

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities VIII: 1 January 1994 – 30 June 1994

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Introduction

This is the eighth in the series of reports on developments in the field of EU international trade law.¹ This report will cover developments that occurred during the 6 months period 1 January 1994 to 30 June 1994.

1. GATT/World Trade Organization

The Marrakesh Meeting

By far the most momentous event in the first half of 1994 regarding GATT was the ministerial meeting at Marrakesh on 12-15 April 1994 during which the Uruguay Round texts were signed.

Some slight changes were made to the texts adopted in December 1993. An American initiative prompted the renaming of the Multilateral Trade Organization as the World Trade Organization (WTO).

Next Generation Issues

Discussions since Marrakesh have focused on the implementation of the Uruguay Round agreements and on 'next generation issues' (environment and trade, social policy and trade, etc.).

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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. The fifth report was published in 4 *EJIL* (1993) 283-304. The sixth report was published in 4 *EJIL* (1993) 588-606, and the seventh report in 5 *EJIL* (1994) 285-311.

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The ministers at Marrakesh adopted a Decision which creates a Trade and Environment Committee within the WTO. This committee will deal with the relationship between trade and environmental issues. Further, the participants in the WTO agreed that the issue of labour rights and trade should be placed on the agenda of the Preparatory Committee that will be working in the months ahead to establish the WTO. Both developments have been heavily contested by many lesser developed countries, which see such policy issues as potentially protectionist developments from the side of the Western countries.

Ratification

Both in the United States and the EU the ratification of the Uruguay Round encountered delays, thereby endangering its entry into force on 1 January 1995.

In the EU a dispute has arisen on the *legal nature* of the Uruguay Round agreements. While the Commission and Parliament maintain that the agreements should only be ratified by the Community, most Member States feel that the agreements contain points which do not fall within the competence of the Community. Hence they claim that the agreements are of a mixed nature. Related to this issue is the question whether the Community will be represented in the WTO by the Commission only or jointly by the Commission and the Member States. The Commission has referred the matter to the European Court of Justice for an advisory opinion, which is not expected before November 1994. This may make it difficult for the Community to have the agreements ratified by 1 January 1995.

In the United States a budgetary problem has arisen. Because the reduced tariffs are expected to seriously decrease US tax revenue, the US administration has had the difficult task of finding supplementary funding. This has caused delays in the ratification procedure which have not yet been solved. Another issue on which disagreement exists within Congress is whether the President's fast-track negotiating authority should also cover trade-related labour and environmental issues.

2. Accession and EEA

2.1 General

On 1 January 1994 the European Economic Area (EEA) Agreement² entered into force between the EU and Austria, Finland, Iceland, Norway and Sweden.³ Pursuant to a referendum Switzerland opted out of the EEA. The economic union between that country and Liechtenstein prevents the latter from joining the EEA until its relationship with Switzerland has been revised.

2.2 Scope of the EEA

The EEA aims to extend much of the rules of the EU to the EU's five partners. The EEA enlarges the scope of EU rules in the fields of:

- free movement of goods;
- free movement of services, persons and capital;
- competition law.

2 OJ (1994) L 1/3.

3 OJ (1994) L 1/1.

In other fields the EEA merely aims to strengthen cooperation between its parties. These areas include:

- research and technological development;
- information services;
- environment;
- education;
- social policy;
- consumer protection;
- small and medium-sized enterprises;
- tourism;
- the audiovisual sector; and
- civil protection.

2.3 Institutional Provisions

The EEA Agreement foresees the creation of an EEA Council composed of Members of the Council of the European Union and the European Commission, and of one Member of Government of each of the EFTA countries. The EEA Council is responsible for developing the general policy lines underlying the EEA Agreement. The EEA Joint Committee watches over the implementation of the EEA Agreement. The EEA Agreement further foresees the establishment of an EEA Joint Parliamentary Committee.

2.4 Future of the EEA

The accessions of next year will deprive the EEA of much of its practical value. Austria, which held a referendum on 12 June, will definitively join the EU; the same goes for Finland, which held its referendum on 16 October. Sweden and Norway will decide on their accession later this year. Should all four countries join, then the EEA would only count Iceland and the EU as its Members.

