

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities X: 1 January 1995 – 31 December 1995

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Introduction

This is the tenth in the series of reports on developments in the field of EU international trade law.¹ This report covers developments that occurred during the twelve months period 1 January to 31 December 1995.

I. World Trade Organization

Selection of WTO Director and composition of WTO bodies

As we reported in our previous report,² the WTO took off with a rough start. It took until 21 March 1995 for a compromise to emerge on the person of the Director-General. The composition of other offices, such as the Textile Monitoring Body set up under the Uruguay Round Textiles Agreement, proved to be equally contentious.

A major dispute arose around the composition of the Appellate Body. Under the new WTO dispute settlement rules, a standing seven-member Appellate Body can

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1 The first report was published in 1/2 *EJIL* (1990) 337-364, the second in 1 *EJIL* (1991) 166-199. The third report was published in 2 *EJIL* (1991) 146-176, the fourth report in 3 *EJIL* (1992) 372-421, the fifth in 4 *EJIL* (1993) 283-304 and the sixth in 4 *EJIL* (1993) 588-606. The seventh report was published in 5 *EJIL* (1994) 285-311, the eighth in 5 *EJIL* (1994) 572-599 and the ninth in 6 *EJIL* (1995) 287-316.

2 Edwin Vermulst and Bart Driessen, 'Commercial Defence Actions and Other International Trade Developments in the European Communities IX: 1 July 1994-31 December 1994', 6 *EJIL* (1995) 287 at 288.

hear appeals against panel reports. Initially, the United States strongly pressed for two Americans on the Appellate Body. The Community reacted by claiming as many seats as the US would secure. Other WTO Members overwhelmingly disagreed with both trade blocks, arguing that these proposals implied that the rest of the world would be left with only three seats. In the end a compromise was found, whereby the seats are divided over one EC national (Mr Claus-Dieter Ehlermann), one US citizen (Mr James Bacchus), one Japanese (professor Mitsuo Matsushita), a Uruguayan citizen (Mr Julio Lacarte Muro), a Philippino (Justice Florentino Feliciano), a New Zealand national (Mr Christopher Beeby), and an Egyptian (Dr Said El-Naggar).

Development of an EU Code of Conduct on Trade Issues

As a consequence of the European Court of Justice's Opinion 1/94,³ the Commission has been negotiating a code of conduct for Community and Member States in the WTO. The Court had determined that the competence to deal with the TRIPs and GATS agreements resided both with the European Community as such and with the EC Member States. No agreement has yet been reached on the issue.

Compensation for accession

In view of the accessions of Austria, Finland and Sweden to the Community, the United States, followed by scores of other states, requested compensation negotiations. When Austria, Finland and Sweden joined the Community on 1 January 1995, they replaced their own customs tariffs with the EC's Common Customs Tariff. In many cases, this effectively meant that tariffs for products imported into the three new EC Members became lower than they otherwise would have been. In some instances, however, the EC tariffs are higher than the original Austrian, Finnish or Swedish tariffs.

Article XXIV:6 of GATT 1994 provides in case of such enlargements an opportunity for the countries 'with which such concession was initially negotiated' and those having 'a principal supplying interest' (Article XXVIII) to request negotiations if 'any rate of duty' is increased 'inconsistently with the provisions of Article II.'

The Community, while denying that on balance, the accessions impaired benefits to the US or to any third country, adopted provisional compensation measures in the form of tariff quotas with reduced tariffs for a variety of products.⁴

In December 1995 the United States and the Community reached an agreement on compensation for the enlargement. The EC agreed to implement the 1997 tariffs for industrial products also in 1996. The acceleration will not affect the negotiated

³ See in 6 *EJIL* (1995) 287 at 288.

⁴ Regulation No 3361/94, OJ (1994) L 356/5, corr. in OJ (1995) L 68/34, extended by OJ (1995) L 150/97.

tariffs for 1997, 1998 or 1999. For some products, such as semiconductors and newsprint, a special deal has been concluded. By virtue of the MFN principle, the concessions are valid for imports from any country. Negotiations with Canada, Australia and some other states have also been concluded.

Negotiations on Financial Services

Negotiations on financial services continued throughout the first half year of 1995. However, the objective of a global agreement by 30 June was not reached. Main stumbling block for the United States remained the – in its opinion – disappointing market access offers of several key developing countries. Thanks to an initiative of the Community the negotiations were not entirely in vain; most participants concluded the agreement shortly after the 30 June deadline.

The agreement has been concluded for a period of approximately 17 months. Further negotiations should lead to a permanent agreement. The United States has indicated it intends to join these follow-up negotiations.

Shipbuilding

The OECD Agreement on normal conditions in commercial shipbuilding was adopted.⁵ The agreement, valid between OECD countries, prohibits uncompetitive conditions in the shipbuilding sector. The EC adopted legislation allowing it to take measures against uncompetitive shipbuilding by other OECD or by non-WTO Members (see section 4.6, *infra*).

New-generation trade issues

Newly emerging topics on the international trade agenda include the trade/environment, trade/labour and trade/competition relationships. Discussions on all three topics has not gone much further than the initial stage. As far as the environment and labour issues are concerned, many – mostly Asian – countries have strong apprehensions about the possibility of protectionism in disguise.

As far as environment and trade is concerned, such concerns are shared by the US Administration. Trade and environment is one of the priorities for the WTO Ministerial Meeting in December 1996 where the necessity of multilateral environmental agreements will be addressed.

In March 1995, France issued a memorandum on the linkage between trade and labour policies. The French Government's memorandum noted that there is a growing trend, both within the Community and elsewhere, toward the acceptance of some minimum labour standards in international trade. The French stance was supported by the United States. The remaining EC Member States on the other hand, have not

5 OJ (1995) C 355.

yet agreed on a common approach. The Commission is currently working on a study of social standards and trade, which it hopes to finish toward the Summer of 1996.

II. Accessions and EEA

Austria, Finland and Sweden left the EEA when becoming EC Member States on 1 January 1995. On 1 May 1995, the small principality of Liechtenstein joined the ranks of the EEA,⁶ which now only counts Norway, Iceland and the Community as its other Members.

Bulgaria, Estonia, Latvia, Lithuania, Rumania and Slovakia submitted formal applications for EC membership. They follow Hungary and Poland, which did so earlier.

Meanwhile, the EC adopted a 400-page *White paper on the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union*. The paper sets out in detail the legislative steps which the central European countries have to take in order to prepare for their accession to the EC.

III. Dumping

A. General Developments

Legislation

Many developments of interest took place in the field of anti-dumping law. First, the Council adopted a Regulation amending the new basic anti-dumping Regulation.⁷ The new text makes it clear that on-going investigations are still covered by the old law instead of the new Regulation.

Shortly thereafter, a second amendment concerning the time limits in anti-dumping law was adopted.⁸ Last year, the Council adopted Regulation 521/94 adopting certain time-limits in anti-dumping proceedings. This Regulation was only to enter into force after the Council would adopt a separate Decision to be adopted before 1 April 1995. (A similar provision featured in Article 24 of the new basic anti-dumping Regulation.) However, the Institutions broke their own deadline for introducing deadlines! In order to 'legalise' the situation, the Commission had to propose an amendment of the basic anti-dumping Regulation.

The time-limits involved, which became applicable per September 1995, are:

6 OJ (1995) L 86/58.

7 OJ (1995) L 41/2.

8 OJ (1995) L 122/1.

- a 45 days' limit for the acceptance or rejection of complaints;
- a nine months' limit for the imposition of provisional duties;
- 15 months for the conclusion of investigations.

As a warming-up for the new deadlines, the Commission has become more strict with deadlines in anti-dumping proceedings from the beginning of 1995 onwards. In all the cases which were initiated since the beginning of 1995, the Commission granted extensions of at most two weeks. In some cases no extensions were granted at all.

A revised new basic anti-dumping Regulation was proposed and adopted in 1996, which takes into account the changes made to its short-lived predecessor, and corrects some textual errors.⁹

The notable *Ball Bearings* Judgments are discussed in Section 7, *infra*.

ATC panel report

A WTO panel report struck down EC practice concerning asymmetry (*EC anti-dumping duties on audio tapes in cassettes from Japan*).¹⁰

In this case, Japan had challenged (among others) the EC practice to include profits and indirect selling expenses of the related distributors on the domestic market in the normal value while deducting those expenses and profit of the related subsidiaries from the export price. The panel seems to treat what is part of the level of trade problem in terms of allowances made for indirect expenses and profits. (In the Uruguay Round negotiations, this was known as the asymmetry issue.) The panel observed that:

(369) . . . the purpose of the allowances provided for in the last sentence of Article 2.6 [of Regulation 2423/88] was to permit the establishment of an export price on a basis which would remove the unreliability arising from the relationship between exporter and importer . . . This meant, in view of the Panel, that construction of an export price did not *per se* require adjustments as provided for in the second sentence, but the need for such adjustments would depend on the fact situation of the particular comparison. Accordingly, the 'asymmetry' to which Japan objected appeared to derive not from the EC's methodology for constructing an export price *per se*, but more generally from the alleged failure of the EC to make due allowance for differences between the Japanese and EC markets in indirect selling expenses and profits associated with sales activities.

The panel noted that the EC itself recognised that allowances for indirect costs could be necessary: Regulation 2423/88 gave the possibility to grant an allowance for salesmen's salaries. The Panel went on to consider that:

(374) . . . the term 'price comparability' should be interpreted in light of the object and purpose of the Agreement. The Panel considered that the first clause of Article 2.6 indicated that one of the objectives of the comparison rules in that Article was to ensure a fair comparison between the export price and the normal value. Whether or not the provisions

9 OJ (1995) C 319/10, adopted in OJ (1996) L 56/1.

10 Not adopted or published.

of Article 2 gave rise to an independent obligation to conduct a fair comparison (an issue on which the Panel did not consider it necessary to express itself in this case), the Panel therefore considered that in its interpretation of the term 'the other differences affecting price comparability' it should take into account this objective. The Panel further considered it evident that to interpret the term 'the other differences affecting price comparability' *per se* to exclude differences in indirect costs could result in an unfair comparison between the export price and the normal value.

The panel concluded that:

(a) the EC, by failing to make due allowance on its merits for differences in indirect selling expenses, and with respect to profits related to differences in the functions performed by the seller in the domestic and export markets, which differences could affect price comparability, had acted inconsistently with its obligations under Article 2.6 of the Agreement;

(b) Articles 2(9) and 2(10) of the EC's Basic Regulation were mandatory legislation inconsistent with Article 2.6 of the Agreement because they precluded the making of due allowance, on its merits, for differences in indirect selling expenses and with respect to profits related to differences in the functions performed by the seller in the domestic and export markets, which differences could affect price comparability.

Since the previous basic anti-dumping Regulation did not allow adjustments for indirect selling expenses, the panel therefore concluded that it violated the GATT requirement that a fair comparison between export price and normal value be made.

The panel report received mixed reactions. Legal practitioners generally welcomed the report as recognition of a blatant unfairness in EC anti-dumping law under Regulation 2423/88. The EC Member States have been divided on the issue; as a possible compromise the Community will probably veto the panel report coupled with amendments to the basic Regulation in order to take account of the consequences.

Reorganisation of the Anti-Dumping Divisions

The Commission reorganised its Anti-Dumping Divisions and upgraded them into Directorates within its Directorate-General I.

From now on, Directorate I.C will be dealing with the dumping side of proceedings, while Directorate I.E will be in charge of the injury side and the determination of Community interest. Directorate I.E will also be responsible for other commercial defense instruments. This implies that, from now on, in every anti-dumping proceeding there will be two teams of case handlers: one for dumping and one for injury. This split is intended to enable the Community to meet the deadlines laid down in the basic anti-dumping Regulation while it will (hopefully) enhance the objectivity of the assessments. The two Directorates will coordinate their activities through a steering group of the heads of unit.

