of usually 110/120/220/240 volts and not capable of operating with a power supply of 12 volts DC or less, originating in Japan and in the Republic of Korea.

Secondly it was clarified that where the compact disc player is combined with other apparatus to form a rack, the relevant value used in applying the anti-dumping duties should be that of the compact disc player alone.

Certain semi-finished products of alloyed steel, Turkey, Brazil, OJ (1992) L 95/26 (provisional)

Normal values were established on a monthly basis in view of the high inflation rates in Turkey and Brazil. With respect to export prices, in the case of the Turkish producer, six alloy steel grades accounted for approximately 70% of the total Turkish export sales to the Community. The Commission decided, therefore, in agreement with the Turkish producer to base the dumping calculations on these six alloy steel grades. This sampling, sometimes called the 70% rule, has been used occasionally by the Commission in cases where quantities exported are very substantial. Dumping duties of 16 and 15% were imposed on Turkey and Brazil respectively. In both cases the dumping duties were based on the injury margin. Two Brazilian companies, Vibassa and Acos Finos Piratini, received dumping duties of 7.4 and 1.7% respectively because their dumping margins were lower than their injury margins. The 1.7% dumping margin of Acos Finos Piratini was therefore not considered to be *de minimis*.

Binder and bailer twine from Mexico, Brazil, OJ (1992) C 111/11 (initiation review)

This is a sunset review requested by the EC industry.

Commercial Defence Actions

Silicon metal from Brazil, OJ (1992) L 96/17 (provisional)

Normal value for Brazil was determined on a monthly basis in view of the high inflation rate. Dumping margins found by the Commission varied between 18.55 and 67.16%. With one exception, the dumping margins in all cases were higher than the injury margins. Dumping duties were therefore imposed on the basis of the injury margins with the exception of Camargo Correa Metals where the dumping duty was set by reference to the dumping margin.

Portland cement from Turkey, Romania, Tunisia, OJ (1992) C 100/4 (initiation)

The complaint was lodged by Ofecemen, the national organization of Spanish cement producers, acting on behalf of producers representing the totality of Spanish portland cement production. This is a regional industry case as the Spanish producers allege that they sell almost all of their production of the product in question in Spain and that the demand in Spain for cement is not to any substantial degree supplied by producers located elsewhere in the Community.

Certain ball bearings from Singapore, OJ (1992) C 100/5 (notice)

In September 1989 the Commission opened a mixed Article 14/15 review which is presently still in progress. In February 1992 the two Singapore exporters of ball bearings submitted evidence to the Commission alleging a change in the dumping margins since the investigation period for the above review. The exporters requested that the information available to the Commission be appropriately updated. In support of their request the exporters claimed that since the initiation of the review there had been a progressive and continuous decline in dumping margins. In support they referred to the investigation of the refund claims which had been lodged by their related importers for the period October 1989 to September 1991, and alleged that dumping margins throughout this period were less than 1%. The exporters claimed that this large reduction in their dumping margin over a prolonged period of time should be taken into consideration when arriving at the decision regarding the review. The Commission agreed that there was sufficient evidence to request more recent data on dumping of injury with a view to concluding the review on the basis of an updated investigation period. It may be noted that it is very unusual for the EC Commission to update the investigation period at the request of interested parties.

Fluorspar from China, OJ (1992) C 105/23 (initiation)

The EC industry suggested Morocco as a surrogate for China.

Potassium chloride from Belarussia, Russia, Ukraine, OJ (1992) L 110/5 (provisional)

The investigation period was the unusually short period of 1 January 1990 to 30 June 1990. The Commission found that there are three basic specifications for Potassium chloride:

- a potassium content not exceeding 40% K₂O, by weight, on the dry anhydrous product, and therefore falling within CN Code 3104 20 10,
- a potassium content exceeding 40% K₂O but not 62% falling within CN Code 3104 20 50,
- a potassium content of 62% K₂O falling within CN Code 3104 20 90.

Exports from the former Soviet Union consisted entirely of products falling within the first two CN Codes. The Commission found that these two products were two types of a single like

product as their physical and chemical properties were the same and their use, as agricultural fertilizers, identical. However the product containing over 62% K₂O had no agricultural use. It was a refined product and therefore had different chemical properties from the other two types of potassium chloride. It was used as a raw material in the pharmaceutical and chemical industries. This product was not interchangeable with the other two products and it was therefore excluded from the proceeding.

As the Soviet Union was not, at the time of the investigation, a market economy country, normal value was calculated on the basis of the non-market economy rules. A Canadian supplier was used as a surrogate. Export prices from Canada to the United States were used for this purpose.

Export prices were reconstructed. The dumping margin found was 35%. While the price undercutting was only 3%, the Commission considered it necessary to use the price underselling method for purposes of calculating injury margins. In the price underselling method a profit margin of 9% was considered reasonable in view of production sectors and the constraints imposed by technological advances and environmental protection. Although it would seem on the basis of these figures that the dumping duty would be imposed by reference to the injury margin, this was, however, not the case. The Commission found that Soviet potash prices were so low that increasing them to the target price would exceed the dumping margin. The duty was therefore set by reference to the dumping margin of 25%. The Commission decided to impose a variable duty in view of the room for manoeuvre enjoyed by exporters in countries still without market economies and in view of the impact of even the slightest undercutting on the potash market.

Ferro-silicon from the USSR, Iceland, Norway, Sweden, Venezuela, Yugoslavia, Brazil, OJ (1992) C 115/2 (review)

This was an Article 14 request by the EC industry. The request was aimed only at ferro-silicon originating in the territory of the former USSR. However, the Commission also examined the situation relating to the other countries mentioned in the previous proceedings i.e. Iceland, Norway, Sweden, Venezuela, Brazil and Yugoslavia and found that the changed circumstances cited by the EC industry were equally applicable to these countries. It therefore decided to self-initiate a review proceeding against these countries. The review request was based on an increase in the dumping margins.

Photo albums from China, OJ (1992) C 120/10 (initiation)

The surrogate suggested by the EC industry for China was Japan.

Video cassettes from Hong Kong, OJ (1992) L 139/1 (amendment)

This decision related to the newcomer review request of the Hong Kong company Wai Shing. As Wai Shing had actually exported to the EC, it was possible for the Commission to calculate the dumping margin which was found to be 13.8%. As the Commission found that the prices of video cassettes from Hong Kong were subject to a high degree of volatility, the Commission considered that, for the types investigated, the duty should take the form of a variable duty. For all other video tapes, a 13.8% *ad valorem* duty was imposed.

Large electrolytic aluminium capacitors from Japan, OJ (1992) L 152/22 (provisional)

In the notice of initiation of the proceeding the Commission had defined the scope of the proceeding as:

... certain large electrical capacitors, aluminium electrolytic, with a CV product (capacitors multiplied by rated voltage) between 18 000 and 310 000 μC (microcoulombs), originating in Japan falling within CN Code ex 8532 22 00...