3. Dumping

3.1 General Developments

Amendments to the Basic Anti-Dumping Regulation⁴

After the deadlock on the adoption of the Uruguay Round package was resolved in December 1993, the Council could make progress with the adoption of two proposals strengthening the Basic EU Anti-Dumping Regulation, i.e. (1) the revised decision-making procedure, and (2) the introduction of stricter deadlines. The two issues had been politically tied, in particular by France.

The decision-making procedure in dumping proceedings has been amended by two Regulations. Until March, the Council decided by qualified majority on the extension of provisional anti-dumping duties and on the imposition of definitive duties. *Council Regulation*

⁴ For a detailed analysis see Waer, Vermulst, 'EC Anti-Dumping Law and Practice after the Uruguay Round – A New Lease of Life?', 28 *Journal of World Trade* (1994) 5-21.

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(EC) No. 522/94 of 7 March 1994 on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Regulations (EEC) No. 2641/84 and No. 2423/88⁵ changed this to a simple majority.

The change in voting system is likely to increase the Commission's power, because a larger number of States (seven) will have to be mustered in order to block a proposal from the Commission. Because France, the Iberian States, Greece, Italy and Belgium tend to accept anti-dumping measures more willingly, this may mean that it will be more difficult for Member States opposing anti-dumping duties to prevent anti-dumping action.

The second change in the Basic Regulation has been effected by Council Regulation (EC) No. 521/94 of 7 March 1994 on the introduction of time limits for investigations carried out against dumped or subsidized imports from countries not Members of the European Community and amending Regulation (EEC) No. 2423/88.⁶

When the deadlines imposed by this Regulation enter into force, the following time-limits will be imposed:

1. If the Commission considers a complaint unfounded, it has to notify the complainant within one month after his complaint has been lodged. The advantage of this new rule for importers is that they will know after one month of the lodging of the complaint whether they will be under investigation or not.
2. Consultations between the Commission and the Member States in the Anti-Dumping Committee must take place 'within a time frame which allows the time-limits set by the present Regulation to be respected.' The Chairman of the Anti-Dumping Committee must ensure that this happens. It is as yet unknown what happens if these time limits are not respected.
3. The right to inspect non-confidential information is explicitly granted to consumer organizations. This will enhance openness and transparency and is therefore a positive element.
4. If an interested country or third party supplies the Commission with false or misleading information, the Commission 'shall' (in the old text: 'may') disregard that information.
5. Provisional duties must be imposed within nine months after the initiation of the investigation. This could be disadvantageous to exporters, who at present may benefit from long delays in investigations. It is as yet unknown what will happen if this time limit is not respected.
6. The normal period of duration of an investigation is set at one year. In any event an investigation must be concluded within 13 months after the initiation in the case of anti-subsidy investigations and within 15 months after initiation in the case of anti-dumping investigations. Considering the 9 months' limitation to the imposition of provisional duties, the 15 months' limit is not a new element, because the maximum time limit between the imposition of provisional duties and definitive duties is currently set at a maximum of 6 months under the existing legislation.
7. The new text of Article 11(5) appears to suggest that the Commission could immediately extend provisional duties for two more months (if exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission), without having to draw up a separate decision to extend provisional duties.
8. Article 14 review investigations must normally be completed within 15 months after the date of the initiation of the review. As duties remain in force pending the review, any limitation to the review period should be good news for exporters. It should be noted, however, that this time limit does not apply to Article 15 sunset reviews.

5 OJ (1994) L 66/10.

6 OJ (1994) L 66/7.

For reasons of budgetary resources, the time limits will only enter into force after a separate Decision is taken, which the Council will have to adopt before 1 April 1995 (Article 2 of Regulation 521/94). However, the Commission will soon send a proposal for a completely new Basic Anti-Dumping Regulation to the Council. It is therefore possible that before 1 April 1995 a completely new Basic Anti-Dumping Regulation will enter into force, thereby rendering Regulation 521/94 pointless.

Judicial Review

The Council adopted a Decision empowering the Court of First Instance to deal with dumping and subsidies cases from 15 March 1994.⁷ This development should be welcomed, because it will probably imply a closer scrutiny of the facts of dumping cases; however, it remains to be seen whether the Court of First Instance can escape the boundaries of the jurisprudence imposed by the European Court of Justice.