Thirteenth annual report on anti-dumping and anti-subsidy activities

The Commission issued on 4 July 1995 its annual report on anti-dumping and anti-subsidy activities.¹¹ From the report it transpires that by the end of 1994 151 anti-dumping and anti-subsidy measures were in force, 23 of which were undertakings. The report further stresses that these measures affected 0.71% of total imports into the Community.

B. Administrative determinations

Tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten from China, OJ (1995) L 14/1 (extension provisional)

The provisional duties previously imposed were extended.

Furfuraldehyde from China, OJ (1995) L 15/11 (definitive)

The Commission chose Argentina as a surrogate country and came up with a dumping margin of 62.6%. As far as injury is concerned, an interesting discussion occurred with respect to the definition of the Community market. In the provisional determination the Commission had based its calculation on injury by taking imports from China and the production of the EC producer into account. The Commission had excluded imports from a third country which were based on a long term exclusive supply contract between the third country producer and a company linked to the major EC importer of furfuraldehyde which covered more than 80% of the furfuraldehyde purchased by the importer. The Commission considered these third country imports to constitute a captive market. However, for purposes of the definitive Regulation, the Commission accepted that these imports should be included and that they did *not* really constitute a captive market. As a result, the market share of Chinese imports decreased substantially, but was still considered sufficient to cause injury. The Chinese exporter Sinochem offered a price undertaking coupled with a commitment not to exceed a maximum quantity of exports. The Commission refused this undertaking first of all, because it would have implied giving Sinochem individual treatment and secondly, because a number of violations of undertakings by Chinese exporters had taken place in recent years. In particular, Sinochem itself had previously breached an undertaking. A specific duty was imposed of ECU 352 per tonne.

¹¹ Commission doc. COM(95) 309 final.

Colour televisions from Malaysia, China, Korea, Singapore, Thailand, OJ (1995) L 21/1 (extension provisional)

The provisional anti-dumping duty was extended with a period of two months.

Ferroboron from Japan, OJ (1995) C 32/2 (notice of impending expiry)

A notice was published that the anti-dumping duties applicable to ferroboron from Japan were bound to expire on 29 July 1995.

Silicon metal from China, OJ (1995) C 35/3 (notice of impending expiry)

A notice was published that the duty applicable to silicon metal from China was bound to expire on 29 July 1995.

Potassium permanganate from former Czechoslovakia, OJ (1995) C 40/5 (notice of expiry)

A notice was published that the anti-dumping duty applicable on potassium permanganate from former Czechoslovakia expired on 18 February 1995.

Notice regarding the application of anti-dumping measures in force in the Community following the enlargement to include Austria, Finland and Sweden, OJ (1995) C 40/50

As of 1 January 1995, all anti-dumping measures in force on imports into the Community apply equally to imports into Austria, Finland and Sweden following their accession to the Community as of that date. The Commission therefore gave notice that it was prepared to review anti-dumping measures, pursuant to Article 11(3) of the basic anti-dumping Regulation.

Certain footwear from China, Indonesia, OJ (1995) C 45/2 (initiation)

The product under investigation is footwear with outer soles of rubber or plastic and uppers of textile materials.

Certain footwear from China, Indonesia, Thailand OJ (1995) C 45/3 (initiation)

This parallel proceeding against certain types of footwear covered 1) men's and women's footwear with outer soles of rubber, plastics, or composition leather and uppers of leather, not covering the ankle, with in-soles of a length of 24 centimetres or more, and also such footwear which can not be identified as men's or women's footwear, and 2) women's footwear with outer soles of rubber or plastics and uppers of plastics not covering the ankle with in soles of a length of 24 centimetres or more.

In both cases sports footwear was explicitly excluded from the scope of the proceeding.

Oxalic acid from Brazil, OJ (1995) C 47/2 (notice of impending expiry)

The Commission gave notice that the undertakings accepted from Brazilian producers were bound to expire on 16 August 1995.

Tungsten ores and concentrates, tungstic oxide and tungstic acid, tungsten carbide and fused from China, OJ (1995) C 48/3 (notice of impending expiry)

The Commission gave notice that these cases were bound to expire by 29 September 1995.

Urea from the former USSR, the former Czechoslovakia, OJ (1995) L 49/1 (amendment definitive USSR, termination former Czechoslovakia)

The Commission self-initiated this review on the basis of information relating to 1992, indicating that the quantities of imports from the USSR and Czechoslovakia were significantly greater than the quantities provided in the undertakings accepted in 1987. As far as sales from the Czech and Slovak Republics were concerned, the Commission based normal value on prices in the Slovak Republic as these were found to be profitable where export sales were made via the former Czechoslovak export monopoly holder Petrimex. The net price at which the production companies sold the urea to Petrimex was considered as the export price, taking into consideration the fact that the ultimate destination of the goods was known to the manufacturer at the time of their delivery. The dumping margins found were 0.7% for Duslo and 11.8% for Chemopetrol. As far as the former Soviet Republics were concerned the Commission decided to exclude Belarus, Georgia, Tajikistan and Uzbekistan. The dumping investigation was therefore limited to Russia and the Ukraine. The Slovak Republic was used as a surrogate country. The dumping margins for Russia and the Ukraine amounted to 28.2% and 20.4%, respectively. For purposes of the injury examination, the Czech and the Slovak Republic were excluded; the Czech Republic because of the negligible dumping of the sole Czech producer, and the Slovak Republic because the market share, which had increased considerably over the years, was still minimal during the investigation period.

As far as the Ukraine was concerned it was found that the market share during the investigation period amounted to 1.7%. This was also considered to be a sufficient basis for decumulation. The market share of Russian imports, on the other hand, rose from 0.9% in 1989 to 2.6% during the investigation period. The Commission further considered whether there was a likelihood of further injury in the event of expiry in the existing anti-dumping measures. The Commission found that there was certainly such a possibility as regards Russian exports in view of the breakdown

of the collective farming system in the country. The Commission considered it highly probable that as a result the domestic demand for urea would plummet as the newly privatized farms would have no money to purchase for fertilizers. The urea producers would therefore be obliged to explore further the possibility of increasing their trade possibility with the Community. As far as the Ukraine was concerned, on the other hand, the Commission found that the Ukraine was not self-sufficient in natural gas, the raw material used by Ukrainian urea producers 'and relies heavily imports of gas from Russia'. As this gas supply had been severely disrupted and the Ukraine might no longer be capable of utilizing its existing capacity it was found that imports from Ukraine were unlikely to increase if the duties were to last. The Commission therefore decided to impose an anti-dumping duty only with respect to Russia. The Commission imposed a variable duty set as the difference between ECU 115 per tonne and the net, free at the Community frontier price, before customs clearance, if this price was lower.

Gas-fuelled, non-refillable pocket flint lighters from the Philippines, Mexico, OJ (1995) C 67/3 (initiation)

Interestingly, the Commission noted that it had received two complaints, one against the Philippines and one against Indonesia and Mexico. However, the Commission considered that, as far as Indonesia was concerned, the complaint contained insufficient evidence of injury and therefore refused to initiate the proceeding against Indonesia.

Gas-fuelled, non-refillable pocket flint lighters from Thailand, OJ (1995) C 67/4 (review)

This changed circumstances review was requested by the EC industry which alleged that the measures were no longer sufficient to counteract the injurious dumping. The Commission decided to re-investigate both dumping and injury.

Tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten from China, OJ (1995) L 64/1 (amendment; collection provisional)

In view of the fact that two Chinese producers had withdrawn their undertakings, the Council considered it necessary to definitively collect the provisional duties.

Ball bearings with a greatest external diameter exceeding 30 mm from Japan, OJ (1995) C 71/3 (interim review)

The request for this interim review was lodged by the EC industry which alleged that both dumping and injury had increased.

Ball bearings with a greatest external diameter not exceeding 30 mm from Japan, OJ (1995) C 71/4 (interim review)

This interim review was lodged by the EC industry on the same grounds as the investigation above.

Iron and steel tubes from the former Yugoslavia (Serbia and Montenegro), OJ (1995) C 77/2 (expiry)

Artificial corundum from China, Russian Federation, Ukraine, OJ (1995) L 73/1 (amendment)

V/O Stankoimport, an exporter in the Russian Federation, which had previously given the Commission an undertaking, had informed the Commission that it had started to export certain types of artificial corundum which it had declared not to export in the undertaking. Furthermore, Stankoimport had informed the Commission that it was experiencing difficulties in selling for export to the EC certain other types of artificial corundum at the prices stipulated in the undertaking, due to changes in market conditions. The Commission agreed to investigate the allegations, but Stankoimport subsequently informed the Commission that it had decided to withdraw its undertaking. The Commission therefore decided to impose the definitive duty of 9.8% that had been imposed with respect to other Russian producers previously.

Colour televisions from Malaysia, China, Korea, Singapore, Thailand, OJ (1995) L 73/3 (definitive; definitive collection provisional)

The Commission largely maintained its provisional findings although it accepted some of the arguments made by various exporters. Duties imposed varied from 2.6% to 29.8%, on average being in the range of 13 to 23%. Not surprisingly, the operations of Philips and Thomson in Singapore and Thailand got off lightly with duties of 2.8%, 2.6% and 3%, based on their injury margins.

Colour televisions from Turkey, OJ (1995) L 73/84 (termination)

The proceeding was terminated, essentially on the basis that there was no dumping for some manufacturers while colour televisions from others had not acquired Turkish origin.

Urea from the former USSR, former Yugoslavia, OJ (1995) L 75/29 (corrigendum)

In the original Regulation the Commission had mixed up the names of the Czech and the Slovak producers and these were now corrected.

Certain magnetic disks (3.5" microdisks) from Canada, Indonesia, Macao, Thailand, OJ (1995) C 84/4 (initiation)

The Commission initiated the investigation in the fourth anti-dumping proceeding concerning microdisks.

Ball bearings with greatest external diameter not exceeding 30 mm from Thailand, OJ (1995) C 84/5 (impending expiry)

Disodium carbonate from the USA, OJ (1995) L 83/8 (provisional)

Normal value was based either on domestic prices, after exclusion of sales made at a loss, or on constructed normal value. In the constructed normal value, a profit margin of 10% was used. Where export prices were constructed, a 5% profit margin was deducted. Dumping margins varied between 0.1% and 13.9%.

Although US exporters Rhône-Poulenc and Solvay Minerals were related to EC producers Rhône-Poulenc and Solvay, it was considered that the latter two should still be considered as part of the EC industry because they had imported relatively small quantities.

As far as injury was concerned, the Commission found that consumption had decreased, that the volume of US exports had increased and that the US producers had consistently undercut the prices of EC producers. Other injury indicators were equally positive.

With respect to causation, the Commission noted that the EC soda ash market is a transparent and price sensitive market. The Commission found that the increase in dumped imports from the United States had coincided with a significant loss of market share and reduced profitability for the Community industry. The price erosion on the Community market had also coincided with the undercutting of the Community industry's prices by the United States imports. Other factors, such as the enhancement of competition between Community producers as a result of Article 85 and 86 proceedings sanctioning discriminatory practices, the lack of efficiency of the Community soda ash producers, the effects of the recession, the increased use of cullet together with the substitution of caustic soda for soda ash, imports from central and east European countries, and the effect of the dollar fluctuations during the investigation period, were all discussed in detail but it was decided that the effects of dumped imports of soda ash from the USA, taken in isolation, had to be considered as having caused material injury to the EC industry.

Duties imposed were as follows:

- Asahi Glass	6.7%
- FMC	14.3%
- General Chemical	8.1%
- NACC	9.4%
- Rhône-Poulenc	5.4%

- Solvay Minerals 8.8%
- Texasgulf 0.0% (*de minimis application*)

Polyolefin sacks from India, Indonesia, Thailand, OJ (1995) C 92/3 (initiation)

Furfuryl alcohol from Thailand and China, OJ (1995) C 95/4 (initiation)

Polyester yarn from Malaysia, OJ (1995) C 95/5 (initiation)

Polyolefin sacks from China, OJ C 95/7 (impending expiry)

Ferro-silico-manganese from Russia, Ukraine, Brazil, South Africa, OJ (1995) L 89/1 (extension provisional)

Methenamine from Bulgaria, former Czechoslovakia, Poland, Romania, OJ (1995) C 100/4 (expiry)

Video cassette recorders from Korea, Singapore and key components thereof from Korea, OJ (1995) C 104/3 (initiation)

An interesting aspect of this complaint was that it was brought not only against completed VCRs, but also against the scanners and the video heads, as far as Korea was concerned. This has happened only sporadically, e.g. previously in *Audio tapes in cassettes, pancakes and jumbos*, in *Video tapes in cassettes and pancakes*, and in *Lighters and parts*.