With respect to the scope of the proceeding, some of the foreign producers claimed that the product subject to investigation exported to the Community could be more precisely defined by adding certain requirements. As the complainant did not object to this request the scope was amended to include:

... at a voltage of 160 volts or more and with a diameter of 19 mm or more and a length of 20 mm or more.

Normal value was based on constructed value.

One Japanese producer had included in its sales and general and administrative expenses a negative entry relating to income from financial investment (non-operating income). The Commission decided to disallow this deduction as these financial revenues had no connection with the manufacture of capacitors. It should be noted that the Commission position towards non-operating income is not always consistent. Some Commission officials take the position that non-operating income should not be allowed to offset non-operating expense as non-operating income is not connected to the manufacture of the product under investigation. Other Commission officials allow such an offset. It is submitted that the offset should be allowed. In particular because non-operating *expenses* are routinely included. In other words, with respect to non-operating *expenses*, the Commission does not investigate whether or not such expenses have a connection with the manufacture of capacitors but routinely includes them. With respect to non-operating income, on the other hand, some Commission officials will disallow such income.

Where exports were made through related sales subsidiaries in the EC, export prices were constructed and a profit margin of 5% was imputed to the related importers.

With respect to allowances, the Commission disallowed transportation costs incurred to transport the product from the factory to the producers' warehouses as such pre-sale transportation costs were not allowable under Article 2(10)(c)(i) of the basic Regulation. Allowances claimed for travel and communication expenses were also refused as these were not provided for in the Regulation.

Dumping margins found varied between 14.1 and 43.1%. Injury margins were based on the price underselling method and a profit of 12% was used in the calculation of the target prices. In all cases, dumping margins were lower than the injury margins and dumping duties were therefore set by reference to the dumping margins.

The Commission found that the four cooperating Japanese producers represented only 33% of imports into the EC. The Commission therefore decided that it would constitute a bonus for non-cooperating producers to use the highest margin found with respect to any cooperating producer and apply it to them. Rather, for those producers which did not reply to the questionnaire, the Commission considered it appropriate to establish the dumping margin on the basis of the highest dumping margin found for a particular model sold in significant quantities by one of the cooperating producers. Sales of this model accounted for 27% of the exports of that producer and for 7% of all exports of the cooperating producers. The duty imposed on this basis on non-cooperating producers amounted to 75%.

Compact disc players from Taiwan, Singapore, Malaysia, OJ (1992) C 148/7 (initiation)

This case is essentially an extension of previously initiated proceedings against Japan and Korea. An unusual aspect of the complaint was that it also alleged that a large number of the compact disc players subject to anti-dumping duties imposed in 1990 on imports of this product originating in Japan and Korea, were now being exported from Taiwan, Singapore and Malaysia. The EC industry furthermore claimed that at least some of the compact disc players concerned may not originate from the three countries concerned. In other words, the EC industry claimed that a significant number of CDPs were either purely shipped to other countries or were assembled under such circumstances that the assembly did not confer origin. The Commission announced that it would be paying particular attention to the origin of the CDPs in question and the questionnaires sent out to foreign producers indeed requested substantial information on the origin of parts and components.

Container corner fittings of work cast steel from Austria, OJ (1992) L 165/37 (undertaking, termination)

This was a sunset review request. Although the case concerned only one producer and one country, the Commission did not succeed in finishing the proceeding within the one year time limit laid down by Article 7(9)(a) of the EC basic Regulation. Reportedly, the duration of the exchanges of information with the Austrian producer following the disclosure meeting, was the reason that the one year time limit could not be observed. As this case is probably as simple as an anti-dumping proceeding can possibly be, one may wonder whether the one year time limit in the basic Regulation is realistic.

Normal value was based on constructed value in which a profit margin of 6% on turnover was included. Although in the original proceeding only 5% profit had been used, the increase was considered to be reasonable, given 'the peculiarities and investment requirements of the sector concerned, considered in the light of its current situation'.

The weighted average dumping margin was in excess of 20%.

Although the weighted average level of price undercutting was found to be 6.3%, the Commission explicitly stated that no violation of the undertaking in force had been established. The Austrian producer offered a price undertaking the effect of which, in the view of the Commission, would be to increase export prices in the Community to the level considered necessary to eliminate the injury. This would be achieved by allowing the Community producers to apply selling prices which eliminate the losses and provide them with an adequate return. This undertaking was accepted.

The Commission noted that in case of a violation of the undertaking, the Commission could, in accordance with Article 10(6) of the basic Regulation, immediately impose a provisional duty on the basis of the results and conclusions of the investigation set out in the Regulation. In view of the fact that the injury margin was apparently lower than the dumping margin and the fact that the injury margin itself is not mentioned in the Regulation, one may wonder how the Commission would implement its intention.

Silicon metal from China, OJ (1992) L 170/1 (amendment)

This Regulation provided the outcome of the previously initiated anti-absorption investigation into imports of silicon metal from China. None of the exporters cooperated in the investigation. The Commission was therefore by and large forced to use best information available. Import prices were based on the basis of customs statistics, these being corroborated by the information obtained by Community importers. This information showed that the import price at Community borders of silicon metal originating in China fell considerably since the imposition of provisional anti-dumping duties. It therefore appeared that, by reducing their

prices for export to the Community after imposition of the anti-dumping duty, the exporters of silicon metal from China had borne the anti-dumping duty either completely or partially.

The amount of absorption of the anti-dumping duty was calculated by the Commission on the basis of the difference between the import price of silicon metal originating in China during the period 1 January 1988 to 31 December 1988, the period of the original investigation, and the import price during the period following imposition of *provisional* anti-dumping duties, from 1 April 1990 to 30 September 1991. The amount of absorption thus came to an average monthly figure of 178% for the period from 1 April 1990 to 30 September 1991. In view of the extent of absorption, the Commission decided to double the amount of anti-dumping duty to ECU 396 per tonne. Three interesting aspects of this first concluded anti-absorption investigation are the following:

- the Commission started the investigation of absorption as of the moment *provisional* duties were imposed;
- rather than imposing provisional and subsequent definitive dumping duties, the Commission amended the original investigation results, in other words, imposed definitive duties immediately;
- the Commission explicitly noted that Article 13(11)(a) of the Basic Regulation limited the additional amount to strict compensation for the amount of anti-dumping duty borne by the exporter which cannot, logically, be greater than the amount of the anti-dumping duty concerned.

1.3. Court Cases¹⁰

Case 171-179/87, Photocopiers; Ricoh, Canon, Mita, Matsushita, Konishiroku, Sanyo, Minolta, and Sharp v. Council, Judgments of 10 March 1992 (not yet reported)

The European Court of Justice has rejected the appeal made by eight Japanese firms requesting annulment of the Regulation imposing definitive anti-dumping duties on photocopiers in 1987. Definitive duties of up to 20% had been imposed by the 1987 Regulation on the imports of low-and medium speed plain paper photocopiers.¹¹ The appeals had been lodged both on the grounds of the Commission's investigation procedures and on the grounds of the substance of the 1987 Regulation. The Court dismissed the appeals on all grounds.