Suspension of Anti-dumping Measures against EFTA Countries

As a consequence of the entry into force of the EEA Agreement the Council suspended anti-dumping duties and undertakings concerning Austria, Finland, Iceland, Norway and Sweden.⁸

3.2 Administrative Determinations

Flat-rolled products of iron or non-alloy steel (cold-rolled) from the former Yugoslavia, OJ (1994) C 7/3 (Notice of impending expiry)

Unwrought magnesium from Kazakhstan, Russia and Ukraine, OJ (1994) C 11/4 (initiation)

The complainant suggested Japan as the analogue country. The complainant even submitted information on two possible alternative analogue countries, Canada and the United States.

Cotton fabrics originating in China, India, Indonesia, Pakistan and Turkey, OJ (1994) C 17/3 (initiation)

The complaint was filed on behalf of producers allegedly representing a major proportion of the total cotton fabric in the Community. However, most of the European industry failed to reply (properly) to the EC producers' questionnaires. As a result the Commission proposed to terminate the proceeding because of no injury. However, apparently for political reasons, the Council refused to adopt the proposal to terminate the proceeding. It remains to be seen whether this case, which has no legal justification, will be allowed to continue for political reasons.

7 Council Decision of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (94/149/ECSC, EC), OJ (1994) L 66/29.

8 Council Regulation (EC) No. 5/94 on the suspension of the anti-dumping duties against EFTA countries, OJ (1994) L 3/1.

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Synthetic staple fibre fabric originating in India, Indonesia, Pakistan and Thailand, OJ (1994) C 17/4 (initiation)

This is a parallel case to the cotton fabrics proceeding. Similar to the cotton case, the Commission proposed termination but the Council did not adopt this proposal.

Bed linen originating in India, Pakistan, Thailand and Turkey, OJ (1994) C 21/8 (initiation)

The Commission encountered a similar lack of cooperation to that in the fabrics' cases. It is therefore expected that also in this case the Commission will propose termination because of no injury.

Hematite pig-iron originating in Brazil, Poland, Russia and Ukraine, OJ (1994) L 12/5, (provisional)

Of the 21 Brazilian companies that replied to the questionnaire, 17 exported to the Community during the investigation period. These 17 accounted for 76% of the relevant exports on the basis of Eurostat figures. After consultation, the Commission established a sample of six companies on the basis of whose figures the existence of dumping would be established. Normal value was based on constructed value by adding cost of production and a 5% profit. Because of Brazil's high inflation rate the Commission calculated monthly normal values to ensure a fair comparison. The weighted average dumping margin for the sample companies was 51.3%.

For Poland the Commission also resorted to constructed value. The dumping margins ranged between 31.53 and 50.2%.

For Russia and Ukraine normal value was based on the weighted average normal value established for Brazil. Due to lack of cooperation from the producers, export prices for Russia and Ukraine were based on the best information available. For this purpose the Commission resorted to Eurostat statistics. The weighted average dumping margin was found to be 104.51%.

These high dumping margins however exceeded the level of duty necessary to remove the injury (the actual undercutting margins amounted to 12.29, 5.44, 20.52 and 20.52% for Brazil, Poland, Russia and Ukraine, respectively). As a result, the duty was set as a minimum import price of ECU 149 per tonne (cif duty unpaid). This floor price was established by calculating adding cost and a reasonable profit (5% on turnover) for the Community producers.

Isobutanol from Russia, OJ (1994) L 24/1 (extension provisional)

Bicycles from Indonesia, Malaysia and Thailand, OJ (1994) C 35/3 (initiation)

The complainant alleged significant dumping margins resulting in significant margins of undercutting. The alleged undercutting margins varied between 44 and 48%.

Tube or pipe fittings from China, Croatia, Slovakia, Taiwan and Thailand, OJ (1994) C 35/4 (initiation)

Ethanolamine from the United States, OJ (1994) L 28/40 (definitive)

The product description slightly changed by excluding salts from ethanolamine. The reason was that these salts had actually not been covered in the complaint and therefore no duties

were justified on this type of ethanolamine. Accordingly, the provisional duties imposed on these salts were released.

The Commission did not accept any further argument from the producers following disclosure and as a result the provisional duties (in the form of floor prices) were confirmed and definitively collected.

