

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1992 – 31 December 1992

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This is the fifth in the series of reports on developments in the field of EC international trade law.¹ This report will cover developments that occurred during the six months period 1 July 1992 to 31 December 1992.

1. Dumping

1.1. General Developments

Uruguay Round

The Uruguay Round negotiations have essentially been on hold pending expected action on the part of the Clinton Administration to fix a time limit on the fast track extension that will probably be requested of the US Congress. Accordingly, there have been no new developments concerning the revised Anti-Dumping Code since our previous report.²

New decision-making procedure in EC anti-dumping cases

The proposal for the new decision-making procedure, which we discussed in our previous report,³ has been published in the Official Journal.⁴

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1 The first report was published in 1/2 *EJIL* (1990) 337-364. The second report was published in 1 *EJIL* (1991) 166-199. The third report was published in 2 *EJIL* (1991) 146-176. The fourth report was published in 3 *EJIL* (1992) 372-421. These were annual reports. It is intended that the reports will become bi-annual.

2 The fourth report, *supra* note 1, at 372-376. See also *infra* text Section 3.2. of this report.

3 Our fourth report, *supra* note 1, at 376-378.

4 OJ (1992) C 181/9.

GATT Panel report: Audio tapes in cassettes

High level GATT meetings took place between EC and Japanese officials concerning the audio tapes in cassettes proceedings. Japan opposes the calculation of injury and injury margins, whereas the EC argues that the duties were more moderate than the actual dumping margins, and that injury has in fact further increased since duties were imposed.

Market economies – State traders

Since the entry into force of the trade provisions of the Association agreements, Poland, Hungary, and the Czech and Slovak Republics,⁵ have been considered market economies for anti-dumping purposes.⁶

Also the Baltic States are now considered market economies.⁷ To preclude companies in the Baltic States from requesting a review, DG-I-C has annulled all dumping measures insofar as they relate to the Baltic States.⁸

All other East European countries continue to be qualified as non-market economies for anti-dumping purposes.⁹

1.2. Administrative Determinations

Video cassettes from Hong Kong, OJ (1992) L 182/6 (amendment)

This was the result of the newcomer review requested by Bico Magnetics. The reference period was six months which is rather normal in newcomer reviews and, in the absence of any home market sales, normal value was based on constructed value. Despite the fact that the Commission used an 8% profit margin in the constructed value no dumping was found. Accordingly, Bico Magnetics was exempted from the duty.

Certain semi-finished products of alloy steel from Turkey and Brazil, OJ (1992) L 182/23 (definitive)

Basically, the provisional determination was confirmed, except for two Brazilian companies that managed to obtain lower dumping margins.

Ferro-silicon from Poland and Egypt, OJ (1992) L 183/8 (provisional)

The investigation covered the odd period from 1 January 1990 to 31 March 1991 (fifteen months).

For Egypt the Commission based normal value on constructed value. For Poland, Norway was considered an appropriate reference country. In Norway the Commission also resorted to constructed value. A six percent profit margin was imputed for the constructed value in both Egypt and Norway.

5 1 March 1992; see *infra* text Section 3.4.

6 There has not been an official publication which qualifies these countries to be treated as market economies for anti-dumping purposes.

7 Not only for anti-dumping purposes. See, Council Regulation 848/92, OJ (1992) L 89/1.

8 Not officially published.

9 Including the countries of the former Soviet Union (except the Baltic States). See, Council Regulation 848/92, OJ (1992) L 89/1.

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The export prices were based on the actual export prices. On this basis the dumping margins found were significant: 43.9% for Poland and 61.5% for the cooperating Egyptian producer.

The injury margin was calculated on the basis of underselling with a target profit of 6% for the EC industry. On this basis, a 32% injury margin was established. In accordance with the *lesser-duty rule*,¹⁰ the provisional duty was set at 32% for both countries.

Ferro-silicon from Poland and Egypt, OJ (1992) L 183/40 (acceptance undertaking)

The sole cooperating Egyptian producer offered an undertaking which was accepted.

Pure silk typewriter ribbons from China, OJ (1992) L 174/27 (provisional)

On the basis of Article 2(5)(c) the Commission took Community prices as the basis for establishing normal value (with a 5% profit margin). The dumping margin was 47.2% and the injury margin 24.6%. The duty was based on the injury margin and a price undertaking was accepted from the one known exporter of the product under consideration.

Ferro-silicon from China and South Africa, OJ (1992) C 173/8 (initiation)

For China, the complainants suggested South Africa as the surrogate country.

Synthetic fibres of Polyesters from India and Korea, OJ (1992) L 197/25 (provisional)

The Commission imposed provisional duties on all Korean companies except Cheil. The anti-dumping duties imposed varied between 1.7 and 9.0%.

For the Indian companies the provisional duties varied between 12.6% and 15.9%. These duties were limited by the injury margin. The dumping margins exceeded the injury margins because the Commission did not make an allowance for differences in import charges and indirect taxes (duty drawback).¹¹

Although the principle of the Indian system was clear (the import charges and indirect taxes payable are borne by materials incorporated in the Polyester Staple Fibre [PSF], when the PSF is sold on the domestic market; these import charges and indirect taxes are refunded when PSF is exported), the proof of the system was not so easy. The reason for this initial difficulty of evidence was that the Indian implementation of the system is quite complicated (advance licence and replenishment system) and that some of the proof of the system was in the hands of third parties that had no interest in providing the proof.

EPROMs from Japan, OJ (1992) C 181/7 (newcomer review)

On 17 July, a partial review was initiated of the anti-dumping measures applicable to EPROMs from Japan. The products under consideration include in particular Flash EPROMs and one-time programmable read only memories (OTPs). The review was requested by Intel Corporation. This company alleges that it should be considered as a newcomer.