[Small screen] colour televisions from Korea, OJ (1995) C 105/2 (review)

This expiry request with respect to SCTVs was expanded by the Commission into a review covering all screen sizes. Such expansion was considered necessary because the Commission had decided in the CTVs proceeding discussed above that all CTVs constituted one like product. However, the very existence of separate duties on small screen colour televisions obviously contradicted that finding. The Commission therefore had no choice but to initiate a review against all screen sizes in order to remedy its inconsistent measures.

Gas-fuelled, non-refillable pocket flint lighters from China, OJ (1995) L 101/38 (amendment)

The Commission chose the Philippines as surrogate country, despite the fact that the cooperating Philippine producer was part of a group of companies of which an EC complainant was also part. To take account of this, the Commission paid particular attention to the costs of the Philippine producer and adjusted them, where necessary.

Claims that normal value should have been based on prices in Hong Kong ex Article 2 (6) of Regulation 2423/88 were rejected by the Commission. First, the Commission opined that, as a general rule, the provisions of Article 2 (6) are not

applicable to imports originating in a non-market economy. *Quaere* why not?! However, the Commission then proceeded to analyze in more detail why Article 2 (6) should not be used:

... it is likely that the vast majority of Chinese disposable flint lighters were simply transhipped in Hong Kong. Concerning the existence of production in the country of export, it would appear, according to information made available to the Commission, that there was no production of finished disposable flint lighters in Hong Kong during the investigation period. Finally, as far as sales prices in the country of export are concerned, since the lighters are either manufactured in China under sub-contracting agreements or the parties involved are related, the Commission cannot be satisfied that these sales were made in the ordinary course of trade.

In view of the above, it is concluded that, even if Article 2 (6) were to be considered applicable to imports originating in a non-market economy country, it would not be appropriate in the context of the current investigation to establish normal value on the domestic market of the country of export, since there was no production of finished disposable flint lighters in Hong Kong and, additionally, no reliable comparable price would exist for these products in that territory. The normal value would thus have to be based on the prices on the domestic market of the country of origin. However, since the People's Republic of China is a non-market economy country, normal value must be established in accordance with Article 2 (5) of the basic Regulation.

The weak point in this reasoning at first sight seems to be that the Commission did not focus on the prices charged in Hong Kong. It is submitted that as long as sales were made to independent customers, it does not matter whether or not producers in China and sellers in Hong Kong were related because, even if they were, this does not influence the sales price to independent Hong Kong customers.

Requests for individual treatment were rejected and the Commission found a dumping margin 80.3%. Injury and causation were also found.

Since prices of Chinese lighters had steadily declined since the imposition of the original measures in 1991, the Commission understandably took the position that an *ad valorem* duty would not be appropriate and rather imposed a specific duty of ECU 0.065 per piece.

Hydraulic excavators weighing more than six tonnes from Korea, OJ (1995) C 117/6 (initiation)

The Commission noted that the complaint had been lodged on 12 December 1994. As the notice of initiation was published on 12 May 1995, it therefore took the Commission exactly five months to initiate the proceeding.

Certain photo albums from Korea, Hong Kong, OJ (1995) C 124/7 (expiry)

Certain polyester yarns (man-made staple fibres) from Indonesia, OJ (1995) L 118/1 (amendment)

This review was launched following submissions by six Indonesian companies that they were no longer dumping. In accordance with the submissions, the review was limited to the dumping side only. The dumping margins found by the Commission were either zero or *de minimis*:

– Bitratex	0.64%
– Elegant	0.68%
– Indorama	0.10%
– Kanindo	0.00%
– Lotus Indah	0.00%
– Sulindamills	1.89%
– Sunrise	0.08%

Under these circumstances, the Commission agreed that exports from these companies should be exempted from the 11.9% duty imposed in the original investigation.

Potassium permanganate from China, OJ (1995) L 118/6 (amendment)

This amendment corrected an administrative oversight of the Commission Services which had forgotten to repeal measures imposed in 1988 when they imposed new measures in 1994.

Ferro-silicon from Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela, Brazil, OJ (1995) L 118/7 (amendment)

The investigation was re-opened following newcomer review requests made by two Brazilian producers. Although the two Brazilian producers had not yet exported and it was, therefore, not possible to determine their dumping margin, the Commission imposed a variable duty set by reference to the normal values found for the producers during the investigation. It is submitted that this is a sensible manner of dealing with newcomer review applications in cases where export prices do not exist.

Certain watch movements from Malaysia, Thailand, OJ (1995) L 121/76 (termination)

The Commission terminated the proceeding because the EC complainant went into receivership shortly after the imposition of provisional measures. The Commission was then informed that the competent French court for commercial affairs had accepted an offer from another company for the maintenance of the activities of the original complainant. However, the former explicitly requested that the proceeding not be pursued. In these circumstances, as the complaint was no longer supported by

producers whose collective output represented a major proportion of the Community's production of the like product, it was apparent that protective measures were unnecessary.

Unalloyed, unwrought zinc from Kazakhstan, Poland, Russia, Ukraine, Uzbekistan, OJ (1995) C 143/12 (initiation)

Poland was suggested as surrogate country for the other countries.

Certain types of electronic microcircuits known as DRAMs (Dynamic random access memories) from Japan, Korea, OJ (1995) L 126/58 (suspension)

This is the first time that the Commission used the new provision in the basic Regulation authorizing the suspension of anti-dumping duties under certain circumstances. The Commission suspended the duties for nine months on the following grounds:

[t]he anti-dumping duties were imposed in order to underpin the undertakings and in order to ensure that imports of any DRAMs outside the scope of the undertakings would not be made an injurious price level. The present market situation is one of strong demand, where market forces are sustaining a level of prices for DRAMs which is at or above the prices at which the above companies have undertaken to sell in the Community. It appears therefore that the absence of injurious dumping of DRAMs on the Community market at present is not dependent on the maintenance of the anti-dumping measures. Whilst the minimum prices applicable pursuant to the undertakings have been overtaken by market prices, the continued existence of the ad valorem anti-dumping duties constitutes an unnecessary barrier to entry to the Community market for DRAMs not covered by an undertaking.

Simultaneously, the Commission determined that, during the period of suspension, the obligation for producers concerned to adhere to the minimum price provisions of the undertakings as well as the quarterly calculation and communication of such prices to these producers by the Commission should be discontinued also. However, the obligation of the producers to file quarterly reports stayed in force in order to enable the Commission to monitor developments.

PET video film from Korea, OJ (1995) C 147/4 (initiation)

This is the third time that an anti-dumping proceeding was initiated against (certain types of) PET film from Korea. As the prior two proceedings were terminated on grounds of 'no injury,' it remains to be seen what will happen in this proceeding.

Monosodium glutamate from Indonesia, Korea, Taiwan, Thailand, OJ (1995) C 164/7 (notice)

Microwave ovens from China, Korea, Thailand, Malaysia, OJ (1995) L 156/5 (provisional)

Korea was taken as surrogate for China. As all Chinese exports were made through related Hong Kong sales organizations, the Commission constructed export prices and deducted 5%, reflecting the costs incurred for the export operations carried out in Hong Kong. Arguably, these selling organizations should have been considered as part of the export network – as opposed to the importing network – and only direct selling expenses should have been deducted. Claims for individual treatment were rejected.

With respect to Korea, normal value was largely based on domestic prices. Export prices were constructed where sales were made through related parties.

As there were no domestic sales in either Malaysia or Thailand, constructed normal values were used, based on producer-specific Malaysian and Thai costs of manufacture to which were added the SGA and profit rates found with respect to Korea.

The dumping margins found were as follows:

China	20.8%
Korea	
– Daewoo	24.8%
– LG	32.8%
– Korea Nishin	30.5%
– Samsung Korea	4.8%
Malaysia	
– Samsung Malaysia	31.7%
Thailand	
– Acme	20.3%

As far as the definition of the domestic industry was concerned, the Commission was once more, as is usual in the consumer electronics/appliances area, confronted with the fact that there were various groups of EC producers, only one of which comprised the complainants. The group comprising producers related to Korean or Thai manufacturers was summarily excluded. The other three groups were lumped together and it was found that the EC producers represented a major proportion (at least 60%) of total MWO production of this group.

The Commission cumulated imports from all countries under investigation. It found that volumes and market shares of dumped imports had increased while the prices of the imports had significantly undercut the prices charged by EC producers. Other injury indicators were also found positive.

Although the Commission considered other factors such as other imports, other – non-complaining – EC producers, and the behaviour of the EC industry, it decided

that, notwithstanding the possible existence of certain other relatively minor causes of injury, dumped imports originating in China, Korea, Malaysia and Thailand, when taken in isolation, had, in view of their low prices and their substantial and rising market share, caused material injury to the Community industry.

Duties were imposed on the basis of the dumping margins as these were lower than the injury margins.

Ferroboron from Japan, OJ (1995) C 176/4 (expiry)

Flat pallets of wood from Poland, OJ (1995) C 178/6 (initiation)

The Commission announced its intention to resort to sampling.

Certain sections of iron or non-alloy steel from the Czech Republic and the Republic of Hungary, OJ (1995) C 180/2 (initiation)

Certain types of electronic microcircuits known as EPROMs (erasable programmable read only memories) from Japan, OJ (1995) L 165/26 (suspension)

The measures were suspended on similar grounds as those discussed above with respect to DRAMs.

Certain types of electronic microcircuits known as DRAMs (dynamic random access memories) from Japan, Korea, OJ (1995) C 181/13 (initiation review)

The Commission received a mixed interim/expiry review request from the EC industry as regards Japanese DRAMs. It decided to open such review and, further, to self-initiate an interim review with respect to Korean DRAMs.

Peroxodisulphates (persulphates) from China, OJ (1995) L 169/15 (provisional)

The Commission decided to use Japan as surrogate country. Not surprisingly, the resulting dumping margin was 110.1%. Injury and causation were also found. However, the duty of 83.3% was limited by the injury margin.

Monosodium glutamate from Indonesia, Korea, Taiwan, Thailand, OJ (1995) L 170/4 (provisional)

The Commission decided to impose provisional anti-dumping duties based on the results in the original investigation on the ground that it had reasons to believe that undertakings had been violated. The specific duties imposed were as follows:

Indonesia

– Indomiwon

0.163 ECU/kg

Korea	
- Cheil Foods	0.132 ECU/kg
- Miwon	0.163 ECU/kg
Taiwan	
- Tung Hai	0.163 ECU/kg
- Ve Wong	0.163 ECU/kg
Thailand	
- Thai Fermentation	0.124 ECU/kg

Linear tungsten halogen lamps from Japan, OJ (1995) C 186/3 (notice of impending expiry)

Silicon metal from China, OJ (1995) C 193/3 (initiation review)

The Commission received a request for an expiry review, but decided, on its own initiative, to turn it into an interim review.

Refractory chamottes from China, OJ (1995) L 179/56 (provisional)

The Commission decided, having heard the complainants, that the proceeding should be limited to unprocessed refractory chamottes because there were significant physical differences between processed and unprocessed refractory chamottes and only the latter had been imported.

In accordance with the suggestion of the EC industry, the Commission selected the United States as surrogate country and based normal value on the domestic sales prices of the two cooperating American producers.

In view of the lack of cooperation of the Chinese producers, the Commission based the export price on best information available and used Eurostat statistics for this purpose. The dumping margin found was 28.44%.