Copper sulphate from Bulgaria and the former Soviet Union, OJ (1994) C 37/4 (expiry)

Paracetamol from China, OJ (1994) C 39/4 (expiry)

Television camera systems from Japan, OJ (1994) L 40/23 (extension provisional)

Gum rosin from China, OJ (1994) L 41/50 (termination)

The case is very exceptional because the reason for the termination was (absence of) Community interests calling for intervention.⁹ Termination for this reason has occurred only a handful of times in the history of EU anti-dumping. It should be noted the Commission *had* found that imports from China were dumped (17.4%) as a result of which injury was caused.

A large majority of the EU Member States claimed that it was not in the interests of the Community to impose anti-dumping measures. The infrequency of this type of termination merits reproduction of the relevant part *in toto*:

These representations [by the Member States] pointed out, in particular, that the negative effects of anti-dumping measures on the users of gum rosin would be overwhelmingly disproportionate to the benefits arising from anti-dumping measures in favour of the Community industry. As far as the latter is concerned, it consists of medium-sized firms, solely in one Member State [Portugal], which make use of a limited natural resource. Should anti-dumping measures be imposed, the Community market would continue to be largely dependent on imports, since the Community industry's capacity of production can cover only a minority share.

In contrast, gum rosin is a primary product used in numerous industries (e.g. tyres, paper manufacturing, painting, adhesive and varnish), based in most of the Member States where they represent a high value added and support a large number of jobs. The imposition of anti-dumping measures would result, for these companies, in a substantial increase in the respective costs of production of the above products as they have to maintain a steady and abundant supply of gum rosin. It would, therefore, potentially jeopardize the situation of these industries.

In addition, it was argued that the imposition of anti-dumping measures would not be adequate to remove the injury, since it would provoke a significant increase in the price of gum rosin and result in a quick penetration of the Community market by substitute products which, for the time being, are not a viable alternative because of their high prices.

... the Commission concludes that protective measures would not be appropriate and that it would not be in the Community interest to continue the proceeding.

⁹ Articles 11(1) and 12(1) basic Regulation.

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Urea from the former Czechoslovakia and the former Soviet Union, OJ (1994) C 47/3 (Notice)

The Commission published this Notice in accordance with Article 15(4) of the basic Regulation.

VCRs from Korea and Japan, OJ (1994) C 48/12 (impending expiry)

The Commission announced the expiry of anti-dumping duties and undertakings on Korean and Japanese VCRs.

Large aluminium electrolytic capacitors (LAECs) from Korea and Taiwan, OJ (1994) L 48/10 (provisional)

The Commission imposed provisional duties on large aluminium electrolytic capacitors (LAECs) originating in Korea and Taiwan.

This proceeding was initiated in March 1993 pursuant to a complaint of the *Federation for Appropriate Remedial Anti-Dumping* (FARAD) on behalf of B.H. Components Ltd, Nederlandse Philips Bedrijven and Roederstein GmbH.

We recall that the LAECs involved are not the same as the LAECs which were subject of an anti-dumping proceeding involving Japan. The LAECs subject to provisional anti-dumping duties in this case are described as 'large electrical capacitors, non-solid, aluminium electrolytic, with a CV product (capacitance multiplied by rated voltage) between 8 000 and 550 000 µc (microcoulombs) at a voltage of 160 V or more, falling within CN code ex 8532 2200.'

The investigation period was the calendar year 1992. In its decision to impose provisional duties the Commission notes that none of the known Korean companies had responded to the questionnaire. Another company named in the complaint as a related importer had stated that it had not imported Korean or Taiwanese LAECs during the investigation period. Therefore, in the absence of cooperation from the Korean industry, the Commission based itself on the facts available. For normal value the Commission based itself on the constructed value calculations of the complaint while adding a 10% profit. For export prices the Commission also resorted to the complaint.

The provisional dumping margin for Korean producers was set at 70.6%.