10 Article 13(3) basic anti-dumping Regulation.

11 Article 2(10)(b) of the basic anti-dumping Regulation.

Certain nuts of iron or steel from Taiwan, OJ (1992) L 197/1 (repeal)

In 1977 the Council had imposed a special duty on imports of certain nuts of iron and steel from Taiwan.¹² On 16 March 1982 the Commission initiated a review of the case.¹³ On 27 August 1982 the Commission terminated the review and confirmed the duty.¹⁴ Ten years after the 1982 review the Commission considered that a further review of the measures was warranted in order to examine the advisability of the duty continuing in force.

The Community industry did not bother to react to the questionnaires and accordingly the Commission determined that there was no injury. One may wonder why the Commission did not, by analogy with an anti-dumping duty, announce the impending expiry under the sunset clause in 1987 and open the possibility for interested parties to request a review. On the other hand one could question why the producers/exporters concerned did not request a review themselves in 1987. In any event, 15 years of duty is one of the longest in the history of EC anti-dumping practice.

Outer rings of tapered roller bearings from Japan, OJ (1992) L 199/8 (provisional)

The products covered are TRB cups, which are defined as:

outer rings of tapered roller bearings, further worked than turned, originating in Japan and falling within CN code ex 8482 99 00 (Taric codes 8482 99 00*11 and 8482 99 00*91).

This is the one of the recent proceedings against a *part* of a finished product (the Tapered Roller Bearing). This trend started after the GATT Panel declared the screwdriver provision in violation of GATT and has also been found in cases such as *Capacitors* and *Parts of pocket lighters*. In view of the ongoing negotiations in the Uruguay Round, this trend can be expected to continue.

The duties were 6% for NTN Corporation and 12.4% for any other producer/exporter.

Ferro-silicon from the former Soviet Union, OJ (1992) C 186/25 (notice)

This was a notice as foreseen under Article 15(4) of the basic Regulation.

Manganese steel wear parts from South Africa, OJ (1992) C 188/3 (initiation)

The case commenced on 25 July 1992.

Gum-rosin from China, OJ (1992) C 195/5 (initiation)

Brazil was suggested as the surrogate country.

12 This special duty was the result of an *enquiry procedure* that had been initiated in 1976 (OJ (1976) C 183/4). As a result of this enquiry procedure price undertakings had been accepted. However, these undertakings had been evaded or breached. Namely, the actual Taiwanese export prices were around 15% lower than the undertaking prices. In view of the urgency of the situation at the time the Council imposed a special duty of 15% on the nuts of iron or steel. This possibility was foreseen under Article 1(2) of Regulation 459/68 and currently no longer exists.

13 OJ (1982) C 67/7 (initiation).

14 OJ (1982) L 254/15 (termination).

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Low carbon ferro-chrome (LCFECR) from Kazakhstan, Russia, and Ukraine, OJ (1992) C 195/6 (initiation)

South Africa was suggested as the surrogate country.

Certain plates, of iron or steel, from Slovenia, Macedonia, Montenegro, Serbia, Croatia, Bosnia-Herzegovina, OJ (1992) L 221/36 (amendment; acceptance undertakings Slovenia, Macedonia, Montenegro, Serbia; termination Croatia, Bosnia-Herzegovina)

As a result of the review the Commission found a 14.4% dumping margin, which was lower than the injury margin. On this basis the Commission imposed a floor price of 44 ECU per 1,000 kilograms. This duty does not apply to three companies that had offered undertakings that were accepted.

Silicon metal from Brazil, OJ (1992) L 222/1 (definitive; definitive collection provisional)

Several Brazilian producers deducted interest earned on currency operations from their financing costs and deducted financial profits from production costs. In this regard the Commission took the following position:

The Commission, however, takes the view that such profits may be taken into account only if connected with a firm's main production activity and the ensuing sales, and then only to offset financial costs resulting directly from that production and those sales. This net financial profit may in no circumstances be offset against the firm's production costs.

Again it is submitted that the offset should be allowed,¹⁵ in particular because non-operating expenses are routinely included when calculating the firm's production cost. As a second best alternative the Commission should in the case of operating expenses also carefully check whether they are related to the firm's production costs.

The dumping margins vary between 18.3 and 67%.

The Commission calculated injury margins on the basis of underselling using a 6.5% target profit for the EC industry. The injury margins were lower than the dumping margins for three of the six cooperating companies.

All exporters tried to offer undertakings but the Commission did not accept these. The undertakings were, according to the Commission, not such as to remove the injury and would need frequent adjustments in view of the fluctuating price of silicon metal on the world market. Accordingly, anti-dumping duties were imposed. The duties varied between 18.3 and 36.8%.

Radio broadcast receivers from Korea, OJ (1992) L 222/8 (definitive)

Two issues were important in this proceeding: the level of trade and the credit costs.

First of all, the Commission faced a level of trade problem. In the Korean market, Korean producers mostly sold their car radios either to related or unrelated car manufacturers. The reason is that in Korea cars come pre-equipped with a car radio. This means that the remaining market in Korea is essentially limited to the so-called replacement market. In the EC, on the other hand, cars are generally sold without a car radio, and the car radio is therefore an option.

¹⁵ See also *Large electrolytic aluminium capacitors from Japan*, OJ (1992) L 152/22 (provisional). This notice is discussed in our fourth report *supra* note 1, at 398.