Case 188/88, NMB (Minebea) v. Commission, Judgment of 10 March 1992, (not yet reported)

In 1988 the Commission rejected, in part, the applications for refunds by Minebea's European subsidiaries in respect of anti-dumping duties imposed on ball bearings < 30 mm originating from Singapore.¹²

The appeal concerned the controversial Commission practice of treating anti-dumping duties as a cost (incurred between importation and resale) in the construction of the export

¹⁰ For a more detailed analysis of the seven judgments, see Vermulst, Hooijer in *Common Market Law Review* (1993) (forthcoming).

¹¹ Plain paper photocopiers from Japan, OJ (1987) L 54/12 (definitive).

¹² Commission decisions published in OJ (1988) L 148/26, L 148/28, L 148/31. The Regulation imposing definitive duties on ball bearings < 30 mm from Singapore was published in OJ (1984) L 193/93. For Minebea the duty was 33.89%.

price. The appeal, in particular, concerned the Commission practice of treating the anti-dumping duties as a cost in the calculation of the dumping margin for the purposes of the refund.¹³

The Court did not uphold the appeal. It determined that the Commission, by treating the anti-dumping duty as a cost in the construction of the export price, had not incorrectly interpreted the basic Regulation. Such interpretation was also legitimate for the purposes of the refund procedure. The Court held that in this respect there is no inconsistency between the basic Regulation and the Anti-Dumping Code.¹⁴

Case 315/90, Groupement des industries de matériels d'équipement électrique industrielle associée (Gimelec) and others v. Commission, Judgment of 27 November 1991 (not yet reported)

In 1990, the Commission terminated the anti-dumping proceeding against certain single-phase, two-speed electric motors from Bulgaria, Romania, and Czechoslovakia on the basis of no injury.¹⁵ The companies who were the original complainants appealed against this decision. The Court rejected the appeal on all of the appellants' grounds and upheld the Commission decision.

Case 170/89, Bureau Européen des Unions de Consommateurs (BEUC) v. Commission, Judgment of 28 November 1991 (not yet reported)

On 14 January 1989, the Commission initiated an anti-dumping proceeding against audio cassettes and audio cassette tapes from Japan, Korea, and Hong Kong.¹⁶ The *Bureau Européen des Unions de Consommateurs* (BEUC), whose objects consist in the protection of consumers, asked to be heard and to make written submissions. In this regard it asked for access to the non-confidential file. The Commission responded that access to the non-confidential file, according to Article 7(4)(a) of the basic Regulation, was reserved to 'complainants, exporters and importers known to be concerned'.¹⁷ BEUC therefore was not granted access to the non-confidential file.¹⁸ This decision was communicated by letter (sent by fax).

It was against this letter that BEUC brought an action for annulment, arguing that by refusing access to the non-confidential file pursuant to Article 7(4)(a) of the basic Regulation violated the principle of the right to a fair hearing. BEUC argues that the fact that Article 7(4)(a) limits the right to certain categories does not matter because observance of the right to a fair hearing is a fundamental right of EC law, which must be granted even in the absence of an express provision. The Court did not agree with the reasoning of BEUC because an anti-dumping proceeding and any resulting measures are not directed against practices

¹³ The applicant made a distinction between the treatment of the anti-dumping duty as a cost in a refund and a review procedure.

¹⁴ It should be noted that Article 9.3.3. of the draft Code provides that in principle payment of anti-dumping duties should *not* be treated as a cost of related importers in refund proceedings.

¹⁵ Certain single-phase, two-speed electric motors from Bulgaria, Romania, and Czechoslovakia, OJ (1990) L 202/47.

¹⁶ Audio cassettes and audio cassette tapes from Japan, Korea, and Hong Kong, OJ (1989) C 11/9 (initiation).

¹⁷ See the opinion of the Advocate General, where the letter is reproduced in full.

¹⁸ Apparently, however, the Commission *did* give BEUC access to the non-confidential version of the complaint.

attributable to consumers or organizations such as BEUC. According to the Court, the proceeding can therefore not result in a measure adversely affecting them. Therefore, the Court held that the principle of a right to a fair hearing had not been violated by refusing access to the non-confidential file.

Secondly, BEUC argued that it is illogical from the point of view of the principle of sound administration and coherent application of EC procedural rules that Article 7(4)(a) is limited to the parties explicitly mentioned in that Article. The Court dismissed this argument by distinguishing between anti-dumping proceedings and proceedings before the Court. The principle of the second argument relates to the latter, but not to the former, according to the Court.

In sum, the Commission has not violated the law, *but* the Court stated in an *obiter dictum* that:

there is nothing in the wording of Article 7(4)(a) of the basic anti-dumping regulation to prevent the Commission from allowing persons who have legitimate interest to inspect the non-confidential file.¹⁹

The situation which arises is that by providing BEUC with a copy of the non-confidential version of the complaint, the Commission, in our view, implicitly recognised BEUC as a person having a legitimate interest to inspect the non-confidential file. The Commission did not grant access to the rest of the non-confidential file. This is unfortunate from our perspective: if a person has a legitimate interest, and the Commission recognizes this by giving access to the file, the Commission should give full access and not to only part of the file. The margin of discretion which the Court gives to the Commission would preferably be to decide whether or not a person has a legitimate interest to inspect the non-confidential file and not a margin of discretion of how much access a person with a legitimate interest should be allowed. The obvious counter-argument, on which the Court's reasoning seems to be based, is that any access not specifically mentioned in the basic Regulation is discretionary, and therefore also the amount of access.

Finally, it should be noted that the draft Dumping Code provides that authorities shall provide opportunities for, *inter alia*, consumer organizations to provide information which is relevant to the investigation regarding dumping, injury, and causality.²⁰ The draft Code, however, does not qualify a consumer organization as an 'interested party' and, consequently, the procedural safeguards applicable to 'interested parties' do not apply. Since the borderline between 'information relevant to the investigation' and 'procedural safeguards' can be thin there is room left for interpretation. That the Court has permitted the Commission discretion in determining the 'amount of access' rather than a margin of discretion to determine 'access or not' is unfortunate for consumer organizations who will not benefit from the draft Code in this respect.

Case 358/89, Extramet v. Council, Judgment of 11 June 1992 (not yet reported)

The case was already noteworthy because in earlier hearing held last year, the Court declared admissible an application for annulment brought by Extramet, an *independent* importer.²¹

Again, the case merits attention because the Court found that Extramet's appeal for annulment of the Regulation imposing anti-dumping duties was justified. Extramet first argued

¹⁹ This dictum seems to find its inspiration in recital 17 of the A-G's Opinion.