Two Taiwanese companies responded to the questionnaire. For the *producer/exporter* Kaimei Electronics normal value was based on domestic selling prices or constructed value, depending on the model. This company obtained a 10.7% dumping margin. The second Taiwanese company, Lelon Electronics, was a *trading* company. In deviation of Article 2 (3)(c) of the Basic Anti-Dumping Regulation the Commission stated that

... as a rule, individual dumping margins are not established, nor are duties imposed on exporters who do not manufacture the product.¹⁰

This company was therefore denied an individual dumping margin and was subjected to the residual duty, despite its reply to the questionnaire. On the basis of the facts available the

10 Article 2(3)(c) of the Basic EC Anti-Dumping Regulation provides that '[w]here the exporter in the country of origin neither produces nor sells the like product in the country of origin, the normal value shall be established on the basis of prices or costs of other sellers or producers in the country of origin in the same manner as mentioned in subparagraphs (a) and (b). Normally the prices or costs of the exporter's supplier shall be used for this purpose.'

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residual duty for Taiwan was based on the highest dumping margin found for a particular model of Kaimei Electronics.

Provisional anti-dumping duties were set at the level of the dumping margins:

- 70.6% for all Korean producers;
- 10.7% for Kaimei Electronic Corp. of Taiwan;
- 75.8% for all other Taiwanese producers.

Urea from the United States, Austria, Hungary, Kuwait and Malaysia, OJ (1994) C 54/9 (expiry)

Urea from Romania and the former Yugoslavia (Croatia), OJ (1994) C 54/9 (intention to carry out review)

Gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand, OJ (1994) L 54/1 (amendment)

We recall that the Thai company, Thai Merry, withdrew its undertaking on 18 August 1993. The Council confirmed the provisional duty (established in accordance with Article 10(6)) and collected the amounts provisionally secured.

Synthetic hand-knitting yarn from Turkey, OJ (1994) L 55/58 (termination)

The majority of the Community industry did not (adequately) reply to the questionnaire. Therefore, the injury allegations of the complaint could not be substantiated. Accordingly, the proceeding was terminated because of no injury.

Peroxodisulphates from China, OJ (1994) C 64/4 (initiation); Active powdered carbon from China, OJ (1994) C 64/5 (initiation)

In both cases the United States was suggested as the reference country.

Polyester yarns from Indonesia, OJ (1994) L 59/19, 21, 23, 25 and 27 (refund)

This proceeding concerned recurring refunds. The Commission determined after on-the-spot-investigation that the dumping margin for the Indonesian producer PT Indorama was negligible (less than 0.1%). Accordingly, all importers of Indorama who had filed refund applications were given a refund of the full amount of anti-dumping duties paid.

Fluorspar from China, OJ (1994) L 62/1 (definitive)

Similar to the provisional determination the duty was based on the dumping margin. Following modifications to the level of comparison the margin increased from 13.2 to 37.8%. As a result the floor prices increased to ECU 113.50 per tonne (dry net weight).

3.5" microdisks from Hong and Korea, OJ (1994) L 68/5 (provisional)

The Commission had initiated the proceeding in September 1992 after a complaint from Sentinel Computer Products Europe NV (Wellen, Belgium), Rhône-Poulenc Systems (Noisy-le-Grand, France), Boeder AG (Flörsheim am Main, Germany), Balteadisk SpA (Arnad,

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Italy), and Computer Support Italy srl (Verderio Inferiore, Italy). The only Korean company to be directly involved was SKC Ltd. and its related importer SKC Europe GmbH.

The normal value of SKC's microdisks was established on the basis of the domestic sales. SKC's export price to unrelated importers was established on the basis of prices payable or actually paid for products exported to the EU. The export price for products sold to its related importer were constructed with an imputed 5% profit margin.

For Hong Kong the Commission determined that none of the producers had any viable domestic sales. Normal value was therefore based on constructed value. SG&A and profit were determined on 'any other reasonable basis' as foreseen in Article 2(3)(b)(ii) of the Basic Anti-Dumping Regulation. In this regard the Commission imputed a 10% profit margin. For one producer the Commission constructed the export price because it considered this price unreliable. The price was considered unreliable because certain components supplied by the OEM were not reflected in the export price. Therefore, the Commission added to the export price actually charged an amount to represent cost and profit realizable on the component concerned. It is unclear from the Regulation whether on the normal value side the Commission also specifically calculated an OEM normal value for this producer.

The residual duty for Hong Kong was based on the facts available (i.e. the information from the complaint) because of the lack of cooperation from Hong Kong producers.