Most Korean exports of car radios to the EC were made to unrelated distributors, who sold them to the options market. The Commission, in its provisional determination, had solved this by comparing sales made to unrelated distributors in both Korea and the EC, despite the fact that the sales to unrelated distributors in Korea were made in much smaller quantities. In its definitive determination, the Commission partially changed its view:

... given the fact that sales quantities [in Korea] to distributors or retailers were in general relatively low, the Commission, in order to estimate a reasonable profit margin for sales in large quantities to distributors [in the EC], based itself on the profit achieved on profitable sales to car manufacturers [in Korea], but adjusted it upwards by an estimated margin of 3.9%, due to the clear differences in the nature of these customers to those on the export markets.

In other words, the Commission applied a selective normal value with a special profit margin (in constructing normal value) to estimate the effect of differences in quantities sold.

Secondly, there was the issue of the credit costs. The Commission changed policy towards allowing the open account system:

[t]wo exporters ... requested that this [credit cost] adjustment should be calculated on the basis of the average period of credit granted to its [sic] domestic customers for accounts and notes receivable and the normal interest applicable in Korea for short-term borrowing.

This claim was rejected since the adjustments for differences in conditions and terms of sale can only be granted to the extent that they affect price comparability. In respect of credit terms the price paid or payable can normally only be affected by a credit period which is agreed at the date of sale (i.e. date of contract or the date of invoice at the latest). Consequently, any costs resulting from an additional period of credit beyond the initially agreed period have to be considered as a general cost for the selling company since this condition was not included in the price at the date of sale and the buyer did not take such an additional period into account when he agreed to the price offered by the seller of the goods. The allowance for differences in credit terms was, therefore, only granted by the Council for the period of credit agreed between the seller and buyer of the goods. The allowance for differences in credit terms was, therefore, only granted by the Council for the period agreed between the seller and the buyer of the goods at the date of sale.

Where no fixed period of credit was included in the conditions and terms of sale the Commission estimated the adjustment for these sales on the basis of 30 days of credit since these kinds of sales were similar to consignment sales, where 30 days represents the normal period of credit granted to the buyer.

Since the normal value was established on the basis of cost of production, the adjustment had to be limited to the costs of interest for the exporter for these periods of credit based on the refinancing rate of the company.

This is the first time that the EC Commission fully rejected the Korean open account system. As there is a high likelihood that the EC Commission will take a similar approach in future cases, Korean companies might want to consider explicitly laying down payment terms in their contracts with Korean customers.

Another interesting aspect of the case was the interpretation of Article 2(10)(e) of the basic Regulation. A number of exporters had objected to the fact that the Commission had not accepted their claims that the export price should not be reduced by the amounts for insignificant adjustments. However, the commission considered that:

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[t]he exclusion of insignificant adjustments in accordance with Article 2(10)(e) of [the basic] Regulation ... refers to adjustments mentioned in Article 2(9)(a) and 2(10)(a) to (c). These adjustments can only be claimed for 'differences affecting price comparability'. An allowance was consequently only considered to be *de minimis* if the 'difference' between the allowance for the export price and the normal value was less than 0.5% of the respective price or value...

This view was confirmed by the Council.

Ethanolamines from the United States, OJ (1992) C 201/12 (initiation)

The case was initiated on 8 August 1992.

Outboard motors from Japan, OJ (1992) C 204/4 (review)

At the request of the EC industry the Commission expanded the product scope of the review. The relevant part of the notice of initiation reads:

[t]he product concerned is the same as the one that was the subject of the proceeding that resulted in Regulation (EEC) No. 1305/87, namely outboard motors of up to 63 kW used for commercial or recreational purposes...

The applicant argues that the Community industry now produces the whole range of motors up to 63 kW and that the reasons for excluding some outboard motors from the scope of the measures do no longer exist. According to the applicant, these motors are dumped, and therefore he asks for the restoration of anti-dumping measures concerning them...

This investigation will cover the complete range of motors covered by the proceeding.

Pig-iron from Turkey, OJ (1992) L 230/30 (termination)

The case was terminated because of no injury. The Turkish imports were considered to be of an accidental and temporary nature.

Plain paper photocopiers from Japan, OJ (1992) C 207/16 (review)

The product scope of the review was larger than in the original proceeding. High-speed copiers now also form part of the investigation.

Calcium metal from China and the former Soviet Union, OJ (1992) C 213/14 (notice)

The ECJ in the *Extramet* case¹⁶ had declared void the Regulation imposing anti-dumping duties on Calcium metal from China and the Soviet Union. This notice reminded importers of calcium metal, who had been paying these anti-dumping duties, that they may request a reimbursement of the duties.

¹⁶ Case 358/89, *Extramet v. Council*, Judgment of 11 June 1992 (not yet reported). The case is discussed in our fourth report, *supra* note 1, at 402-403.

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Dynamic random access memories from Korea, OJ (1992) L 272/13 (provisional)

This investigation was initiated in March 1991. Verifications were held in Korea in December 1991. In May 1992, the Commission disclosed to the three companies involved (Samsung, Hyundai and Goldstar) the methodologies used in computing the dumping margins. They are characterized by the use of cost allocation formulas which are different from those normally used under the generally accepted accounting principles [GAAP] in Korea. This is the first time that the EC Commission has rejected Korean GAAP. In all previous EC anti-dumping proceedings, Korean GAAP have been accepted by the EC Institutions.

The dumping margins provisionally established were:

Goldstar:	122.4%
Hyundai:	57.3%
Samsung:	18.1%

On 16 September, effective 18 September, the provisional anti-dumping duties were imposed.

However, the provisional duties were limited by the injury margin, which was set at 10.1%.