²⁰ Article 6(12) of the draft Code.

²¹ See also Vermulst, Graafsma, 2 *EJIL* (1991) at 165.

its case on the ground of no injury. The ECJ determined that indeed the Community Institutions had not adequately examined whether Pechiney (the sole EC producer) had self-inflicted injury by not supplying Extramet with the calcium metal.²² The Court therefore had no need to consider the other grounds raised by Extramet and annulled the Regulation.

Case 16/90, Detlef Nölle v. Hauptzollamt Bremen-Freihafen, Judgment of 22 October 1991 (not yet reported)

This judgment may have important ramifications for the selection of surrogate countries in non-market economy proceedings.²³ The German importer Nölle contested the imposition of definitive anti-dumping duties on paint brushes from China before the Hauptzollamt Bremen-Freihafen which asked the ECJ for guidance. The most important arguments were those relating to the calculation of normal value.

Nölle argued first of all that the Chinese paint brush industry was subject to market forces to such an extent that it was wrong for the Commission to have used the surrogate country approach. The Court held that the decisive criterion for the application of the non-market economy rules was the existence of a non-market economy. Even if certain elements of that economy were subject to market forces, this did not make the country a market economy.

Alternatively, Nölle argued that it was wrong for the Commission to have used Sri Lanka as the surrogate country. Nölle argued that Taiwan should be used as the surrogate for China on the basis of:

- (1) the volume of domestic sales in Taiwan;
- (2) the prices in Taiwan which were based on the existence of sufficient competition; and
- (3) the characteristics of the Taiwanese paint brush industry which were, in Nölle's opinion, very similar to the characteristics of the Chinese paint industry, in particular with respect to access to raw materials.

In contrast, the market in Sri Lanka for paint brushes was very small. Additionally, there were only two Sri Lankan producers of the types of paint brushes under consideration, one of which was related to an EC complainant. In Nölle's view this situation did not guarantee sufficient competition on the Sri Lankan market. Nölle supplied evidence that the paint brush prices in Sri Lanka were higher than those of representative Italian and German producers. Further, while China produced all the raw materials necessary for the manufacture of paint brushes, in Sri Lanka all the raw materials had to be imported.

The Commission defended itself by pointing out that the paint brushes manufactured in Taiwan were mostly different types and that, furthermore, it had in fact written to two important Taiwanese producers requesting information, but these letters had remained unanswered (which was not surprising in view of the fact that the Commission had given the Taiwanese producers a deadline of only five to six working days). Moreover, the Commission had not informed Nölle about the refusal of the two Taiwanese producers to cooperate.

The Court held that under these circumstances the Commission's choice of Sri Lanka was insufficiently motivated.

The judgment is important because the Court thoroughly reviewed the efforts of the Commission to find an appropriate surrogate country and clearly found them wanting. In view

²² Extramet argued that if Pechiney had sold the calcium metal to Extramet, Pechiney would not have suffered a drop in production during the reference period, and the imports from the Soviet Union and China would only have been half as great and therefore would not have represented more than a minimal market share.

²³ See also Vermulst, Hooijer, *supra* note 9, at 396-403; Vermulst, Graafsma, *supra* note 8, at 19-22.

of *prima facie* evidence adduced by Nölle in favour of Taiwan and against Sri Lanka, the Commission brushed away Nölle's arguments too casually and should have made a more serious effort to obtain Taiwanese data.

As a result of the judgment the Regulation is no longer applicable. In response to the judgment, the Commission published a Notice in which it stated that the importers may file a request for a refund of the provisional and definitive duties collected.²⁴

C-105/90, Goldstar Co. Ltd. v. Council (Compact Disc Players), Judgment of 13 February 1992 (not yet reported)

The European Court of Justice has rejected the appeal made by the Korean firm Goldstar requesting annulment of the Regulation imposing a definitive anti-dumping duty of 26.1% on the firm's imports of CDPs. This was a very important case since it was the first time in EC anti-dumping history that a Korean company had gone to the European Court of Justice.

Goldstar was among several Korean and Japanese exporters on whom the Commission had imposed definitive duties ranging from 8 to 32%. Goldstar had appealed against the Regulation on the grounds that the Commission's calculations of the dumping margin were incorrect. Goldstar claimed that the method of calculation was distorted by Goldstar's very modest sales on its home market.

The Commission, however, ruled that Goldstar's sales on its home market were sufficient to meet the '5% rule'. The '5% rule' requires that a minimum of 5% of the EC export sales should be made on the home market on a quantity, model-by-model, basis for these domestic sales to be considered in the ordinary course of trade. If the 5% test is met, the domestic sales will be used for comparison with the export prices to calculate the dumping margin.

2. Other Trade Protection Laws

2.1. Countervailing Duties

Polyester fibres and polyester yarns from Turkey, OJ (1991) L 272/3 (definitive collection); OJ (1991) L 272/92 (undertaking)

The Turkish Government and the Turkish exporters submitted specific arguments on five of the seven schemes which the Commission had held countervailable.²⁵

(1) *Export subsidies*

a) *The corporate tax exemption scheme*

²⁴ OJ (1991) C 332/5 (Notice concerning imports of paint, distemper, varnish and similar brushes from China).

²⁵ For an analysis of the provisional duties see Vermulst, Graafsma, 2 *EJIL* (1991) at 165-168. In its provisional determination, the Commission had identified eleven subsidy schemes. It considered two of these schemes to be not countervailable because they terminated before the end of the investigation period (the *Resource Utilization Support Fund* and the *Rebate of Indirect Taxes*); one because the products involved were not eligible for payments from the scheme (*Support and Price Stabilization Fund*), and one because its benefits were negligible (*Low Interest Credit for Operational Phase*).

The quantification, rather than the identification, of the subsidy was challenged by the Turkish Government and one exporter. Indeed, the Commission lowered the exemption rate on which it based its calculations, but not to the level which the Turkish Government had proposed.²⁶

(2) *Domestic subsidies*

a) *The incentive premium*

The actual gain accruing to the companies which benefitted under this scheme was negligible and the Council did not take into account the advantages of this scheme.

b) *The investment incentive allowance*

The Government and one exporter argued that the depreciation period which the Commission used in its calculation was not representative. The Commission, however, had based its findings on the information found during the on-the-spot investigation and the Council therefore confirmed the Commission's calculation method.

Also, it was argued that the subsidy accruing to fibres and yarns proper was lower than the amount of the subsidy, which was a subsidy for all investments. However, since the exact amount could not be indicated by the defendant, the Council again confirmed the Commission's original calculations.

c) *The customs exception*

The countervailable amount was lowered because the Government and the exporters proved that the customs duty rate for which they benefitted from an exemption was reduced from 30 to 5% in November 1989 (after the investigation period).