As regards injury, the Commission concluded that Chinese exports, by reason of their lower prices and significant volume, taken in isolation, had caused material injury to the EC industry.

The Commission imposed a variable duty equal to the difference between ECU 75 and the net free-at Community frontier price, per tonne, if the latter price is lower.

Potassium chloride from Belarus, Russia, Ukraine, OJ (1995) C 201/4 (review)

This interim review was initiated following a request by the International Potash Company (Moscow, Russia), representing producers of potassium chloride in Belarus and Russia. The company alleged that dumping margins had decreased. It further requested a change in the form of the duty.

Oxalic acid from Brazil, OJ (1995) C 201/6 (expiry)

Aspartame from Japan, USA, OJ (1995) L 186/8 (repeal)

NutraSweet Company had requested a review on the ground that dumping from the United States had decreased. Surprisingly, the investigation period was only six months. Although NSC had initially focused on the dumping aspects, when it became clear that the duty imposed would not be repealed on dumping grounds, NSC reportedly shifted the emphasis of its argumentation to injury aspects.

As regards dumping, the Commission indeed found that domestic prices had gone down because of the expiry of NSC's patent. NSC made only two export transactions to the EC during the investigation period which, according to the Commission's findings, had, however, been specifically 'arranged' with European customers for the purposes of the review investigation. The Commission considered this misleading and therefore based the calculation of the export price on the old export prices recorded during the original investigation. The Commission found that a dumping margin still remained.

On the other hand, on the injury front, the Commission found that exports from the United States and Japan had essentially been replaced by production in France. Furthermore, the Dutch complainant HSC, when requested, did not provide comments which was taken by the Commission as an indicator that it had lost interest in the continuation of the measures.

The duties on the United States and Japan were therefore repealed.

Colour televisions from China, OJ (1995) C 203/4 (review)

The EC industry had requested an interim review on small screen colour television, but the Commission decided, on its own initiative, to expand the review to cover CTVs of all screen sizes.

Powdered activated carbon from China, OJ (1995) L 192/14 (provisional)

The surrogate country used was the United States and normal value was based on prices to distributors (for level of trade reasons) in the US market. The dumping margin found was 71.5%.

As regards injury, the Commission found that EC consumption had expanded and that the Chinese market share had increased. Although Chinese export prices had increased, they nevertheless undercut the prices of the EC producers.

Community production declined, capacity remained stable, capacity utilization decreased, stocks decreased, sales and market share decreased, prices increased only marginally, while production costs had risen continuously. The rising costs were found to have been caused by increasing raw material costs, higher fixed costs resulting from falling capacity utilization and costs incurred for environmental protec-

tion. Furthermore, the Community producers' profitability as well as employment had fallen.

The Commission concluded that the increase in Chinese market share had been at the expense of the EC producers and that injury had been caused by the dumped imports.

The injury margin, based on the target price methodology, amounted to 66.8% and a concomitant duty was imposed.

Ammonium nitrate from Russia, OJ (1995) L 198/1 (definitive)

Poland was used as surrogate country. Dumping margins found were 41.6% for Russia and 27.4% for Lithuania.

The Commission decided to decumulate Lithuania on the following grounds:

At first sight several factors appear to militate in favour of cumulation:

- the volume of imports originating in both Russia and Lithuania is significant. During the investigation period, their market shares were 7.3% and 3.2% respectively,
- the physical characteristics of the normal quality ammonium nitrate from both countries are broadly similar,
- the Russian and Lithuanian products are in competition in the Community with each other and with the like product produced by the Community industry,
- the Russian and Lithuanian products use the same type of distribution channels in the Community and the selling price of good quality ammonium nitrate from both countries in the Community is broadly similar.

However, in this particular case, a number of other factors have to be considered. Although the combined volume of imports from Russia and Lithuania increased in the investigation period, the volume of Russian imports rose by 55% in the investigation period compared to 1992/93, while imports from Lithuania fell by 28% in the same period, in spite of an overall increase of 3% in Community demand. The market share of Russia rose from 4.9% to 7.3% whilst that of Lithuania fell from 4.6% to 3.2%. Thus from a position of near parity in 1992/93, the Lithuanian and Russian imports diverged in the investigation period to a point where the former was equivalent to only about 40% of Russian imports.

Although selling prices charged by importers in the Community for normal quality Russian and Lithuanian product are not too dissimilar, the Lithuanian product commands a small premium. The average cif import price of the Lithuanian product was ECU 89 per tonne in the investigation period, compared to ECU 75 per tonne for the Russian product. The average fob export price of Lithuanian ammonium nitrate is also well above that of the Russian product. This difference in average prices is explained by the fact that certain shipments of the Russian product were of an inferior quality which commanded exceptionally low prices on arrival in the Community and served to reinforce the image of the Russian product as being inferior and less reliable than the Lithuanian ammonium nitrate, almost all of which arrived in good condition at the Community frontier.

In addition, a particular feature of this case is the previous UK regional investigation, which has resulted in measures intended to remove injury in the UK market. Up to 1993 both Russian and Lithuanian imports had been concentrated in the UK. In the investigation period, the major part of the Lithuanian imports into the EC still went to the UK. This high concentration in the UK means that the Lithuanian market share in the rest of the Community was barely 2%, compared to 4% in the UK. In contrast, less than 40% of Russian imports to the Community were made in the UK; and Russia's market share across the Community market was more uniform than Lithuania's.

In the remainder of the Community market, excluding the UK, Russian imports increased dramatically during the investigation period, while the trend in Lithuanian imports was downwards. Imports into the EC (minus the UK) from Lithuania declined from 33 153 tonnes (quarter ending March 1993) to 28 676 tonnes (quarter ending March 1994), a decrease of 13.5%. Exports from Russia to the same destination increased from 22 768 tonnes to 105 830 tonnes, up by 364%, over the same period.

In view of the divergent development of imports from Russia and Lithuania, in terms of their overall volume and market share in the Community and their degree of concentration in the UK market, and the difference in terms of price, it is considered that the conditions of competition between the two do not make cumulation appropriate in this case.

The Commission decided that imports from Russia had caused injury and imposed a variable (minimum price) duty, based on the injury margin, which, in turn, was based on the target price methodology.

Ammonium nitrate from Lithuania, OJ (1995) L 198/27 (termination)

This proceeding was terminated for the reasons set out above.

Ammonium nitrate from Russia, Lithuania into the UK, OJ (1995) L 198/29 (termination)

This regional industry proceeding, covering the UK only, was terminated because it was superseded by the findings reached in the Community-wide investigations discussed above.

Barium chloride from China, OJ (1995) C 235/2 (impending expiry)

Certain types of electronic microcircuits known as EPROMs (erasable programmable memories), OJ (1995) C 239/3 (impending expiry)

Espadrilles from China, OJ (1995) L 229/10 (refund rejection)

The application was declared inadmissible because the applicant had made a variety of procedural mistakes.

Certain anti-dumping measures in force from Korea, Thailand, OJ (1995) C 258/7 (notice)

The Lucky Goldstar group had notified the Commission that it had changed its name from Lucky Goldstar to LG. As a result, 'LG' replaced the word Goldstar.

Ball bearings with greatest external diameter not exceeding 30 mm from Thailand, OJ (1995) C 258/7 (expiry)

Certain tube or pipe fittings, of iron or steel, from China, Croatia, Thailand, OJ (1995) L 234/4 (provisional China, Croatia, Thailand; termination Slovak Republic, Taiwan)

Thailand was used as surrogate country. Dumping margins found were as follows:

China	58.6%
Croatia	
– Zeljezara Sisak	58.6%
Slovak Republic	
– Zeleziarne Podbrezova	25.2%
Taiwan	
– Rigid Industries	49.9%
– C.M. Pipe	54.4%
Thailand	
– Awaji	39.5%
– Benkan	51.3%
– TTU	63.4%

The Slovak Republic and Taiwan were decumulated on the basis of their low and sharply declining levels of imports. With regard to the other countries, injury and causation were found and duties imposed were as follows:

China	58.6%
Croatia	
– Zeljezara Sisak	38.4%
– Others	38.4%
Thailand	
– Awaji	39.5%
– Benkan	51.3%
– TTU	58.9%
– Others	58.9%

EPROMs (erasable programmable read only memories) from Japan, OJ (1995) C 262/9 (review)

Coumarin from China, OJ (1995) L 239/4 (provisional)

The Commission used as surrogate country the United States and as surrogate producer Rhône-Poulenc Inc. Unsurprisingly, the dumping margin was 'higher than 50%.' The injury margin was 42.9% and the specific duty of 3,479 ECU/tonne was therefore based on the latter.

Parts of gas-fuelled, non-refillable pocket lighters from Japan, OJ (1995) L 239/30 (termination)

The complaint was withdrawn on the basis of 'market developments' and the proceeding terminated.

Plain paper photocopiers from Japan, OJ (1995) L 244/1 (definitive)

In this review investigation of what is arguably one of the most complicated cases in the history of EC anti-dumping law, a myriad of issues were raised and it would not make sense to discuss them all here. The interested reader is therefore referred to the Regulation itself.¹² Suffice it here to point out the three most salient aspects of the Regulation:

- the Council decided to limit the duration of the duties for a period of two years in view of the length of the review investigation;
- the Council decided to maintain the old duties imposed in 1987;
- the Council decided to expand the scope of the proceeding by also including high speed copiers, *i.e.* copiers with a speed of more than 75 copies per minute.

Disodium carbonate from the USA, OJ (1995) L 244/32 (definitive)

Definitive duties imposed were as follows:

FMC	8.9%
AG Soda	5.5%
General Chemical	2.5%
North American Chemical	7.1%
Rhône-Poulenc	5.3%
Solvay	6.2%

With the exception of Rhône-Poulenc, all duties were based on the dumping margin.

Interestingly, the Commission already announced in the Regulation its intention of conducting a review of the measures after one year from the date of their imposition, in order to examine, in particular, the situation on the Community soda ash market.

¹² And to Vermulst, Waer, EC Anti-Dumping Law and Practice (Sweet & Maxwell 1996).

Glyphosate from China, OJ (1995) C 266/22 (initiation)

Ferro-silico-manganese from Russia, Georgia, Ukraine, Brazil, South Africa, OJ (1995) L 246/56 (undertakings; termination Georgia)

The Commission accepted the undertakings given by two Ukrainian and two South African producers and terminated the proceeding with respect to Georgia because of its *de minimis* market share.

Ferro-silico-manganese from Russia, Ukraine, Brazil, South Africa, OJ (1995) L 248/1 (definitive); OJ (1995) L 248/56 (undertakings)

Dumping margins found were as follows:

Russia	54.2%
Ukraine	43.9%
Brazil	36.1%
South Africa	
– Highveld Steel	45.3%
– Samancor	48.3%

In order to determine injury, the countries concerned were cumulated and injury and causation were found.

The Commission accepted undertakings from the Ukrainian and South African exporters and imposed duties on the others. The specific definitive duties were as follows:

Russia	ECU 504/tonne;
Ukraine (residual)	ECU 492/tonne;
Brazil	ECU 485/tonne;
South Africa (residual)	ECU 500/tonne.

Georgian exports of FesiMn were *de minimis* and the proceeding (!) was therefore terminated as far as this country was concerned. Finally, the Council decided not to definitively collect the provisional duties in view of the change in the form of the duty.

Bicycles from Indonesia, Malaysia, Thailand, OJ (1995) L 248/12 (provisional)

The dumping margins found were as follows:

Indonesia	
– PT Inera Sena	0.4% (<i>de minimis</i>)
– PT Jawa Perdana Bicycle	22.8%
– PT Wijaya	22.01%
– PT Federal Cycle Mustika	25.9%
– PT Toyo Asahi	25.9%
– Residual	29%

Malaysia

- Akoko	25.18%
- Fairly Toraya	29.96%
- Lerun/Berjaya	38.27%
- Rolls Rally	28.25%
- Residual	41.5%

Thailand

- Bangkok Cycle Industry	18.29%
- Siam Cycle Manufacturing	41.91%
- Thai Bicycle Industry	13.25%
- Victory Cycle Co.	13.25%
- Residual	48.8%

Community producers expressly supporting the complaint accounted for 55.3% of EC production and were therefore considered to constitute a major proportion. The Commission resorted to sampling on the part of the EC industry and selected the sample on the basis of their size and geographical location. However, mainly big producers were included in order to enhance representativeness and not to put an undue burden on small firms.'