Certain magnetic disks (3.5" microdisks) from Hong Kong and Korea, OJ (1992) C 239/4 (initiation)

On 18 September 1992 the Commission initiated this proceeding against micro-disks from Korea and Hong Kong.

Cotton yarn from Brazil and Turkey, OJ (1992) C 244/14 (review)

This was a newcomer review, requested by four Brazilian and a Turkish company.

Deadburned (sintered) magnesia from China, OJ (1992) L 282/15 (provisional); Magnesium oxide from China, OJ (1992) L 282/23 (provisional)

These were two similar cases that had been initiated almost simultaneously. The provisional Commission Regulations were delivered on the same day.

Deadburned magnesia falls within CN Code 2519 90 30 and caustic magnesite is imported under CN Code ex 2519 90 90. Also the chemical composition of the two products is very similar: both have a magnesia content ranging from about 80 to 98% MgO (magnesium oxide) and share the following principle impurities: SiO₂, Fe₂O₃, Al₂O₃, Cao, and B₂O₃ (silicon oxide, iron oxide, aluminium oxide, calcium oxide, and boron oxide). Further, both products are mined in an ore, crushed and sorted, which are then burnt in a kiln. The difference between the products is the temperature at which the two products are burnt: deadburned magnesia is burnt at between 1,500 and 2,000 °C whereas magnesium oxide is burnt at between 700 to 1,000 °C.

For both proceedings Turkey was used as the reference country. The duties were calculated on the basis of the dumping margin and set in the form of a floor price. These variable duties were ECU 69 for deadburned magnesia and ECU 34 for magnesium oxide.

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Ball bearings with a greatest external diameter exceeding 30mm from Japan, OJ (1992) L 286/2 (modification)

This modification was the result of an Article 14 review.

The Commission based its calculations on those types of bearings which were most important in terms of export volume to the EC of each separate manufacturer. The minimum threshold for an export volume to be considered representative was set at a minimum of 70% of the total sales to the EC.

The export prices were constructed with a 6% profit margin. The Commission based the construction on the resale prices in the United Kingdom, Germany, and France, representing more than 70% of the total Japanese exports to the EC.

Seven companies obtained a zero margin, whereas for five others the dumping margins varied between 25.3 and 50.6%.

For the determination of the situation of the EC industry, the Commission first had to determine what companies actually formed part of the EC industry. Some of the companies were related to the exporters in question and in accordance with Article 4(5) were not considered part of the EC industry. For the determination of the actual level of injury, the Commission resorted to the *CDP methodology* of determining injury.¹⁷ In other words, the Commission did not calculate the difference between the target price of EC models and the prices of the imported models, but rather increased the prices of the imported models by the amount of difference between the sales price and the target prices of the directly competitive EC models. In all instances the injury margins were considerably lower than the dumping margin and accordingly the duties were set at this level.

Monosodium Glutamate from Indonesia and Korea, OJ (1992) L 299/1 (amendment)

This proceeding concerned a request by three Korean companies located in Indonesia for a 'newcomer review'. They are Cheil Samsung Astra, Indomiwon Citra, and Miwon Indonesia. This was the first time Korean companies had asked for a newcomer review. The newcomer review distinguishes itself from the normal review in that it can be requested even *within* one year after the conclusion of the original proceeding (the one year minimum, applicable to normal review requests, therefore does not apply to newcomer reviews). To be considered a 'newcomer', and thus having the possibility to ask for a newcomer review, a company must fulfil three requirements:

- (1) it must not have exported the product under investigation to the EC during the investigation period (either directly or indirectly);
- (2) there may be no links with the companies involved in the original proceeding ('links' are interpreted broadly); and
- (3) the company must have the intention to export to the EC (or have exported to the EC after the investigation period). This third requirement can be fulfilled, for example, by giving the names of potential importers, providing documentary evidence of sales offers.

As a result of the review the Council modified its duties on MSG and the Commission accepted certain undertakings. Cheil Samsung Astra and Indomiwon will from now on be exempted from the original Regulation imposing definitive duties. The Commission accepted undertakings from these companies. For Miwon the case is different. It had not been able to show the third

¹⁷ For more detail see Vermulst, Waer, 'The Calculation of Injury Margins in EEC Anti-Dumping Proceedings', 25:6 *Journal of World Trade* at (1991) 22, at 23.

requirement (intention to export) and accordingly was not classified by the Commission as a genuine newcomer. Therefore, Miwon will remain subject to the original duty.

Synthetic polyester fibres from Romania, Taiwan, Turkey, Serbia, Montenegro, Macedonia, Mexico, and the United States, OJ L 306/1 (1992) (modification Romania, Taiwan, Turkey, Serbia, Montenegro, Macedonia; termination Mexico, United States)

This proceeding was the result of a review requested by the 'Association of Importers of Synthetic Polyester Fibres'.

For Taiwan the Commission based normal value on constructed value because of the 5% rule. The imputed profit margin varied between 6 and 11%.

For Serbia, Montenegro, Macedonia, and Turkey the normal value was based on home market sales.

For Romania, the Commission chose Taiwan as the reference country.

Actual export prices were taken, except for the Turkish producer whose export prices were constructed because he sold through subsidiaries or associates based in the Community.

The dumping margins varied between 5.9 and 15.6%. Since these margins were lower than the injury margin, the duties were based on the dumping margins.

No dumping margins were calculated for the United States and Mexico. The amount of imports of these countries were decumulated from the other imports. Their amount of imports was considered *de minimis* (between 0.1 and 0.5% for Mexico and 0.8% for the United States). In accordance with consistent Commission practice it was considered that these small amounts of imports could not have contributed to the injury.