The anti-dumping duties which reflected the dumping margins found:

Country	Producer	Rate of duty
Korea	SKC Ltd.	8.2%
	Other companies	8.2%
Hong Kong	Jackin Magnetic Co. Ltd.	7.2%
	Plantron HK Ltd.	6.7%
	Swire Magnetic Holdings Ltd.	22.2%
	Technosource Industrial Ltd.	20.1%
	Other companies	35.7%

Polyester yarns from Indonesia, OJ (1994) C 74/3 (review)

Following (1) the full refund of anti-dumping duties to the importers of mixed yarn exported by PT Indorama (see above) and (2) the evidence of the absence of the dumping by other producers the Commission initiated an Article 14 review.

Electronic weighing scales from Japan, OJ (1994) C 74/4 (Article 13(11) review)

The Community industry alleged that anti-dumping duties imposed on products from Teraoka Seiko Co. Ltd. and Tokyo Electric Co. Ltd. were borne by those firms. Accordingly, the Commission initiated an anti-absorption proceeding.

Ferro-silicon from South Africa and China, OJ (1994) L 77/48 (definitive)

The Council confirmed the provisional findings. In particular the Council rejected the argument from the South African producers that their exports should not be cumulated with those from China. Moreover, the proposal from one South African producer for price

undertakings or, alternatively, a floor price was rejected. The Council considered that duties should be imposed at the level of the dumping margins provisionally established. Accordingly, the duties were: Rand Carbide 34.7%; South Africa residual 47.4%; China: 49.7%.

Potassium chloride from Belarus, Russia and Ukraine, OJ (1994) C 80/1 (amendment)

This review was initiated because developments in the three republics led to 'the introduction of autonomous marketing arrangements for potash, and the establishment of new export channels.'

Normal value was based on domestic selling prices in Canada. It should be noted that for the profitability determination certain exceptional costs were not taken into account because these costs were not incurred in the ordinary course of trade and it would not be appropriate to make the Belarus, Russian and Ukraine producers bear the burden of these additional costs. These extra costs were certain exceptional depreciation and financial expenses due to a recent change of ownership. The Commission's reasoning, adopted by the Council, to exclude these costs makes sense and should be applauded.

As far as injury was concerned, the Commission cumulated the dumped imports from the countries concerned.

Finally, in view of the strong indications of circumvention of the previous minimum price duty and the risk that a specific duty has of an increased dumping margin the Council established a combination of a floor price and a specific duty. The Council established a certain minimum floor price but also a minimum payable sum in ECU. The importers will have the higher of the two amounts. The result in practice is that (1) should exporters artificially raise their export prices to circumvent the floor price they will still have to pay the specific duty and (2) should exporters drastically drop their prices to 'absorb' the specific duty the importers still have to pay the difference between the export price and the minimum floor price.

Imports of aspartame originating in the United States, OJ (1994) C 115/4 (initiation review)

A definitive duty had been imposed by Council Regulation (EEC) No. 1391/91.¹¹ The American company Nutra/Sweet requested a review, contending that domestic prices in the US decreased as a result of the expiry of patents.

Portland cement originating in Poland, the Czech Republic and the Slovak Republic, OJ (1994) C 117/3 (initiation)

The Commission initiated a proceeding at the request of producers in eight of the German federated States. For this purpose the Commission applied Article 4(5) of the Basic Anti-Dumping Regulation.

Isobutanol originating in the Russian Federation, OJ (1994) L 87/3 (definitive)

The Council imposed a definitive (specific) duty of 102 ECU per tonne. Normal value was determined on the basis of domestic prices in the US.

¹¹ OJ (1991) L 134/1.

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Television camera systems from Japan, OJ (1994) L 111/106 (definitive)

The dumping margins for Ikegami and Sony decreased whereas the margin for Hitachi went up. Injury margins still exceeded the dumping margins and therefore the duties were limited by the dumping margins. The dumping margins remained substantial:

Ikegami:	82.9%
Sony:	62.6%
Hitachi:	52.7%
Residual:	96.8% (incl. Matsushita and JVC)

The price undertakings offered by the three exporters (Ikegami, Sony and Hitachi) were refused by the Commission.