Injury was assessed cumulatively and injury and causation were found. Duties were based on the dumping margins as margins of price undercutting in all instances were higher.

The Commission also explained in detail its logic for not generally taking into account developments that occurred after the end of the investigation period:

... The Commission notes that it is the consistent practice of the Community institutions, confirmed by the European Court of Justice, not to take into account developments which have occurred after the investigation period. Indeed, in accordance with the provisions of the Community anti-dumping legislation ... the conclusions reached in anti-dumping proceedings are based on the situation prevailing in the investigation period, generally a one year period prior to the official initiation of the proceeding.

This evaluation of a situation by reference to a defined period ensures that the detailed investigation, verification and analysis of the allegations put forward in an anti-dumping complaint can be carried out on the basis of ascertainable facts, in order to reach a reliable conclusion ... Eurostat price figures alone cannot in this case constitute a sufficient basis for findings of injury. Not to limit the investigation to a particular reference period would result in the perpetuation of investigations, thereby preventing conclusions being based on verified information. This aspect is of particular importance in the present situation.

Decreases of imports from countries subject to anti-dumping proceedings may be caused by a variety of reasons, which cannot be determined without detailed analysis of the underlying strategies of the operators in the exporting countries and in the Community. The outcome of an anti-dumping proceeding could be influenced at will be [sic] such strategic behaviour if information related to periods after the initiation of the proceeding had to be taken into account.

Polyolefin sacks and bags from China, OJ (1995) C 271/3 (review)

The EC industry requested an expiry review but the Commission decided to turn it into a mixed expiry/interim review.

Certain magnetic disks (3.5" microdisks) from USA, Mexico, Malaysia, OJ (1995) L 249/3 (provisional)

The Commission decided that it was not necessary to calculate dumping margins for the cooperating US and Mexican producers because it had found *de minimis* injury margins for them, based on the price undercutting method. With respect to Malaysia, the Commission found dumping margins of 26.8% and 46.4% for Mega High Tech and Discomp respectively. In view of the high level of non-cooperation, the Commission found it necessary to impose high residual duties on all three countries. For injury purposes, the three countries were cumulated and injury and causation were found, which was not surprising against the background of the previous two proceedings. The duties imposed were as follows:

United States

- 3M	0%
- TDK	0%
- Verbatim	0%
- Residual	44%

Mexico

- Verbatim	0%
- Residual	44%

Malaysia

- Mega High Tech	13%
- Discomp	24.8%

Certain grain oriented electrical sheets from Russia, OJ (1995) L 252/2 (provisional)

Brazil was selected as surrogate country and the resulting dumping margin was 73.46%. The duty was based on the substantially lower injury margin of 43.2%.

Certain magnetic disks (3.5" microdisks) from Japan, Taiwan, China, circumvention by imports from Canada, Hong Kong, India, Indonesia, Macao, Malaysia, Philippines, Singapore, Thailand, OJ (1995) L 252/9 (initiation)

This was the first anti-circumvention proceeding initiated under the new basic Regulation. It was also the first-ever third country circumvention proceeding. Thus far, the European Commission had used non-preferential origin rules to attack third country circumvention.

Television cameras from Japan, OJ (1995) L 255/11 (amendment)

In the Regulation imposing definitive duties, the Commission had specifically excluded enumerated high-end professional cameras. Subsequently, several Japanese producers requested the Commission to expand the list to cover new high-end models. On the other hand, the Japanese producer Ikegami had developed a new model with four sensors, charge-coupled devices (CCDs) instead of three CCDs, as described in the product definition. The EC industry requested that this model be included because it was a like product. The Commission agreed with both requests.

Certain ring binder mechanisms from Malaysia, China, OJ (1995) C 284/16 (initiation)

Synthetic fibres of polyesters from India, Korea, OJ (1995) L 262/28 (review)

This was a newcomer review requested by an Indian producer. In conformity with the new rules, the Commission repealed the duty in force with respect to this producer and made his imports subject to registration.

Pure silk typewriter ribbon fabrics from China, OJ (1995) C 291/20 (notice)

The Commission gave notice that the measures imposed in 1990 remained in force pending the outcome of a review requested in August 1991 and initiated in January 1992! It is stultifying that some of these reviews last so long.

Microwave ovens from China, Korea, Thailand, Malaysia, OJ (1995) L 263/1 (extension provisional)

Audio tapes in cassettes from Japan, Korea, OJ (1995) C 304/3 (impending expiry)

Welded wire-mesh from the former Yugoslavia, OJ (1995) C 304/4 (impending expiry)

Certain electronic weighing scales from Japan, OJ (1995) L 274/15 (termination)

This anti-absorption investigation was terminated following withdrawal of the complaint by the EC industry.

Peroxodisulphates from China, OJ (1995) L 275/21 (extension provisional)

Monosodium glutamate from Indonesia, Korea, Taiwan, Thailand, OJ (1995) L 275/22 (extension provisional)

Ferro-silico-manganese from South Africa, OJ (1995) L 280/20 (registration)

The South African producer Highveld Steel withdrew the undertaking immediately prior to the adoption of the Regulation imposing definitive duties. The Commission

therefore proposed to the Council to amend the Regulation imposing definitive duties to ensure that such duties also apply to Highveld Steel and, in the meantime, made any imports of Highveld Steel subject to registration with a view to possible retroactive application of the duties.

Refractory chamottes from China, OJ (1995) L 285/1 (extension provisional)

Powdered activated carbon from China, OJ (1995) L 285/2 (extension provisional)

Certain electronic weighing scales from Singapore, OJ (1995) L 307/30; corr. OJ (1995) L 308/120 (amendment)

The Commission determined that absorption had taken place by Teraoka Weigh System and revised the duty upwards from 10.8% to 15.4%.

Peroxodisulphates from China, OJ (1995) L 308/61 (definitive)

A definitive duty of 83.3% was imposed.

Certain welded tubes, of iron or non-alloy steel, from Yugoslavia (except Serbia and Montenegro) and Romania, OJ (1995) L 308/65 (repeal)

An interim review was requested by a Romanian producer and the Commission decided to extend the review also to the former Yugoslavia, Turkey and Venezuela.

Dumping margins were as follows:

Croatia	31.1%
Romania	10.3%
Turkey	
– Borusan group	3%
– Yucel Boru group	7.6%

No dumping margins could be calculated for Macedonia and Venezuela because there had been no exports from these countries. No dumping calculations were made for Bosnia-Herzegovina and Slovenia because this was not considered necessary as significant production facilities in these countries did not seem to exist.

Although the Commission found injury, it decided that such injury had not been caused by the dumped imports. The measures were therefore repealed.

Certain asbestos cement pipes from Turkey, OJ (1995) C 346/3 (impending expiry)

Unwrought magnesium from Russia, Ukraine, OJ (1995) L 312/37 (provisional)

The surrogate country was Poland. Kazakhstan was decumulated because of its *de minimis* market share. The dumping margins found were 55% for Russia and 64%

for Ukraine. As injury margins were even higher, the duties were limited to the dumping margins and took the form of variable duties.

Espadrilles from China, OJ (1995) C 347/16 (impending expiry)

IV. Other commercial policy instruments

A. General

The Council adopted a Regulation deleting Estonia, Latvia and Lithuania from the list of Regulation 519/94.¹³ As a result, for the purposes of EC commercial defense actions (including anti-dumping and anti-subsidy proceedings) the Baltic states are no longer considered non-market economy countries.

B. Countervailing duties

General

A Regulation introducing time limits in anti-subsidy proceedings was published.¹⁴ As a result, the time limits foreseen in Articles 7 (13), 8 (9) and 9 (1) of the basic anti-subsidies Regulation¹⁵ entered into force on 1 September 1995.

Administrative determinations

An amendment and a Decision accepting a new undertaking concerning the countervailing duty on ball bearings from Thailand were adopted.¹⁶ The decisions are the outcome of a review initiated as a result of changes in the Thai export tax.

C. Quotas and safeguard measures

Transitory rules for the import of textiles were adopted to smooth over the effects of the accession of Austria, Finland and Sweden.¹⁷ This régime is now largely of historical interest.

As a definitive measure, the EC adapted its textile agreements with the major textile supplying countries.¹⁸ The EC concluded such agreements under the Multi-

13 OJ (1995) L 85/9.

14 OJ (1995) L 122/2.

15 OJ (1994) L 349/22.

16 OJ (1995) L 118/5 (duty) and 118/94 (undertaking).

17 OJ (1995) L 120/1.

18 OJ (1995) L 94.

Fibre Arrangement (now being replaced by the WTO Textile Agreement). Such bilateral agreements foresee quantitative restrictions and the possibility of safeguard measures.

The Community also adapted its legislation on quotas for other products to the new accessions.¹⁹

D. Counterfeit and pirated goods

The basic anti-counterfeiting Regulation²⁰ and, later in 1995, the implementing Regulation²¹ were adopted.

The basic Regulation, which entered into force on 1 July 1995, lays down a procedure for stopping at customs counterfeit or pirated goods entering the Community. For this, it is necessary that the holder of the violated intellectual property right submits an application thereto to the customs authorities in the EC Member State concerned. 'Counterfeit goods' are goods which violate a registered trade mark. 'Pirated goods' are products violating copyrights.

The Regulation improves upon its predecessor on a number of points. First, procedures are accelerated by empowering customs to make the on-the-spot decisions necessary for dealing with traffic in counterfeit and pirated goods. Furthermore, the protection of intellectual property is broadened. Until now, only trade marks fell under the scope of Community legislation. This is now extended to copyrights. Last, the scope of the procedure is also broadened by including customs treatment other than release for free circulation.

The implementing Regulation lays down rules for the procedure for the customs authorities.

E. Exports of dual-use goods

A Regulation and a Decision regulating the export of dual-use goods were adopted.²² Dual-use goods are products that may also be used for military purposes.

The dual-use export system has a dual basis: the basic rules are laid down in Regulation 3381/94, whereas the lists of dual-use goods concerned are contained in the Decision. This double basis has been criticised by the Commission as unnecessary. In the future, it may be difficult to amend the lists, since this can only be done by the EC Member States with unanimity.

19 OJ (1995) L 116/3.

20 OJ (1994) L 341/8.

21 OJ (1995) L 133/2.

22 Regulation 3381/94 and Decision 94/942/CFSP, OJ (1994) L 367/1 and 8, respectively; both amended in OJ (1995) L 90.

Later in the year the Commission published the list of dual-use goods, the export of which was already subject to export authorizations by the Member States before the new régime entered into force.²³ The Member States may retain such national restrictions.

F. Injurious shipbuilding instrument

The Commission proposed the adoption of an 'injurious pricing instrument' in shipbuilding (adopted in 1996).²⁴ This new commercial defence instrument is modelled after the EC's basic anti-dumping Regulation and is aimed against injurious shipbuilding practices.

The international law basis for the instrument is the OECD Shipbuilding Agreement (see section 1, *supra*). The instrument can be used against signatories to the Agreement and towards non-WTO Members. If injurious pricing is determined, the EC may deny loading and unloading rights to the ship concerned for a period up to four years.

G. Other

Importers of crude oil again have to register their imports.²⁵ A similar obligation existed in the past.