Potassium chloride from Belarus, Russia, and Ukraine, OJ (1992) L 308/41 (definitive)

It should be recalled that in the provisional determination the Commission had found that there are three basic specifications for Potassium chloride. The third type of K_2O had been excluded from the provisional determination.¹⁸ However, after hearings, the Commission decided to consider also the third type of potash to be one and the same product.

As previously reported the Commission used Canada as the reference country. In this regard it is interesting to note that although the Canadian production costs were greater than the Canadian and US market prices (sales at a loss) the Commission decided to disregard the production costs. It did so for the following reason:

It then emerged that the firm was bearing temporary and exceptional costs because of the special situation of the area in which its mine was located, and because the mine had started operations a short time before. To add these costs to those of the exports from the former USSR would have been unfair and contrary to Article 2(5)(a) of Regulation (EEC) No. 2423/88.

Establishing normal value on the basis of price levels on the competitive Canadian and US markets is therefore a reasonable and appropriate approach.

The duty finally established was based on the 24% dumping margin despite the fact that the injury margin was not greater than the 12% originally established.¹⁹ One may wonder why no objections were raised.

¹⁸ OJ (1992) L 110/5 (provisional). See discussion in our fourth report *supra* note 1, at 396-397.

¹⁹ 3% undercutting plus 9% profit margin.

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The Commission again set variable duties in view of the room for manoeuvre enjoyed by exporters in countries still without market economies and in view of the impact of even the slightest undercutting on the potash market. The variable duties differed based on the K₂O content of the potash.

DRAMs from Japan, OJ (1992) L 299/4 (amendment)

As a result of an Article 14 review the Council has modified its duties on DRAMs from Japan. In this regard also an undertaking from Motorola was accepted.

Calcium metal from China and Russia, OJ C 298/3 (initiation)

The Regulation imposing definitive duties on Calcium Metal had been declared void by the ECJ in the *Extramet* case.²⁰ Since no duties were applicable any longer, the Commission decided to open a new investigation.

As far as the Soviet Union is concerned the case will now be restricted to Russia since this is the only state from the former Soviet Union where the product concerned is produced and exported.

Monosodium glutamate from Korea, Thailand, Taiwan and Indonesia, OJ (1992) C 286/3 (initiation review)

The Commission initiated a review of the case. The review is limited to the injury aspects of the case.

Although the exporters have provided their comments on the injury, it is especially the sole European producer Orsan which is subject to the investigation. Apparent issues at stake are (1) whether the Brazilian imports, which have undercut the other exporters' prices, can remain outside the scope of duties, and (2) whether the exchange rates of the undertaking will be changed. With regard to the first issue it is expected that in the future also Brazil will be subject to investigation. With regard to the second issue the options are uncertain.

Ammonium nitrate from Belarus, Georgia, Lithuania, Russia, Turkmenistan, Ukraine, and Uzbekistan, OJ (1992) C 306/2 (initiation)

The complainants requested that the Commission use the regional industry concept.²¹ On the basis of this regional industry concept, the UK industry of the product allegedly is suffering injury through the effects of dumping. The Commission agreed and opened a proceeding on this basis.

The complainants suggested Canada as a reference country.

²⁰ *Supra* note 16.

²¹ See also *Certain asbestos cement pipes from Turkey*, OJ (1991) L 309/37. This notice is discussed in our fourth report *supra* note 1, at 379.

Colour Televisions from Korea, (Japan), Turkey, Thailand, Singapore, (Hong Kong), China, and Malaysia, OJ (1992) C 307/4 (initiation)

The Colour Televisions proceeding was initiated on 25 November 1992. The products covered in the investigation are Colour Television Receivers [CTVs], with integral tube, with a diagonal measurement of the screen exceeding 15.5 cm (6") originating in Malaysia, Singapore, Thailand, and Turkey. Further covered are CTVs with integral tube with a diagonal measurement of the screen exceeding 42 cm (16") originating in Korea and China.

For CTVs from Japan and Hong Kong the Commission considers a clarification on the origin of the product appropriate. Pending such clarification, the Commission decided, in view of the apparently declining or low level of imports of CTVs from Japan and Hong Kong, to defer the initiation of the proceeding in respect of the imports of CTVs from these two countries. If, after such examination, it appears necessary to include imports originating in Japan and Hong Kong in the proceeding, the Commission will do so expeditiously and will use the same reference period for this investigation as for the other countries concerned (1 July 1991 – 30 June 1992).

The relevant CN codes are: 8528 10 71, 8528 10 73, 8528 10 75, and 8528 10 78.

The complaint also included chassis and kits falling under CN codes 8528 20 99 and ex 8529 90 70. However, the Commission decided not to include these in the proceeding. The volume of imports of these products did not warrant at this stage the initiation of a procedure.

The complaint was filed by the *Society for Coherent Anti-Dumping Norms* [SCAN] on behalf of:

- Bang & Olufsen AS, Denmark;
- Grundig AG, Germany;
- Nokia GmbH, Germany;
- Philips Consumer Electronics B.V., The Netherlands;
- Seleco S.p.A, Italy;
- Thomson C.E., France.

Capacitors from Japan, OJ (1992) L 353/1 (definitive)

This was a final decision of the EC Council on 30 November 1992, published on 3 December 1992, and effective from 4 December 1992, to impose definitive duties on LAECs from Japan and to definitively collect the provisional duties.

The Japanese producers argued that Philips should be excluded from the Community industry because:

- (1) Philips was itself an importer of the dumped products; and
- (2) the price advantages obtained as a result of the purchases of LAECs in Japan by Philips must have outweighed the corresponding losses of Philips in the Netherlands (the producer).