(3) *Export and domestic subsidy*

a) *The low interest credit for investment purposes*

Since this scheme was abolished in January 1990, and adequate proof was submitted to support this, the scheme was considered to be no longer countervailable.

(4) *Miscellaneous*

a) *Specificity of the domestic subsidies*

In accordance with the Commission's provisional determination the Council decided that:

... the Turkish system does not entitle the applying companies to obtain automatically the subsidies they claim once the criteria are met.

b) *Other*

The Council also confirmed the Commission's provisional determinations with respect to the *additional protocol to the EEC Turkey Association Agreement*, the *compliance with GATT obligations*, and the *cumulation of anti-dumping and countervailing duties*.²⁷

²⁶ The Commission, in its provisional findings, based its calculations on a 20% exemption of the exports earnings from corporate taxation. The Turkish Government proposed 14% (coming into effect in 1993), but the Commission eventually used 18%, the rate which was effectively applicable in 1991.

²⁷ See also Vermulst, Graafsma, 2 *EJIL* (1991) at 167.

(5) Collection of duties and acceptance of undertakings

The Council collected the provisional duties at the rates definitively established and accepted an undertaking from the Turkish Government. The Turkish Government committed itself to gradually abolishing the *corporate tax exemption*, which was the export subsidy considered by the Commission to be the main cause of injury to the Community industry.

2.2. Safeguards

Certain products from Japan, OJ (1991) L 352/60 (extension)

The surveillance regime is extended until 31 December 1992. The products under consideration are: machine tools; colour televisions; cathode-ray tubes; certain motor vehicles; light commercial vehicles; motor cycles; video tape recorders; fork-lift trucks; quartz watches; and high-fidelity equipment.²⁸

Video tape recorders from Korea, OJ (1991) L 352/61 (extension)

The surveillance regime is extended until 31 December 1992.

Footwear from non-member countries, OJ (1991) L 352/62 (extension)

The surveillance regime is extended until 31 December 1992.

Certain products from Japan, OJ (1991) L 357/74 (extension)

The surveillance regime is extended until 31 December 1992. The products under consideration are personal computers and electropneumatic drills.²⁹

2.3. Commercial Policy Instrument

Port charge or fee in Japan, OJ (1992) L 74/47 (suspension)

After the initiation of the procedure,³⁰ the Commission conducted the examination at Community level.³¹ The Commission also conducted the investigation on the Japanese side by requesting information it deemed necessary from the Japanese Government and interested parties in Japan.

The Commission reported the findings of its examination within seven months to the Advisory Committee.³² After consultation of the Advisory Committee the Commission decided to extend the examination period beyond the seven month period.³³ The reason for

²⁸ OJ (1983) L 77/8.

²⁹ OJ (1989) L 150/15.

³⁰ Port charge or fee in Japan, OJ (1991) C 40/18 (initiation), described in the previous report.

³¹ As envisaged in Article 6(1)(c) of the Regulation establishing the Commercial Instrument. This Regulation is published in OJ (1984) L 252/1.

³² In accordance with Article 6(9) of the Commercial Instrument Regulation.

³³ OJ (1991) C 287/5 (extension).

this was that the Japanese Government had indicated that it wished to cooperate with the Commission in order to resolve the problem of the port charge, and therefore the Commission needed more time in order to conduct consultations with the Japanese Government.³⁴

During the consultations, the Commission received formal assurances of the discontinuation of the port charge after 31 March 1992, which were later confirmed in writing. Therefore, the Commission suspended the examination procedure until further notice. This suspension – and not termination – was in order to provide a reasonable guarantee that the scheme will not be reintroduced at a later date in a different form.³⁵

Piracy of sound recordings in Thailand, OJ (1991) C 189/26 (initiation)

This is the second time that the Commission has initiated an examination procedure following a complaint from the International Federation of the Phonographic Industry (IFPI).³⁶ The complaint concerns the ‘piracy’ of sound recordings in Thailand.³⁷

The illicit commercial practice of which the complainant accuses Thailand is the breach of the Berne Convention.³⁸ The breach consists of the non effective implementation of the Thai Copyright Act. The Copyright Act as such appears to comply with Thailand’s ‘commitments’ (revised Berne Convention). The complaint alleges further that the inadequate protection of the European sound recording industry denies this industry fair and equitable market opportunities in Thailand, while the Thai sound recording industry does not encounter similar problems in Europe.

The alleged injury amounts to ECU 200,000,000.

More than a year has lapsed since the initiation and at present it is unclear from the public notices if any further steps have been taken.

2.4. Unfair Pricing Practices in Maritime Transport

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

2.5. Counterfeiting

The draft TRIPs³⁹ Agreement in the Uruguay Round provides that any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from

³⁴ Although the reason for the extension is clear (‘...the interest of the Community...’), the Commercial Instrument Regulation does not explicitly mention the possibility of such extension.

³⁵ Again the reason for the Commission’s behaviour is clear but seems to lack an explicit legal basis. However, there is a precedent: The *IFPI v. Indonesia* proceeding was also suspended (before it was terminated), OJ (1987) L 335/22 (suspension).

³⁶ The first time the Commission initiated a procedure pursuant to IFPI’s complaint was on 21 May 1987, OJ (1987) C 136/3 (initiation).

³⁷ For the purpose of the Regulation ‘piracy’ is defined as: ‘the unauthorized duplication of original phonograms distributed to the public with labels, artwork, trademarks and packaging different from, although similar to, those of the original legitimate phonograms.’

³⁸ More precisely: ‘breach of the Berne Convention for the Protection of Literary and Artistic Works, as revised with the Berlin Revision of 1908 and on several other occasions, and lately, in 1971, with the Paris Act, signed by Thailand, in particular Articles 4(1) of the Berlin Revision of the Convention and 32(1) of the Paris Act.’

³⁹ Trade Related Aspects of Intellectual Property Rights.

Commercial Defence Actions

those of other undertakings, shall be capable of constituting a trademark. This is laid down in Article 15(1) which provides that:

[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

According to Article 15(2), registration may also be denied on other grounds, provided that such grounds do not derogate from the provisions of the Paris Convention. Articles 15(3), 15(4), and 15(5) set forth further criteria on the registrability of the trademark:

3. Members may make registrability depend on use. However, actual use of the trademark shall not be a condition for filing an application for registration.
4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.
5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

The owner of a registered trademark would have the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. This is laid down in Article 16(1) which provides that:

[t]he owner of a registered trademark shall have the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

Article 17 sets forth that Members may provide limited exceptions to the rights conferred by a trademark, such as fair use and descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 18 sets forth that initial registration and each renewal of registration of a trademark would be for a term of no less than seven years. The registration of a trademark would be renewable indefinitely.

If use is required to maintain a registration, the registration could be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. This is provided in Article 19.

Article 21 sets forth that compulsory licensing of trademarks would generally not be permitted.