V. GSP

The Commission published a corrected version of the Annexes to the GSP Regulation²⁶ and, on the last day of 1994, a notice excluding certain products from GSP benefits.²⁷

The Commission is studying the consequences of the new EC GSP for GSP rules of origin and regional cumulation. In practice this mostly concerns products from ASEAN countries. The problems are caused by the graduation system adopted by the Community: many sector/country groups are being 'graduated' from the GSP. If now, *e.g.*, a product from Thailand is graduated from the GSP, any parts from Singapore incorporated in that product will effectively not enjoy GSP benefits. Vice versa, products which do not enjoy GSP benefits if exported directly to the Community, may still be brought under the GSP if incorporated in a product with origin in

23 OJ (1995) C 334/10.

24 OJ (1996) L 56/21.

25 OJ (1995) L 310/5.

26 OJ (1995) L 82/29. Other, minor corrigenda in OJ (1995) L 117/48 and OJ (1995) L 208/19.

27 OJ (1994) C 377/11, corrected by OJ (1995) C 100/4.

another member state of the regional block. The Commission is expected to draft legislation to deal with this issue.

In the Autumn of 1995 the international Confederation of Free Trade Unions and the European Trade Union Confederation filed complaints under the GSP Regulation against Myanmar (Burma) and Pakistan, accusing both countries of widespread forced labour. In the beginning of 1996 the European Commission initiated an investigation under the GSP Regulation against Myanmar.²⁸ The investigation shows that the Commission is willing to investigate 'disloyal' trade practices under the GSP Regulation. The European Commission is entitled to such investigations under Article 9 of the GSP Regulation. In principle, the Commission's investigation should not take longer than one year.

On 31 October 1995 the Commission published two notices specifying explicitly which sector/country pairs were excluded per 1 January 1996 under the 'graduation mechanism'.²⁹ The Commission also adopted a Regulation adapting the GSP to changes in the EC's customs nomenclature.³⁰

VI. Association agreements

A. Central and Eastern Europe

The association agreement ('Europe Agreement') between the EC and Slovenia was signed on 15 June 1995. Slovenia's membership of the emerging Central European Free Trade Area (CEFTA) trade group per 1 January 1996 further enhances this country's status as one of the prime reformers in Central Europe. Free trade agreements between the Community and each of the Baltic states were signed three days earlier.

On 12 June, the Council agreed to open negotiations with Croatia for a trade and cooperation agreement. Croatia hopes a trade agreement to be concluded before the end of the year.

The EC concluded Partnership and Cooperation Agreements with Russia, Ukraine, Moldova, Kyrgyzstan, Kazakhstan and Belarus. The agreements foresee trade on MFN basis and the abolition of quantitative restrictions on industrial products other than textile and steel. The trade parts in the agreements with Russia and Ukraine entered into force on 1 February 1996 through an interim agreement.

28 OJ (1996) C 15/3.

29 OJ (1995) C 289/4 and 5, respectively.

30 OJ (1995) L 308/32.

B. Customs union with Turkey

Of significant importance is the customs union project with Turkey. Since the 1960's such a customs union had been on the drawing boards as the final goal of the Turkish association with the EC. Human rights concerns, some thorny political issues relating to the Turkish-Greek relationship as well as the state of the Turkish economy had raised serious doubts among many Members of European Parliament whether the customs union should be approved. After strong political pressure from the Turkish Government, the Member States Governments, and the United States, it finally was.

As a result of the customs union decision, Turkey and the EC will have a similar external tariff (there are some temporary exceptions foreseen for Turkey). Turkey will gradually adopt commercial policy measures similar to those of the EC. The customs union is not perfect: for the time being, the EC can levy its anti-dumping duties on the EC frontier, even if the goods concerned are transhipped through Turkey. Also, the customs union will not preclude the EC from taking anti-dumping action against Turkey herself.

C. Associations with the Mediterranean

Association and interim agreements were negotiated with Israel, Morocco and Tunisia. The agreements foresee in the long term the establishment of a free trade areas. Negotiations for similar agreements with other Mediterranean countries (Algeria, Egypt, Jordan, Lebanon, the Palestine Authority and Syria) have started or will start in the near future.

D. Other countries

The South American trade grouping MERCOSUR and the Community signed a framework agreement on 15 December. MERCOSUR encompasses Argentina, Brazil, Paraguay and Uruguay. In the trade area, the aim of the agreement ultimately is the reciprocal liberalisation of mutual trade within the framework of an association. The exact scope of the cooperation in the commercial field is to be determined through a further agreement.

The EC is also negotiating a trade agreement with South Africa. While the Community would like to see the agreement evolve into a free trade area between the two partners, South Africa is more hesitant.

VII. Court cases

Case T-2/95 R (Industrie des poudres sphériques vs Council), Order of the President of the Court of First Instance, [1996] ECR II-485

Industrie des poudres sphériques, a French importer of calcium metal, is an old acquaintance of the students of anti-dumping law. Under its old name *Extramet* the company provoked the annulment by the European Court of Justice of the anti-dumping duties on calcium metal on the grounds, *inter alia*, that the complainant Pétchiney had contributed itself to its injury by refusing to supply to Extramet.³¹

The Commission, somewhat stubbornly, decided after that Judgment to resume the proceeding. Definitive anti-dumping duties were imposed in 1994. Extramet appealed this decision as well, on roughly similar grounds. It also requested an order from the President of the Court of First Instance for the suspension of the Regulation.

The applicant's first and main argument was, that it was losing business to Pétchiney as a result of the anti-dumping duty. The Court, by contrast, considered that any damage sustained by Industrie des poudres sphériques was not irreparable. The application for interim measures was accordingly dismissed. The main litigation is still pending.

Case C-334/93 (Bonapharma Arzneimittel GmbH vs Hauptzollamt Krefeld), [1995] ECR I-319

Bonapharma imported pharmaceutical products from Austria. Under the EEC-Austria free trade agreement which at the time was in force, these products benefited from preferential tariffs if the importer could show an EUR.1 certificate (certificate of preferential origin). Such EUR.1 certificates had to be issued by the Austrian customs authorities. Bonapharma claimed these benefits.

Some of the pharmaceutical products imported by Bonapharma were not accompanied by an EUR.1 certificate, because its supplier was unable to obtain information on the origin of the products. Some of the wholesalers and stockists which delivered the products informed Bonapharma's supplier that they were instructed by the EC-based manufacturers not to disclose the origin of the products. Bonapharma had started legal proceedings in Austria against these wholesalers, but had not been successful. Nor did Austrian customs intervene; they considered it not to be their task to conduct an investigation. Bonapharma could, however, show the origin on the basis of pharmaceutical literature.

31 Case C-358/89, *Extramet Industrie SA vs Council*, [1992] ECR I-3813.

The Court considered that three conditions must be fulfilled for the requirement to show an EUR.1 to be waived. First, the origin of the goods could be established beyond doubt on the basis of objective evidence. Second, both the importer and the exporter concerned had taken the steps necessary to obtain EUR.1 certificates. Last, they could not obtain EUR.1 certificates for reasons beyond their control. The Court noted in this respect that it was the result of the uncompetitive conduct of the manufacturers – in itself a violation of the competition clauses of the Free Trade Agreement – that Bonapharma could not obtain the EUR.1 certificates. These conditions were in fact fulfilled by Bonapharma.

Joined Cases T-163/94, NTN Corporation vs Council, and T-165/94, Koyo Seiko vs Council, [1996] ECR II-1381

It is no understatement to consider this Judgment, the first Judgment of the Court of First Instance concerning anti-dumping law, a milestone in European jurisprudence in the field of anti-dumping.

The case concerned an appeal by two Japanese companies against Regulation 2849/92 imposing definitive anti-dumping duties on ball bearings larger than 30 mm from Japan. This Regulation was the result of an interim review requested in 1988 by the original complainant (the European producers' association FEBMA). During the review the normal five-year period of validity of the anti-dumping duties passed and the Commission, in accordance with Article 15(1) of Regulation 2423/88 (the old basic anti-dumping Regulation) published a notice in the Official Journal. The Commission determined that dumping was still taking place. This was barely contested by the two companies. Their arguments concerned the injury finding. In 1991 (apparently at the disclosure of its findings to the companies) the Commission had sent two tables with data on injury factors to the two companies. These two tables were the object of the greater part of the Judgment.

The Court started its reasoning by analyzing Regulation 2423/88. In *Rima* the European Court of Justice (ECJ) had already found that the existence of sufficient evidence of dumping and injury caused thereby is also a prerequisite for the initiation of reviews, even though this requirement was not specifically mentioned in Regulation 2423/88. For lack of specific rules in Article 14 of this Regulation pertaining to the injury determination, the general rule of Article 4(1) is applicable.

Now comes the novelty: whereas the ECJ had confined itself to marginally evaluating whether the Commission reasonably could have come to its findings, the Court goes further:

[i]t is . . . necessary to ascertain whether the reasons given in the contested regulation establish the existence of injury within the meaning of Article 4(1) of the basic regulation.

And then follows a full-blown substantive review. After the Court notes that either material injury or the threat of material must be proven, it invokes Article 3(6) of the 1979 GATT Anti-Dumping Code which provides, *inter alia*, that 'a determination of

a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.' The overriding novelty of the Judgment is the thoroughness with which the Court analyses the determinations made by the Commission. Such substantive controlling of the Commission's findings was conspicuously absent from the jurisprudence of the ECJ, which examined substantive findings – and especially injury findings – at best very hesitantly. This change is to be welcomed as it contributes to the legal guarantees in anti-dumping proceedings.

Another interesting feature is the Court's direct and unequivocal invocation and review of the standards of the 1979 GATT Anti-Dumping Code. This is another turn from European Court of Justice jurisprudence in which the Court would typically find EC legislation in conformity with the GATT Code and would proceed with applying EC legislation. The consequences of this increased relevance of GATT law may be substantial.

Next to the no-injury claim made by NTN and Koyo Seiko, the Court of First Instance specifically ruled on the duration of the review (the review had taken several years). The Court noted that:

the Community institutions commenced their investigations of the ball-bearings sector as early as 1976 . . . They were therefore familiar with the sector, a fact which ought to have facilitated the review. It may also be noted that . . . [t]he re-examination which led to the adoption of Regulation No 3669/84 of 21 December 1984, cited above, took ten months, despite the fact that it covered a wider range of products (ball-bearings and tapered roller bearings originating in Japan), which is much less time than that taken for the review which led to the adoption from Japan with a greatest external diameter exceeding 30 mm.

The argumentation of the Court is convincing and it is to be hoped that this Judgment will influence Commission practice on this point. It may be noted that the Court did not need to rule on the duration issue as it had already determined that the Regulation was to be annulled on the grounds of no injury. This may suggest that the Court specifically wanted to stress that the Commission's 'standard' explanation for the excessive duration is insufficient.

When in 1994 the Court of First Instance acquired competence for dealing with anti-dumping proceedings, increased legal scrutiny of Commission anti-dumping practice was already predicted. It appears that this prediction is being fulfilled, although it must be added that the Commission has lodged an appeal against the Judgment at the ECJ.

Case T-169/94 (PIA HiFi Vertriebs GmbH vs Commission), [1996] ECR II-1735

PIA HiFi Vertriebs GmbH, an importer of compact disc players (CDPs) from Japan, sought annulment of the Commission's decision of 9 June 1993 on claims for a refund of anti-dumping duties levied on CDPs.³² PIA attacked the refund Decision

32 OJ (1993) L 150/44.

since the Regulation imposing anti-dumping duties had already been repealed. It claimed that this was the only way in which it could attack the injury finding.

The Court observed that PIA had not sought to challenge the calculations of the refund Decision, but that it merely wanted to attack the anti-dumping duties. The Court stressed that the refund procedure is a procedure separate from the administrative review.

The Court further noted that PIA could have challenged the validity of the anti-dumping duties in the national courts, after which a prejudicial ruling would have brought the matter before the European Court of Justice. Nor had PIA requested the Commission to issue a speedy decision on the review, or had it acted against the Commission's failure to do so. Last, PIA's view that the refund Decision constituted the definitive anti-dumping duties was unfounded. These duties were laid down by the Regulation imposing definitive anti-dumping measures. The Court rejected PIA's appeal.

Case T-166/94 (Koyo Seiko vs Council), Judgment of 14 July 1995, not yet published

This proceeding started in tandem with the ball bearings Judgment discussed above; the outcome, however, was quite different.