The Commission determined in this respect that Philips had suffered injury through the effects of dumping and was therefore not shielded from the 'unfair business practices'. The Commission further determined that whatever advantages Philips may have obtained, these had not offset the disadvantages suffered by Philips. These circumstances sufficed for the Commission to determine that Philips should not be excluded from the Community industry.

One exporter argued that a separate injury finding should have been made in respect of two different types of capacitors. The Commission rejected this argument because the two types of LAECs have been considered like products and are interchangeable in their uses, especially in

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light of the fact that the exporter making this claim did not introduce arguments nor evidence indicating that the two products cannot be considered as like products.

One exporter (Nichicon) cooperated in the first part of the proceeding but failed later to respond to a certain number of requests for information addressed by the Commission. Nichicon was informed by the Commission that through its behaviour conclusive findings might be made on the basis of the facts available. Nichicon then confirmed that it would not further participate in the investigation. It became therefore subject to the residual duty whereas in the provisional determination it had a dumping margin of 20.1%.

The Council upheld the Commission methodology to calculate the dumping margin.²² The margins found, expressed as a percentage of the total CIF value, were as follows:

Rubycon:	30.1%;	
Elna Co:	35.8%;	
Nippon Chemicon Corporation:	11.6%;	and
Nichicon Corporation:	75 %.	

Several exporters offered price undertakings to the Commission. The Commission examined the offers and considered that:

in view of the wide variety of different types of LAECs and the rapid technology developments, efficient monitoring of the adherence of the exporters to the terms of the undertaking would not be practicable.

The residual duty for non-cooperating producers in the definitive determination remained at the same level as the provisional determination (75%). As noted in our previous report, it is becoming increasingly common to impose a residual duty higher than the highest duty imposed with respect to any cooperating producer when a substantial proportion of the foreign producers does not cooperate. The legal basis for the application of this *best-information-available* rule is Article 7(7)(b) of the Basic Regulation:

In cases in which any interested party or third country refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available. Where the Commission finds that any interested party or third country has supplied it with false or misleading information, it may disregard any such information and disallow any such claim to which this refers.

Video cassettes from Hong Kong, OJ (1992) L 354/1 (amendment)

As a result of the newcomer review Inter-cassette a dumping margin of 1.4% was found. In accordance with consistent Commission practice this was considered *de minimis* and Inter-cassette was exempted from the duty.

Hematite pig-iron from the former Soviet Union to include imports from Brazil and Poland, OJ C 322/2 (extension)

The case was extended to include Brazil and Poland. This was the first case where Poland is going to be treated as a market economy.

²² *Supra* note 15.

Ferro-silicon from Poland and Egypt, OJ (1992) L 369/1 (definitive, definitive collection provisional)

The dumping and injury margins provisionally established were confirmed. One Polish exporter was exempted from the duty because he had offered an undertaking.

Ferro-silicon from Poland and Egypt, OJ (1992) L 369/32 (undertaking Polish producer)

The Polish exporter Huta Laziska offered an undertaking which was accepted.

Certain polyester yarns (man-made staple fibres from Taiwan, Indonesia, India, China, and Turkey, OJ (1992) C 339/2 (newcomer review)

Since the imposition of the definitive duties in April 1992, approximately twenty-five Indian companies had started exporting, or intended to start exporting, to the EC. Accordingly, they requested to be qualified as newcomers because they had no links with the companies previously investigated, nor had they exported to the EC during the original period of investigation.²³

It is expected that in view of the large amount of newcomers (more companies than in the original proceeding) the Commission will resort to sampling.

1.3. Court Cases

The transfer of jurisdiction of anti-dumping proceedings to the Court of First Instance has been approved by the Parliament. The actual transfer has not yet taken place. The transfer has been linked to the adoption of the 'streamlining' proposal of the decision-making procedure. Therefore, once the Council takes a positive decision on the latter, the jurisdiction can be transferred. It is our understanding that either the Council will take a unanimous decision before 1 July 1993, or a decision by qualified majority after that date.

An interesting corollary of the *Al-Jubail* case²⁴ was written question No. 3146/91 of Sir Christopher Proust of the European Parliament.²⁵ Sir Christopher Proust asked what amendments to existing anti-dumping legislation the Commission intended to propose to meet the criticism of the Court as expressed in the *Al-Jubail* judgment.

In its own interpretation of the *Al-Jubail* case the Commission answered that it considered that the Court had

merely found that the Community institutions could not prove that the relevant information had been provided to the applicants.

Accordingly, the Commission stated that it had modified its administrative procedure to be able to make available such proof in the future but further saw

no need to amend the present provisions in the Community's anti-dumping legislation on due process in particular when this issue is a major subject in the Uruguay Round.

Otherwise, no developments took place during the period under investigation.

23 For a short description of the requirements to be qualified as a *newcomer* see above the discussion of *Monosodium Glutamate from Indonesia and Korea, OJ (1992) L 299/1 (amendment)*.

24 Case C-49/88, *Al-Jubail Fertilizer Company and others v. Council*, Judgment of 27 June 1991 (not yet reported). See discussion in our third report, *supra* note 1, at 163 et seq.

25 OJ (1992) C 168/33.

2. Other Trade Protection Laws

2.1. Countervailing Duties

Certain ball bearings from Thailand, OJ (1992) C 182/6 (initiation review)

This Article 14 review was commenced by the EC Commission on its own initiative. The reason for the Commission to initiate the review was that an inadvertent circumvention of the undertaking had taken place.²⁶ An export tax was collected on all ball bearings of Thai origin which were exported directly from Thailand to the Community. However, indirect exports were not covered by the undertaking.