3. Miscellaneous

This Section will deal mainly with three issues: the Uruguay Round, the European Economic Area, and the Association Agreements. It will also touch briefly upon GSP.

3.1. Uruguay Round

The revised Anti-Dumping Code has been discussed above.⁴⁰ To deal with the Uruguay Round across-the-board would be voluminous.⁴¹ Therefore, we selected the topics which traditionally play an important, yet underestimated, role in the common commercial policy but whose importance is expected to greatly increase once the Uruguay Round is concluded. The most obvious topics meeting these criteria are the rules of origin and the dispute settlement. The evaluation is therefore organized according to the following sub-index:

3.1.1. Rules of Origin

3.1.2. Dispute Settlement

3.1.1. Agreement of Rules of Origin⁴²

Summary of the Dunkel Text

The draft agreement on rules of origin provides, for the first time in the history of GATT, strictures on the application of non-preferential origin rules for products. The proposed new code on rules of origin essentially adopts a twofold approach. First, the code sets forth obligations to ensure a more fair and transparent application of non-preferential origin rules. Second, the Code provides for a worldwide harmonization of non-preferential origin rules.

Scope of the Agreement

The agreement covers only non-preferential origin rules. Non-preferential origin rules are the common origin rules. It does not cover the preferential origin rules, which are used in free trade agreements (e.g., the US-Canada Free Trade Agreement, EC-EFTA Free Trade Agreement, etc.) and unilateral preferential trade arrangements (e.g., the GSP system).⁴³

However, the agreement covers all non-preferential origin rules used in non-preferential commercial policy instruments such as anti-dumping and anti-subsidy measures, quantitative restrictions, and origin marking requirements. It is important to note that the agreement also covers rules of origin used for government procurement rules. Its scope does not extend to origin rules for services.⁴⁴

⁴⁰ Section 1.

⁴¹ See for example the handbook: E.-U. Petersmann, M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* (1991).

⁴² Compare P. Waer, *Agreement of GATT Origin Rules in the GATT Dunkel Text* (Memorandum 1992). For an extensive and detailed study on Rules of Origin see E. Vermulst, P. Waer, J. Bourgeois (eds), *Rules of Origin: A Comparative Study* (1993 (forthcoming)).

⁴³ Annex II to the agreement contains a 'common declaration' with regard to preferential rules of origin. In this common declaration the same principles as adopted in the agreement concerning non-preferential origin rules to ensure a fair and transparent application of origin rules are repeated. However, this declaration is apparently not legally binding.

⁴⁴ Nevertheless, the application of the Code for services is seen by many GATT negotiators as a goal of the next set of multilateral negotiations.

Disciplines to Govern the Application of Rules of Origin

The agreement establishes obligations on Contracting Parties to ensure a more fair and transparent application of origin rules. The agreement delineates two phases: the transitional phase (these rules will become effective immediately and will be valid until the harmonization of non-preferential origin rules is completed) and the final phase (after the harmonization of origin rules is completed).

In the *transitional phase*, the most important rules to be introduced are:

- *Clarity*. The obligation that origin rules should be clearly defined;
- *No Trade Objective*. Notwithstanding the commercial policy measure to which they may be linked, rules of origin should not be used to pursue trade objectives directly or indirectly;
- *Not Restrictive of International Trade*. Rules of origin by themselves shall not create restrictive, distorting or disruptive effects on international trade and cannot impose unduly strict requirements;
- *Fairly Administered*. Rules of origin must be administered in a consistent, uniform, impartial and reasonable manner;
- *Appeal Right*. Origin determinations shall be subject to judicial review; and
- *No Retroactivity*. Changes in origin rules shall not be applied retroactively.

In addition, under the proposed transitional origin rules, customs authorities would be obliged to institute a specific procedure for issuing origin rulings for individual traders. They would also be required to provide assessments of origin of a good upon request by an exporter, importer or any person with a justifiable cause no later than 150 days following the request for such an assessment. These requests could be made before a good is actually traded. These assessments (origin rulings) would remain valid, in principle, for a period of three years.

During the transitional period, authorities would also be required, in principle, when introducing new origin rules, to publish a notice to that effect at least 60 days before the entry into force of the new origin rule.

In the *final phase*, after the harmonization of origin rules, the obligation will be added to apply rules of origin equally for all purposes. This means in practice that the same origin rule will apply, for example, in anti-dumping measures as in government procurement schemes.

Harmonization of Rules of Origin

The agreement most importantly provides for a worldwide harmonization of non-preferential origin rules. This harmonization is to be completed in a time frame of three years. The work will be undertaken by a Committee on Rules of Origin, consisting of representatives from each of the parties to the agreement, which will be assisted by a Technical Committee, established under the auspices of the Customs Cooperation Council (CCC), located in Brussels. It is clear that the Technical Committee will do most of the basic work in establishing harmonized rules of origin.

The agreement provides only guiding principles for drawing up the harmonized rules of origin. Most important is that the origin of goods produced in more than one country will be established by considering where the 'last substantial transformation' took place.

In defining this 'last substantial transformation' in the production of each product, the change of customs tariff heading will be used as a basic criterion. For those products for which the substantial transformation cannot be adequately defined by use of a change in tariff heading criterion, the Technical Committee shall elaborate origin rules which may in addition or exclusively require a certain added value or performance of specific manufacturing operations.

The agreement does not define what levels of added value should be considered sufficient.

3.1.2. *Dispute Settlement*

Summary of the Dunkel text

The new draft agreement on dispute settlement would institute a far more 'legalistic' system than that which is currently in force.⁴⁵ One must keep in mind that the dispute settlement mechanism remains restricted to government to government disputes. Private parties have no right of action and can only act through their governments. The main innovations in the Dunkel text fall primarily into the following categories:

- the reduction of delays;
- procedural improvements; the establishment of an appellate body;
- the implementation of panel reports; the possibility of retaliation; and
- certain other reforms.

The Reduction of Delays

Under the current understanding of dispute settlement⁴⁶ there are three elements that typically cause delays:

- (1) delays in the establishment of panels;
- (2) delays in panel consideration of cases; and
- (3) delays in adoption of panel reports.

The draft agreement addresses all three factors, and they are discussed in turn below.

Delays in the Establishment of Panels

The Dunkel text seeks to prevent delays in panel establishment. According to the text, a panel shall be established, at the latest, at the Council meeting following that at which the request first appears as an item on the Council's regular agenda, unless at that meeting the Council decides by consensus not to establish a panel.⁴⁷ In addition, it would require the GATT Secretariat to maintain an indicative list of individuals from which panellists may be drawn. The use of experienced panellists is expected to make panel procedures more efficient than they are at present.

The Dunkel text also provides that a single panel may be established where more than one Contracting Party requests the establishment of a panel related to the same matter, and also provides third Contracting Parties other than principals to the dispute with an opportunity to be heard by the panel and to make written submissions to the panel.