Koyo Seiko, a Japanese producer of tapered roller bearings (TRBs) contested the definitive anti-dumping duties on outer rings of tapered roller bearings (TRB cups) before the Court. A complete TRB consists, in short, of a cone which fits into a ring and a TRB cup.

Koyo Seiko's first argument against the Regulation concerned was that Japanese cups could not have caused injury, since there is no separate market for this product; it is impossible to combine cups and cones of different makes. The Court did not agree: even though complete TRBs compete with each other, the consumer will still be influenced by a price advantage derived from one element of the TRB. The Court noted that according to the information at its disposal, lower cup prices indeed implied lower prices for assembled TRBs (something Koyo Seiko had contested).

Second, Koyo Seiko argued that the Commission should have used Article 13(10) of the basic anti-dumping Regulation to combat anti-circumvention of anti-dumping measures on TRBs instead of initiating a proceeding against cups. The proceeding was, according to Koyo Seiko, vitiated by a misuse of powers. The Court did not agree: the Institutions were entitled to initiate an anti-dumping proceeding against any product that is apparently dumped and causing injury.

Koyo Seiko's third argument was again directed towards the injury finding. Koyo Seiko argued that the Institutions should not have limited their inquiry to the British, German and French markets. The Court held that the Institutions were free to limit their injury inquiry to some EC Member States only, as long as the sample is sufficiently representative. This was in fact the case: the Court calculated that the EC

producers' sales in the UK, France and Germany accounted for a majority of their sales in the Community.

In its fourth plea Koyo Seiko complained that the Institutions had failed to investigate whether other imports had caused injury. The Court, while finding that the text of the Regulation is inaccurate, determined that the Commission had indeed investigated imports from other countries. Most of these imports originated from companies related with the EC producers. Moreover, Koyo Seiko had never alleged that these imports were sold at prices different from those produced in the EC.

The last plea of Koyo Seiko failed too: it argued that the Regulation imposing definitive anti-dumping duties was not sufficiently motivated. Notably, it alleged that it was not clear why a separate market for cups existed, and why the injury inquiry was limited to three Member States. Last, Koyo Seiko alleged that the Regulation did not show that imports from other countries had been taken into account. The Court referred to its earlier findings and disagreed with Koyo Seiko. Consequently, the plea for annulment was rejected.

Strictly speaking, the Court's logic concerning Koyo Seiko's first plea is not supported by Article 3(1) of the 1979 Anti-Dumping Code, which requires the injury determination to be based on:

positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

It follows from the language of Article 3(1) that the conditions (a) and (b) are cumulative.

The first question is, whether the positive evidence requirement refers to the factors mentioned under (a) and (b). *I.e.*, should the relevant part of Article 3(1) be read as '... positive evidence, and involve an objective examination of ...' or as '... positive evidence *on and involving* an objective examination of ...'? The second interpretation fits the text of Article 3(1) better and would seem to be more in line with the logic of anti-dumping law; to interpret Article 3(1) in the manner the Institutions did, lays the way open for injury determinations which take into account only part of the relevant factors. It would further contradict the text of Articles 3(2) and 3(3) of the Code.

Article 3(1) therefore obliges the Institutions to determine whether the volume and prices of Japanese TRB cups caused injury in 'the domestic market for like products.' The Commission, however, based its determination on the effects on the TRB market. Hence the question is raised whether TRBs and TRB cups are like products.

Beyond doubt, this question must be answered in the negative. First, it is in itself already questionable whether parts of TRBs can be like products with completed TRBs. Second, the EC abolished the anti-dumping duty on TRBs on 30 September 1993, with retroactive effect from 29 June 1990. The only reason for the – exceptional – retroactive repeal was the – equally exceptional – long duration of the

review (over three years). Before the Council adopted Regulation 2655/93 retroactively repealing the anti-dumping duty on TRBs, measures were simultaneously in force on both TRBs and TRB cups. The Institutions never considered this a problem, and the retroactive repeal of the measures on TRBs was also for reasons extraneous to this issue. It follows that TRBs and TRB cups cannot be considered to be like products.

The Institutions' argument that the injury caused by TRB cups was felt in the market of finished TRBs is therefore beside the point and cannot replace the evidence of injury caused to TRB cups which is required by Articles 3(1) and 3(2) of the Code. The Institutions arguably did not provide evidence of injury caused to TRB cups and thus violated Article 3(1) of the Anti-Dumping Code.

Case T-171/94 (Descom Scales Manufacturing Co. Ltd vs Council), Judgment of 14 September 1995, not yet published

The Commission initiated an anti-dumping proceeding concerning weighing scales from Singapore in January 1992. In April of that year, after an additional complaint had been filed, the proceeding was extended to South Korea.³³ Descom was one of the Korean producers mentioned in the complaint.

Descom is a South Korean company one half owned by Dailim Scales of Seoul, Korea. The other half is owned by Ishida Japan. Descom's scales were marketed in Korea by Dailim. Exports to the EC were taken care of by Ishida Europe (through Ishida Japan), a full daughter of Ishida Japan. In the Community, all Descom scales were imported by three importers, located in Denmark, Greece and the Netherlands, respectively.

In constructing the export price, the Commission had considered that Ishida Europe incurred costs normally related with an importer. The Commission had therefore treated Ishida Europe as Descom's related importer and constructed the export price on that basis. Descom argued that the Commission should have considered Ishida Europe to be one entity with Descom and take the sales from Ishida Europe to the three importers as the export price. Descom argued that an anti-dumping duty is a kind of customs duty, and that therefore the concepts of customs valuation are applicable to anti-dumping duty as well. In this context, Descom argued that the sales price for purposes of customs valuation is defined as follows by EC law: 'the price actually paid or payable is the total payment made or to be made by the buyer to the seller.' This concept, Descom argued, is equal to the export price in anti-dumping proceedings.

The Court was not convinced. It noted that Ishida Europe was located in Europe, that the export operations from Korea were not taken care of by Ishida Europe but by Descom, and that the sales price from Ishida Japan to Ishida Europe was not similar to the sales price from the latter to the three independent importers.

33 OJ (1992) C 84/14. The definitive anti-dumping measures are published in OJ (1993) L 263/1.

The Court then held that the purpose of customs valuation rules and anti-dumping rules is different. The attempted linkage between the two was therefore rejected.

Descom's second argument, that the price from the independent importers to their first buyer should be used as the basis for the export price, was also rejected, since the three importers are themselves the first independent customers.

As a third argument, Descom argued that not all costs and profits should have been deducted from Ishida Europe, if that company was to be considered the importer. The Court considered that Ishida Europe had refused to reply to the importer's questionnaire and that the Commission was entitled to use best information available.

Descom further argued that certain costs had been deducted both when the export price was constructed and when the comparison was made. The Court noted that Descom had not claimed an adjustment during the proceeding and that therefore it was not entitled to bring up this issue before the Court.

The fifth plea related to the adjustment for salesmen's salaries. Descom claimed that its adjustment had been largely rejected, whereas the Institutions argued that Descom had not adduced evidence that its salesmen were really involved in full-time sales. The Court did not follow Descom. It noted that the amount of the adjustment for salesmen's salaries included other products as well, while not all of the salesmen's work could directly be linked to sales of weighing scales. Since Descom did not furnish a breakdown of the salesmen's costs, the Commission was entitled to use other companies' salesmen's expenses.

Descom's next plea concerned its procedural rights. It claimed that the Commission should have sent a report of the verification visit. The Court, after noting that this plea had not been raised before, rejected it on the grounds that Descom had in fact been informed of the points concerned during the disclosure.

The last plea concerned data which Descom deemed necessary for its defense. This information, however, was never requested during the proceeding and moreover, did not relate to the present proceeding but to the proceeding concerning Japan (involving Descom's parent company Ishida Japan). The appeal was rejected.

Joined cases T-480/93, Antillean Rice Mills, and T-483/93, Trading & Shipping Co. Ter Beek, Judgement of 14 September 1995, not yet published

Two Dutch companies imported semi-milled rice from the Dutch Antilles to the EC. The Commission adopted safeguard measures on 25 February 1993 in view of the competitive prices and large quantities of rice imported. On 13 April of that year this measure was amended.

The Dutch importers appealed both Decisions. One of their arguments was that the first Decision set the price of Antillean rice above that of rice from other countries outside the EC. This argument was successful. The Court ruled that:

by placing ACP rice and American rice in a more favourable competitive position on the Community market than Antillean rice, Article 1(1) of the decision of 25 February 1993 goes beyond what was strictly necessary to remedy the difficulties caused for the marketing of Community rice by imports of Antillean rice.

The remainder of the appeal was rejected.

Case T-167/94, Nölle II, Judgement of 18 September 1995, not yet published

In 1986 the Commission had initiated an anti-dumping proceeding against paint brushes from China which resulted in acceptance of a quantity undertaking in 1987. In 1988 the European paint brush producers lodged a new complaint alleging that the Chinese producers had exceeded the quantity limits of the undertaking. The Commission decided to re-open the proceeding and immediately imposed provisional and – later – definitive³⁴ anti-dumping duties of 69% *ad valorem*. The German importer Nölle contested the imposition of these duties before the Hauptzollamt Bremen-Freihafen which asked the ECJ for guidance. The Court found that the Commission had insufficiently motivated its choice of Sri Lanka as reference country and annulled the anti-dumping measures.³⁵

On 21 December 1991, the Commission published a notice in the Official Journal announcing that the Regulation was no longer applicable and that importers of the Chinese brushes could request a refund from the customs authorities.³⁶ However, on 31 January 1992, the Commission published a notice of continuation of the proceeding.³⁷ The proceeding was terminated in 1993.³⁸

Nölle again seized the courts, now claiming that it had suffered damage as a result of the invalidated anti-dumping measures. The Court of First Instance declared Nölle's action for the main part admissible.

The Court then continued by repeating the ECJ's jurisprudence on liability of the Community: anti-dumping Regulations constitute legislative actions involving choices of economic policy. By consequence, the Community can only be held liable if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals.

On Nölle's claim that the Community was liable since it had breached Nölle's right to a fair hearing, the Court replied that '[t]he anti-dumping proceeding in the present case was not against the applicant [sic] and could not for that reason result in a measure adversely affecting it, since no allegation was made against it.' It would

34 See *Paint brushes from China*, OJ (1986) C 103/2 (initiation); OJ (1987) L 46/45 (acceptance undertakings); OJ (1988) C 257/5 (re-opening); OJ (1988) L 303/11 (provisional) and OJ (1989) L 79/24 (definitive), respectively.

35 Case C-16/90, *Nölle I*, [1991] ECR I-5163.

36 Notice concerning anti-dumping measures on imports of paint, distemper, varnish and similar brushes from China, OJ (1991) C 332/5.

37 OJ (1992) C 24/3.

38 OJ (1993) L 127/15.

appear that the Court thus fails to recognise that it is importers who pay anti-dumping duties and are consequently adversely affected by anti-dumping measures.

The Court did find that the Commission had breached the principle of care and principles of proper administration. It did not, however, determine that this breach was 'manifest and serious' since the Commission had merely failed to investigate whether Taiwan could be used as a reference country. Nölle's claim was consequently dismissed.

Case T-168/94, Blackspur DIY Ltd and others, Judgement of 18 September 1995, not yet published

This case was also generated by the Chinese brushes anti-dumping proceeding described above in *Nölle II*.

Blackspur sold do-it-yourself materials, including brushes. The company imported a consignment of Chinese brushes which were customs cleared after the provisional duties were imposed in 1988. Customs in the United Kingdom requested payment of the anti-dumping duty of £ 18,116.83 only 17 months later. A few months later Blackspur went into receivership and, subsequently, into liquidation. The anti-dumping duty subsequently lost its legal basis with the *Nölle I* Judgement. The company and some of its shareholders requested compensation of damages from the Community under Article 215 of the EC Treaty.