In casu, exports to a third country were subsequently re-shipped to the Community. Since the original destination of these shipments was not the Community, export tax was not paid on such indirect exports to the EC.

The Commission considered that such circumvention could be repeated on a larger scale. There was a loophole, open to abuse. Accordingly, the Commission re-opened the investigation with a view to considering the imposition of a countervailing duty on indirect imports. Since a new investigation was necessary, the Commission moreover intended to also recalculate the amount of export tax which is required to eliminate the effect of the subsidy.

2.2. Safeguards

As a general development in the area of safeguards it should be noted that the *national* trigger mechanism has been gradually removed.²⁷ The reason is that the national mechanisms that allow Member States to apply national safeguard measures on their own initiative is considered incompatible with the (completion of) the internal market.²⁸

The completion of the internal market and the ruling of the ECJ in the case of GSP quotas (Case 51/87)²⁹ mean that as a general rule Community quotas can no longer be divided up among Member States. This means that a quota management system compatible with the internal market has to be established. Therefore, the Commission is preparing a proposal to amend Regulation 1023/70³⁰ relating to the management of Community quotas under this Regulation.

Safeguard measures on a *regional* basis, being allowed under the GATT³¹ will in the future still be possible.

26 Ball bearings with a greatest external diameter not exceeding 30 mm from Thailand, OJ (1990) L 152/59 (acceptance undertaking); see also Vermulst, 'Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1989 - 30 June 1990', published in 2 *EJIL* (1990) 166-199, at 188-190.

27 This development started in 1990; the possibilities to take national measures have either been totally abolished, or have been incorporated in a Community procedure (for example the EFTA agreements or Lomé IV).

However, for example, see OJ (1992) C 321/14 Commission allowed Italy to open quotas for certain products.

28 Similarly, Article 115 measures have also almost been completely abolished. Although the progress has been significant over the past few years with the abolition of Article 115 measures, the remainder of these measures is clearly incompatible with the concept of one single market. Article 115 measures still exist for example for cars, motorcycles, and bananas.

29 Case 51/87, *Commission v. Council*, [1988] ECR 5459.

30 Council Regulation 1023/70, OJ (1970) L 124/1.

31 More specifically, the draft agreement on a new safeguard measure under Article XIX.

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During our reference period, the following measures were introduced:

Iron and steel products from third countries other than EFTA member countries, OJ (1992) L 188/19 (introduction)

The Commission introduced retrospective surveillance.

Slippers and other indoor footwear from China, OJ (1992) L 223/13 (introduction)

The Commission introduced prior surveillance.

Certain steel products from third countries other than EFTA member countries, OJ L 383/39 (introduction)

The Commission introduced prior surveillance.

Steel products from third countries OJ L 383/47 (introduction)

The Commission introduced retrospective surveillance.

2.3. Commercial Policy Instrument

Port charge or fee in Japan

During the period under investigation there have been no developments.

Piracy of sound recordings in Thailand

During the period under investigation there have been no developments.

3. Miscellaneous

This section will deal with the Uruguay Round, GSP, MFA, the Association Agreements, and the Common Customs Code.

3.1. Uruguay Round

There was considerable hope in early December that the agriculture agreements reached between the United States and the EC would unblock the Uruguay Round negotiations. GATT leaders, along with US and EC officials, insisted that they could complete a deal on the major outstanding issues by Christmas, leaving only certain market access issues and legal drafting of a final Uruguay Round package to be completed in early January 1993.

That timetable proved to be too ambitious for several reasons. First, there has been unexpectedly strong internal dissent within the Community over the US-EC farm deals.

France has also lobbied other Member States heavily to support its position or, at the very least, not to isolate France as the sole opponent to the farm accords.

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Secondly, US and EC negotiators, who had predicted a deal in principle by Christmas, underestimated the difficulty involved in closing the gap on certain non-agricultural issues of the Uruguay Round. For example, the US and EC, not to mention other major trading countries, remain at odds over the role of the Multilateral Trade Organization that is part of the Dunkel text. Gaps also remain with regard to: (1) US desires to preserve the ability to take unilateral actions where multilateral rules fail to produce an adequate result, (2) EC desires to exempt cultural programming from multilateral rules on trade in audiovisual products, and, (3) concessions in tariffs and market access in the financial services sector.

As reported earlier in this report,³² action is expected on the part of the Clinton Administration to fix the duration of the fast track extension that will be requested of the US Congress.

3.2. GSP

The EC's GSP Regime³³ was extended into 1993.³⁴ A substantial novelty is that the former Soviet Republics (except the Baltic States) were added to the list of beneficiaries. Otherwise, the Regime virtually remained the same except for certain technical amendments.

3.3. MFA

On 6 October 1992 the Council authorized the Commission to negotiate an extension of the MFA. Accordingly, the Commission negotiated such extension. The outcome of these negotiations on the extension was a Protocol prolonging the MFA until 31 December 1993. On 9 December 1992 the GATT Textiles Committee adopted the Protocol and on 1 January 1993 the extension entered into force.

Later, outside our reference period, the EC Council approved this protocol on behalf of the EC (February 1993).

3.4. Association Agreements with Poland, Hungary, and the Czech and Slovak Republics

The procedures for ratification of these agreements are under way. On the EC's side, the Parliament gave its assent in September 1992.

However, since these procedures could not be concluded by 31 December 1992,³⁵ an exchange of letters was concluded to extend the Interim Agreements until the entry into force of the Association Agreements.