Delays in Panel Consideration of Cases

The Dunkel text also seeks to avoid delays in panel consideration of cases by establishing (in an annex) practical rules for panel operations (e.g., panels will meet in closed session). Furthermore, the annex includes an *indicative* timetable for working procedures *within* the

⁴⁵ The text of the current understanding on dispute settlement can be found in BISD (26th Supp. 1980). By 'legalistic' system, we indicate a model that stresses adjudication according to clearer rules and more precisely fixed timetables, as opposed to a model that would emphasize negotiation and consensus. See in general for dispute settlement proceedings the excellent articles of Brand, 'Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930', 24 *Journal of World Trade* (1990) 5-30, and Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* (1987) 51. For an extensive, recent, analysis see P. Pescatore, Davey, Lowenfeld (eds), *Handbook of GATT Dispute Settlement* (1991).

⁴⁶ The text of the current understanding on dispute settlement can be found in BISD (26th Supp. 1980).

⁴⁷ Article 4(1) of the Dunkel draft text.

panel process. This indicative timetable is very detailed and should help in speeding up the dispute settlement procedure.⁴⁸

The Dunkel text provides that a panel will first, after consulting the parties, fix the timetable for the panel process. According to the Dunkel draft, as a general rule the panel process shall not exceed six months. In urgent cases, the panel shall aim to provide its report within *three* months. In no case may the panel process exceed nine months (as compared with the current average elapsed time of more than twelve months between the Council decision to appoint a panel and a Council decision to adopt the panel's report).

One potentially negative aspect of the Dunkel text which may slow down the panel process, would be that the panel would be authorized to suspend its work at any time at the request of the complaining party for a period of up to twelve months.⁴⁹

Delays in Adoption of Panel Reports

In the past, delays in the adoption of panel reports (and even cancellation of previously adopted reports) have occurred because of the consensus requirement concerning final adoption at the full GATT membership level in the GATT Council. In practice, the 'defendant' in a panel proceeding frequently had the power to block adoption of the panel report. Perhaps the most important practical improvement contained in the Dunkel text is that a panel report would now be adopted unless it is decided by consensus not to adopt the report.

Within sixty days of the issuance of a panel report to the Contracting Parties, the panel report shall be adopted at a Council meeting unless one of the parties formally notifies the Council of its decision to appear or the Council decides *by consensus*⁵⁰ *not to adopt* the report.⁵¹ Since the winning party can always block the formation of a consensus against adoption of the report, the important practical result is that the panel report will always be adopted unless the losing party appeals.⁵²

If one of the parties appeals, an appellate body⁵³ will issue an appellate report. The appellate report shall be adopted by the Council and unconditionally accepted by the parties to the dispute, unless the Council decides *by consensus not to adopt* the appellate report within thirty days following its issue to the Contracting Parties.⁵⁴ Again, the winning party can be expected to block the formation of such consensus, and thus the report of the appellate body will always be final.

Procedural Improvements; the Establishment of an Appellate Body

48 On the other hand, one could argue that the establishment of these deadlines is unrealistic because the complexity of GATT disputes would lead only to failure to meet them. The rebuttal to this would be that Article 10(3) of the draft Dunkel enables parties to 'tailor-fit' deadlines to the degree of difficulty presented by the dispute.

49 Article 10(13).

50 *Consensus* in the new understanding is defined as follows: 'The Council shall be deemed to have decided by consensus if no member of the Council formally objects to the decision'. Footnote 1 to Article 1(9) of the draft Dunkel text.

51 Article 14(4) of the draft Dunkel text.

52 The winning party will always be able to prevent a decision not to adopt by blocking consensus. This would only not be so if the winning party is not a member of the Council, but since 'Council' may also mean 'Contracting Parties' (footnote 1 of Article 1(4)) this will never be the case.

53 See *infra* text at notes 54 to 57.

54 Article 15(14).

A new and salient feature of the new Dunkel text is the creation of a *standing appellate body* ('appellate body'). The appellate body will be composed of a pool of seven members, three of whom shall serve on any one case.

Only the parties to the dispute may appeal a panel decision to the appellate body. The appellate proceedings shall, as a general rule, not exceed sixty days from the date that a party formally notifies its intent to appeal to the appellate body. The appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel.⁵⁵ The appellate body may uphold, modify or reverse the legal findings and conclusion of the panel.⁵⁶ (For rules governing the final adoption of the appellate report, see above).

Although the use of an appellate body could be characterized as a change only in the composition of the members of the panel, it will in fact make the dispute settlement system significantly more adjudicative in nature (which is a desirable consequence). Indeed, the introduction of an appellate body may constitute the most important innovation of the Dunkel text.

The Implementation of Panel Reports; the Possibility of Retaliation

Under the current understanding, not all reports are implemented, and some are implemented with less than full compliance with the panel decision. The new understanding seeks to improve this serious imperfection by laying down clearly what steps are to be followed if the party concerned does not abide by the panel report.

Specifically, the contracting party concerned shall inform the Council of its intentions regarding implementation of the panel report.⁵⁷ If it is impossible to comply immediately with the panel report, the party shall have a reasonable period of time to do so.⁵⁸ Save for exceptional circumstances, the total time period between the date of the establishment of the panel and the end of the reasonable period of time shall not exceed eighteen months.⁵⁹

If the party concerned fails to comply with the panel report within the reasonable period of time, such party shall enter into negotiations with any party to the dispute⁶⁰ no later than the expiration of the reasonable time period with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty days after the end of the reasonable time period, any party to the dispute may request authorization from the Council to suspend the application of concessions or other obligations under the GATT to the Contracting Party concerned. The Council shall grant such authorization within thirty days of the end of the reasonable time period, unless it decides *by consensus* to reject the request. Nevertheless, the *level* of the suspension of concessions or other obligations may be subject to arbitration.⁶¹

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with the GATT has been removed, or the Contracting Party that must implement recommendations or rulings provides a

⁵⁵ Article 15(6) of the draft Dunkel text.

⁵⁶ Article 15(13) of the draft Dunkel text.

⁵⁷ Article 19(3) of the draft Dunkel text.

⁵⁸ Ibid. Various means by which to determine the reasonable period of time are also set forth in Article 19(3).

⁵⁹ Article 19(4) of the draft Dunkel text.

⁶⁰ Article 20(2) of the draft Dunkel text.

⁶¹ See Articles 20(3), 20(4) and 20(5) of the draft Dunkel text. Article 20(4) sets forth that this level shall be equivalent to the level of nullification or impairment.

solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.⁶²

Certain Other Reforms

A last reform which sometimes has been suggested is that increased use should be made of conciliation or mediation. Because however, such proceedings are intended to be confidential, and thus the Dunkel text is not very detailed on this point.