The case focused around the question, whether there was a causal link between the anti-dumping duty and the collapse of Blackspur. The Court found there was none, since Blackspur's reliance on brush sales had diminished (unlike its turnover), while its sales of cheap non-Chinese brushes had actually increased. It was therefore hard to see how the company could not have had alternative suppliers. Furthermore, the anti-dumping duty concerned was disproportionately small compared with the amount of money invested in the company, making it hard to believe that this amount had had a decisive impact on Blackspur's existence.

As a last note it may be observed that the Commission and the Council made one rather odd argument on the question of *fault* (one of the conditions for non-contractual liability of the Community):

the defendant institutions argue that acceptance of the undertaking given by the Chinese exporter cannot be the cause of the damage allegedly suffered by the applicants in so far as Blackspur had not yet been established at that date and/or *the decision accepting that undertaking resulted from a different proceeding to that which led to the adoption of Regulation No 725/89, declared invalid by the Court of Justice.* (Emphasis added)

The Institutions seem to argue that the provisional duty was an extension of the original proceeding while a new proceeding started with the imposition of the definitive measures. This would seem to ignore the system of Regulation 2423/88. Since the Court found no causal link, it did not have to pronounce on the question.

Case T-164/94, Ferchimex vs Council, Judgement of 28 September 1995, not yet published

Ferchimex imports potash from the former Soviet Union. The company is partially owned by Russian, Ukrainian and Belarusian state enterprises.

The Commission opened an anti-dumping proceeding against potash from the former Soviet Union, and subsequently limited the proceeding to Belarus, Russia and the Ukraine. Since these republics are non-market economies, the normal value had to be calculated by virtue of a reference country. The complainants had suggested Canada, and Ferchimex had not objected. However, the Commission found that none of the major producers in Canada was prepared to cooperate. After some trying one smaller producer, Potacan, was willing to submit a questionnaire response. This company, incidentally, was partly owned by two of the complainants.

The Commission found that the volume of sales of Potacan on the Canadian market was rather small; the Commission therefore used the prices of sales to the United States as the basis for the normal value. On this basis, it determined dumping and, injury being found, anti-dumping duties were imposed in 1992.

Ferchimex appealed against these findings on a number of points, one of them being a complaint that the Commission had based itself for its normal value data on the sales prices by a Canadian company partly owned by the complainants.

The Court replied to this plea that the choice of Canada as a reference country was not contested by Ferchimex. The Commission further found that only Potacan was prepared to cooperate. The Court concluded that the Commission had no other alternative than to use Potacan's data (§ 70). The rather absolute way in which the Court phrased this dictum may be regretted, since it wrongly appears to suggest that the Commission cannot decide at a later stage to seek another appropriate reference country if this opportunity arises.

Case C-83/94, Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer, Judgement of 17 October 1995, not yet published

This proceeding concerned three German nationals who stood accused in Germany of exporting dual-use goods to Iraq without a licence. Such licence was compulsory in Germany for dual-use goods products if the security of the Federal Republic, its external relations, or peaceful co-existence between nations were compromised. The German court was not sure whether the exclusive Community competence for commercial policy matters allowed such national legislation and referred the matter to the European Court of Justice for a preliminary ruling.

The Court started by setting out the general principle: Article 113 of the EC Treaty confers onto the Community an exclusive competence for commercial policy. Dual-use goods also fall under the scope of Article 113; national rules are thus only permissible if the Community has authorised them. The next question was therefore: does Community law allow for such national legislation?

The relevant Regulation at the time was Regulation 2603/69 (the 'Export Regulation'). Article 1 thereof prohibited quantitative restrictions on exports other than those specifically provided for. Article 11 provided such an exception: Member States were allowed to adopt quantitative restrictions on grounds of, *inter alia*, public security.

The German Government argued that the licence requirement did not constitute a quantitative restriction, but the Court disagreed with this view. The concept of 'quantitative restrictions' in trade between the EC and other countries includes measures having an equivalent effect. It is interesting that the Court bases itself on, among others, the text of Article XI of GATT 1994, 'which can be considered relevant for the purpose of interpreting a Community instrument on international trade.'

The accused argued that it followed from Article 11 that the only ground for an export restriction of dual-use goods could be a threat against the security of the Federal Republic itself. The Court disagreed: it is difficult to distinguish between foreign policy and security policy objectives. Besides, if Article 11 was interpreted so narrowly, then it would amount to a licence for Germany to take export restrictions vis-à-vis other Member States. It follows that Germany was entitled to impose licensing restrictions on grounds of security concerns.

The Court found that national legislation may put the burden of proof of the civil use of the goods upon the exporter.

Restrictions on the export of dual-use goods were given a stronger legal basis in 1994.³⁹

VIII. Appendix: Anti-Dumping Decisions and Regulations

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Tungsten ores and concentrates, tungstic oxide, tungstic acid, tungsten carbide and fused tungsten	China		OJ L 14/1 *40	OJ L 64/1 (amendment; collection provisional)		OJ C 48/3 **41
Furfuraldehyde	China			OJ L 15/11		

39 See section 4.5, *supra*.

40 *: Extension of provisional duties.

41 **: Notice of impending expiry.

Commercial Defence Actions and Other International Trade Developments

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Colour televisions	Malaysia, China, Korea, Singapore, Thailand		OJ L 21/1*			
Ferroboron	Japan					OJ C 32/2 **; OJ C 176/4
Silicon metal	China					OJ C 35/3 **
Potassium permanganate	former Czechoslovakia					OJ C 40/5 (expiry)
Certain footwear	China, Indonesia	OJ C 45/2				
Certain footwear	China, Indonesia, Thailand	OJ C 45/3				
Oxalic acid	Brazil					OJ C 47/2 **; OJ C 201/6
Urea	former USSR, former Czechoslovakia			OJ L 49/1 (amendment definitive, USSR)		OJ L 49/1 (termination former Czechoslovakia)
Gas-fuelled, non-refillable pocket flint lighters	Philippines, Mexico	OJ C 67/3				
Gas-fuelled, non-refillable pocket flint lighters	Thailand	OJ C 67/4 (review)				
Ball bearings >30mm	Japan	OJ C 71/3 (review)				
Ball bearings £30mm	Japan	OJ C 71/4 (review)				
Iron and steel tubes	Serbia, Montenegro					OJ C 77/2
Artificial corundum	China, Russia, Ukraine			OJ L 73/1 (amendment)		

Table Anti-Dumping: 1 January – 31 December 1995						
Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Colour televisions	Malaysia, China Korea, Singapore, Thailand			OJ L 73/3		
Colour televisions	Turkey					OJ L 73/84
Urea	former USSR, former Yugo- slavia			OJ L 75/29 (corr.)		
3.5" microdisks	Canada, Indonesia, Macao, Thailand	OJ C 84/4				
Ball bearings £30mm	Thailand					OJ C 84/5 **
Disodium carbonate	USA		OJ L 83/8	OJ L 244/32		
Polyolefin sacks and bags	India, Indonesia, Thailand	OJ C 92/3				
Furfuryl alcohol	Thailand, China	OJ C 95/4				
Polyester yarn	Malaysia	OJ C 95/5				
Polyolefin sacks and bags	China	OJ C 271/3 (review)				OJ C 95/7 **
Ferro-silico- manganese	Russia, Ukraine, Bra- zil, South Africa		OJ L 89/1 *			
Methenamine	Bulgaria, former Czecho- slovakia, Poland, Romania					OJ C 100/4
Video cassette recorders and parts	Korea, Singapore (VCRs); Korea (parts)	OJ C 104/3				

Commercial Defence Actions and Other International Trade Developments

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
(Small screen) colour televisions	Korea	OJ C 105/2 (review)				
Gas-fuelled, non-refillable pocket flint lighters	China			OJ L 101/38 (amendment)		
Excavators	Korea	OJ C 117/6 (initiation)				
Photo albums	Korea, Hong Kong					OJ C 124/7
Mixed polyester yarns	Indonesia			OJ L 118/1 (amendment)		
Potassium permanganate	China			OJ L 118/6 (amendment)		
Ferro-silicon	Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela, Brazil			OJ L 118/7 (amendment)		
Watch movements	Malaysia, Thailand					OJ L 121/76
Unalloyed, unwrought zinc	Kazakhstan, Poland, Russia, Ukraine, Uzbekistan	OJ C 143/12				
DRAMs	Japan, Korea	OJ C 181/13 (review)		OJ L 126/58 (suspension)		
PET video film	Korea	OJ C 147/4				

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Monosodium glutamate	Indonesia, Korea, Taiwan, Thailand		OJ C 164/7 (notice); OJ L 170/4 (provisional); OJ L 275/22*			
Microwave ovens	China, Korea, Thailand, Malaysia		OJ L 156/5; OJ L 263/1 *			
Wooden pallets	Poland	OJ C 178/6				
Sections of iron or non-alloy steel	Czech Republic, Hungary	OJ C 180/2				
EPROMs	Japan	OJ C 262/9 (review)		OJ L 165/26 (suspension)		OJ C 239/3 **
Persulphates	China		OJ L 169/15; OJ L 275/21*	OJ L 308/61		
Linear tungsten halogen lamps	Japan					OJ C 186/3 **
Silicon metal	China	OJ C 193/3 (review)				
Refractory chamottes	China		OJ L 179/56; OJ L 285/1 *			
Potassium chloride	Belarus, Russia, Ukraine	OJ C 201/4 (review)				
Aspartame	Japan, USA					OJ L 186/8
Colour televisions	China	OJ C 203/4 (review)				
Powdered activated carbon	China		OJ L 192/14; OJ L 285/2 *			

Commercial Defence Actions and Other International Trade Developments

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Ammonium nitrate	Russia			OJ L 198/1		
Ammonium nitrate	Lithuania					OJ L 198/27
Ammonium nitrate ⁴²	Russia, Lithuania					OJ L 198/29
Barium chloride	China					OJ C 235/2 **
Espadrilles	China			OJ L 229/10 (refund rejection)		
Ball bearings £30mm	Thailand					OJ C 258/7
Tube or pipe fittings	China, Croatia, Thailand		OJ L 234/4 (China, Croatia, Thailand)			OJ L 234/4 (Slovakia, Taiwan)
Coumarin	China		OJ L 239/4			
Parts of pocket lighters	Japan					OJ L 239/30
Plain paper photocopiers	Japan					OJ L 244/1
Glyphosate	China	OJ C 266/22				
Ferro-silico-manganese	Russia, Georgia, Ukraine, Brazil, South Africa			OJ L 280/20 (registration South Africa)	OJ L 246/56 (Ukraine, South Africa)	OJ L 246/56 (Georgia)
Bicycles	Indonesia, Malaysia, Thailand		OJ L 248/12			
3.5" microdisks	USA, Mexico, Malaysia		OJ L 249/3			

42 Regional proceeding.

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Grain oriented electrical sheets	Russia		OJ L 252/2			
3.5" microdisks	Japan, Taiwan, China, circumvention by imports from Canada, Hong Kong, India, Indonesia, Macao, Malaysia, Philippines, Singapore, Thailand	OJ L 252/9				
Television cameras	Japan			OJ L 255/11 (amendment)		
Certain ring binder mechanisms	Malaysia, China	OJ C 284/16				
Synthetic polyester fibres	India, Korea	OJ L 262/28 (review)				
Pure silk typewriter ribbon fabrics	China	OJ C 291/20 (notice)				
Audio tapes in cassettes	Japan, Korea					OJ C 304/3 **
Welded wire-mesh	former Yugoslavia					OJ C 304/4 **
Electronic weighing scales	Japan					OJ L 274/15
Electronic weighing scales	Singapore			OJ L 307/30; corr. OJ L 308/120 (amendment)		

Commercial Defence Actions and Other International Trade Developments

Table Anti-Dumping: 1 January – 31 December 1995

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Welded tubes	former Yugoslavia except Serbia and Montenegro, Romania					OJ L 308/65
Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Under-taking	Termination; Expiry
Asbestos cement pipes	Turkey					OJ C 346/3 **
Unwrought magnesium	Russia, Ukraine		OJ L 312/37			
Espadrilles	China					OJ C 347/16 **