32 See *supra* text Section 1.1.

33 The EC's Generalized System of Preferences currently consists of Regulation (EEC) 3831/90, OJ (1990) L 370/1; Regulation (EEC) 3832/90, OJ (1990) L 370/39; Regulation (EEC) 3833/90, OJ (1990) L 370/86; Regulation (EEC) 3834/90, OJ (1990) L 370/121; Regulation (EEC) 3835/90, OJ L 370/126; and Regulation (EEC) 3900/91 (1991) L 368/11.

34 Regulation (EEC) 3917/92, OJ L 396/1 (1992).

35 The date of the expiry of the interim agreements. The interim agreements had permitted the trade provisions of the Association Agreements to enter into force from 1 March 1992.

3.4. Common Customs Code

On 19 October the Council Regulation establishing the Community Customs Code was adopted.³⁶ The code is an important step towards the completion of the internal market, by guaranteeing uniformity at the EC's external borders. The code assembles the provisions of customs legislation that are at present contained in a large number of Regulations and Directives. The Code therefore incorporates the current legislation, amends it where necessary, and remedies existing omissions. The code will apply from 1 January 1994.³⁷

³⁶ OJ (1992) L 302.

³⁷ Except for certain provisions that will apply already on 1 January 1993, and other provisions that will apply not before 1 January 1995. See Article 253 of the Code.

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4. Appendix: Anti-Dumping Decisions and Regulations

Anti-Dumping Decisions and Regulations (July 1992 – December 1992)							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Video cassettes	Hong Kong				OJ L 182/6		
Certain semi-finished products of alloy steel	Turkey Brazil				OJ L 182/23		
Ferro-silicon	Poland Egypt			OJ L 183/8			
Ferro-silicon	Poland Egypt					OJ L 183/40	
Pure silk typewriter ribbon fabrics	China			OJ L 174/27		OJ L 174/27	
Ferro-silicon	China South Africa	OJ C 173/8					
Synthetic fibres of polyesters	India Korea			OJ L 197/25			
EPROMs	Japan		OJ C 181/7				
Certain nuts of iron or steel	Taiwan						OJ L 197/1
Outer rings of tapered roller bearings	Japan			OJ L 199/8			
Manganese steel wearparts	South Africa	OJ C 188/3					
Gum-rosin	China	OJ C 195/5					
Low carbon ferro chrome	Kazakhstan Russia Ukraine	OJ C 195/6					

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Anti-Dumping Decisions and Regulations (July 1992 - December 1992)							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Certain plates of iron or steel	Slovenia Macedonia Montenegro Serbia Croatia Bosnia-Herzegovina				OJ L 221/36 (Slovenia Macedonia Montenegro Serbia)	-	OJ L 221/36 (Croatia Bosnia-Herzegovina)
Silicon metal	Brazil				OJ L 222/1		
Car radios	Korea				OJ L 222/8		
Ethanolamine	United States	OJ C 201/12					
Standardized multi-phase electric motors	Yugoslavia						OJ C 203/15
Outboard motors	Japan		OJ C 204/4				
Pig-iron	Turkey						OJ L 230/30
Plain paper photocopiers	Japan		OJ C 207/16				
Calcium metal	China Former Soviet Union						OJ C 213/14
Potassium chloride	Belarus Russia Ukraine			OJ L 243/1*			
Copper sulphate	Czech and Slovak Republics Hungary Poland						OJ C 218/15
DRAMs	Korea			OJ L 272/13			
3.5" microdisks	Hong Kong Korea	OJ C 239/4					
Cotton yarn	Brazil Turkey		OJ C 244/14				
* Extension							

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Anti-Dumping Decisions and Regulations (July 1992 - December 1992)							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Ferro-silicon	Poland Egypt			OJ L 281/1*			
Deadburned (sintered) magnesia	China			OJ L 282/15			
Magnesium oxide	China			OJ L 282/23			
Ball bearings > 30 mm	Japan			OJ L 286/2			
Capacitors	Japan			OJ L 286/1*			
Monosodium glutamate	Korea Thailand Taiwan Indonesia		OJ C 286/3				
Monosodium glutamate	Indonesia Korea				OJ L 299/1		
Synthetic fibres of polyester	Romania Taiwan Turkey Serbia Montenegro Macedonia Mexico United States				OJ L 306/1 (Romania Taiwan Turkey Serbia Montenegro Macedonia)		OJ L 306/1 (Mexico United States)
Potassium chloride	Belarus Russia Ukraine				OJ L 308/41		
DRAMs	Japan				OJ L 299/4		
Urea	Libya						OJ C 294/15
Synthetic fibres of polyesters	India Korea			OJ L 326/1*			
Outer rings of tapered roller bearings	Japan			OJ L 326/1*			
Penterythritol	Canada Sweden						OJ C 296/5
* Extension							

Anti-Dumping Decisions and Regulations (July 1992 - December 1992)							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Ferro-silico-calcium/calcium silicide	Brazil						OJ C 297/4
Calcium metal	China Russia	OJ C 298/3					
Ammonium nitrate	Belarus Georgia Lithuania Russia Turkmenistan Ukraine Uzbekistan	OJ C 306/2					
Colour television receivers	Malaysia China Korea Singapore Thailand Turkey	OJ C 307/4					
Capacitors					OJ L 353/1		
Video cassettes	Hong Kong				OJ L 354/1		
Hematite pig iron	Former Soviet Union Brazil Poland	OJ C 322/2					
Mercury	Soviet Union						OJ C 328/4
Ferro-silicon	Poland Egypt				OJ L 369/1		
Ferro-silicon	Poland Egypt					OJ L 369/32	
Certain polyester yarns	Taiwan India Indonesia China Turkey		OJ C 339/2				
* Extension							