Other features are enshrined in Articles 21 through to 25, dealing, respectively, with strengthening of the multilateral system, special procedures for the least-developed countries, arbitration, non-violation complaints, Article XXIII:1(c) complaints and responsibilities of the secretariat.

Furthermore, Section T of the Dunkel text (elements of an integrated dispute settlement system) addresses practical elements of the dispute settlement system. For example, it establishes a *dispute settlement body* which is to concern itself with the implementation of the rules and procedures set out in the new understanding. Other particulars addressed in Section T include: establishment of panels, composition of panels, terms of reference of panels, conflict of substantive provisions, compensation and the suspension of concessions, non-violation complaints and suspension of concessions.⁶³

This last particular, suspension of concessions, is an important addition to the dispute settlement system with respect to retaliation and sets forth the principles and procedures according to which concessions or other obligations may be suspended. In this regard, the most important introduction is the requirement that a party, in deciding what concessions to suspend, should first seek to suspend those in the same sector. Concessions in other sectors could be suspended only if suspension of concessions in the same sector were not practicable or not effective.

3.2. European Economic Area

In June 1990, the EC and the EFTA countries began negotiations aimed at establishing a joint EC/EFTA market, or European Economic Area (EEA), which will comprise 380 million consumers.⁶⁴ On 2 May 1992, the agreement was signed between the EC, its twelve Member States, and the seven countries of the European Free Trade Association.⁶⁵

The EEA agreement consists of 129 articles incorporating the essential provisions of the ECSC Treaty and the EEC Treaty. Once the agreement enters into force, the four fundamental freedoms of free movement of goods, persons, services and capital will apply throughout the nineteen states. Moreover, the so-called *acquis communautaire*, that is, the EC laws embodied in 1400 primary and secondary acts of EC legislation adopted to date – including their interpretation by the ECJ – will also apply to the EFTA States upon the entry into force of the EEA Agreement (subject to any safeguard clauses or transitional derogations included in the agreement).

To become effective, the agreement must be ratified by the competent authorities of each of the nineteen countries involved, and some difficulties are anticipated during the ratification

⁶² Article 20(6) of the draft Dunkel text.

⁶³ Some of these particulars have already been dealt with within the new understanding. Section T, however, deals with the practical aspects of these particulars.

⁶⁴ See also Vermulst, Graafsma, 2 *EJIL* (1991) at 169.

⁶⁵ These seven countries are Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland.

process. Some countries, for example, require particularly large majorities in Parliament (e.g., Norway requires a three quarters majority). In other countries, the agreement will be subject to a popular referendum (e.g., Switzerland will hold a referendum on the Agreement later this year, and it is not yet clear whether the result of such referendum will be positive).

In addition, the European Parliament, which must also ratify the Agreement, is expected to scrutinize it closely to ascertain whether any provisions would weaken the Parliament, or curtail its legislative authority. This concern was already stressed in a resolution taken by the Parliament in February 1992.

Despite the delay caused by the Court of Justice, and despite the potential difficulties involved in ratification, it is still possible that the 1 January 1993 deadline for entry into force of the agreement can be met. Many observers believe, however, that this deadline is somewhat too optimistic and that the effective date of the agreement will be delayed until approximately mid-1993.

With respect to customs duties applicable to products entering the EC or the EFTA countries, there will in principle be no difference with the current situation. A product directly entering the EC from a third country, will be subject to the normal Common Customs Tariff; a product which enters an EFTA country from a third country will be subject to the normal customs tariff of the EFTA country involved. (EFTA countries do not have uniform customs duties, as is the case for the EEC).

Secondly, a product with non-EEA origin which enters the EC *via* an EFTA country, will be subject to the normal Common Customs Tariff. For example, a VCR from Country X which enters into free circulation in Sweden, shall be liable to Swedish customs duties. Subsequently, a VCR which is of Country X's origin will be liable to EC customs duties upon entering the EC. The same applies in the reverse situation: country X's VCR which enters an EFTA country *via* the EC will be subject to both EC and EFTA customs duties.

Duty-free entry of a product into the EC from an EFTA country only applies to products with EEA origin. Therefore, only the origin of the product is of importance upon entering the EC. A product with no EEA origin is subject to normal customs duties at both EC and EFTA borders. An EEA product can enter the EC duty-free from an EFTA country and *vice versa*. The rules of origin are laid down in Protocol 4 to the agreement. The relevant provisions of Protocol 4 are Articles 2 and 4.

3.3. Association Agreements

On 16 December 1991, the Prime Ministers of Czechoslovakia, Hungary, and Poland, Representatives of the 12 EC Member States, and the Presidents of the EC Council and the Commission signed the so-called 'Association-Agreements' (Agreements), which grant association status to Czechoslovakia, Hungary, and Poland (associated countries).

The Agreements are of a mixed nature, i.e., they include both matters of sole EC competence and matters which do not come within the exclusive jurisdiction of the Community. Because of their mixed nature, they must be ratified by national Parliaments in the twelve EC Member States, as well as by the European Parliament (EP). They must also be ratified by national Parliaments in the associated countries before entering into force.

The ratification process is expected to take until approximately the end of 1992. Because of that delay, and because both the EC and the associated countries were eager for the trade liberalizing benefits of the Association Agreements to commence as soon as possible, Interim Agreements were reached between the EC and the associated countries providing that certain of the Association Agreement's provisions would take effect more quickly. Pursuant to the Interim Agreements, the trade provisions of the Association Agreements entered into force on 1 March 1992.

Commercial Defence Actions

Taken together, the Association Agreements are widely viewed as a landmark step in trade relations between the EC and the associated countries. They also represent a significant step for the associated countries on the road to full membership of the EC.

Although the Association Agreements vary somewhat in detail, they generally require the parties to implement across-the-board reductions in both tariff and non-tariff trade barriers during the ten year transitional period. These are to be implemented on an asymmetrical basis so that, in general, the associated countries will benefit from a reduction in EC trade barriers during the first phase of implementation (roughly the first five years), with barriers in the associated countries to EC products generally being reduced and/or eliminated in the second phase (roughly the last five years of implementation). These periods vary somewhat with respect to certain specific economic sectors, including, for example, steel, agriculture, and textiles.

In May 1992, the Council authorized the Commission to begin negotiations with Bulgaria and Romania for the conclusion of similar association agreements. By June 1992, the Community had completed several rounds of negotiations on these association agreements, and their completion is still expected before the end of 1992.

3.4. GSP

Regulation 3587/91 extended the three GSP Regulations into 1992.⁶⁶ Except for minor changes the Regulations virtually remained the same. The most important difference seems to be that Article 2 increases the preferential ECU amounts of the Industrial Products Regulation by 5%, and further increases the reference base of the Industrial Products Regulation by 5% for 1992. The Commission is still in the process of revising its GSP for 1993 and thereafter.

⁶⁶ OJ (1991) L 341/1.

4. Appendix