Silicon carbide from China, Poland, Russia and Ukraine, OJ (1994) L 94/21 (definitive); Silicon carbide from China, Norway, Poland, Russia and Ukraine, OJ (1994) L 94/32 (acceptance undertakings: China, Norway, Poland, Russia, Ukraine; termination: Norway)

For the non-market economies the US served as the reference country. For Norway no dumping was found. The dumping margins for China, Poland, Russia and Ukraine amounted to 72.5, 8.3, 23.3 and 23.3% respectively.

One Russian company offered an undertaking which was accepted.

Ball-bearings from Japan, OJ (1994) L 101/7 (amendment)

The Council adopted on 19 April 1994 an amendment to Council Regulations 2089/84 and 1739/85,¹² by which it recognized the fact that the Japanese company Nippon Seiko Kabushiki Kaisha had changed its name to NSK Ltd. No further legal consequences result from this change.

Calcium metal from China and Russia, OJ (1994) L 104/5 (provisional)

This proceeding followed in the aftermath of the *Extramet* judgment.¹³ In that judgment the ECJ determined that the Community institutions had not adequately examined whether the sole EU producer had self-inflicted injury. Following the judgment the Commission resumed the investigation.¹⁴

The US served as the reference country. The dumping margins, expressed in ECU, amounted to 2,202 and 2,502 per tonne for China and Russia respectively. Following the Court judgment the Commission examined in great detail the possibility of injury having been caused by other factors. However, the Commission concluded that

the dumped imports are to be considered to have caused the material injury to the Community industry.

The calculation of injury margins on the basis of the underselling method (with 5% profit) showed that these were lower than the dumping margins. Accordingly, the duties were limited by the injury margins. The duties amounted to ECU 2,074 and 2,120 per tonne for China and Russia respectively.

¹² OJ (1984) L 193/1 and OJ (1985) L 167/3, respectively.

¹³ Case 358/89, *Extramet v. Council*, [1992] ECR 3813.

¹⁴ OJ (1992) C 298/3.

Electronic weighing scales from Singapore, OJ (1994) C 129/6 (initiation of Article 13(11) review)

A complaint was filed by the European industry, alleging that the sole exporter, Teraoka Weigh System Pte Ltd., had borne the anti-dumping duty on its products. The European industry provided price-lists of importers which, according to the complaint, demonstrate that the resale prices of most models have remained unchanged since the imposition of the anti-dumping duty. Accordingly, the Commission initiated an anti-absorption investigation concerning weighing scales from Singapore.

Grain oriented electrical sheets from Russia, OJ (1994) C 138/8 (initiation)

The procedure was initiated pursuant to a complaint from French, German and UK producers. South Korea was suggested as the reference country.

Coumarin from China, OJ (1994) C 138/9 (initiation)

The complaint was filed by CEFIC on behalf of the sole Community-producer Rhône-Poulenc. It should be noted that in the US, Rhône-Poulenc filed a complaint against dumping of coumarin from China almost simultaneously.

Hematite pig-iron from the Czech Republic, OJ (1994) C 139/7 (initiation)

Video tapes from Korea and Hong Kong, OJ (1994) C 142/2 (intention of review)

Dicumyl peroxide from Japan, OJ (1994) C 121/5 (impending expiry)

Light sodium carbonate from Bulgaria, Poland and Romania, OJ (1994) C 121/6 (expiry)

Hematite pig-iron from Brazil, Poland, Russia and Ukraine, OJ (1994) L 112/19 (extension provisional)

Watch movements from Malaysia and Thailand, OJ (1994) L 120/3 (provisional)

Only one Thai producer cooperated and obtained a 10.6% dumping margin. The residual duty for both Malaysia and Thailand was based on 'the Basic Article' (recital (4)) of the basic Regulation (Article 7(7)(b)). For this purpose the Commission based itself on the information from the complaint.

Ammonium nitrate from Lithuania, Russia, Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, OJ (1994) L 129/24 (undertakings: Lithuania and Russia; termination: Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan)

This was a regional industry proceeding based on Article 4(5) of the basic Regulation. The UK constituted the separate competitive market. The investigation period only covered nine months (January-September 1992). For the selection of the analogue country the Commission considered Canada, the US and Hungary. The Commission eventually opted for Hungary in view of the production environment which is similar to that of Russia and Lithuania and because it considered the accounting information provided by the cooperating producers reliable. Normal value was based on constructed value by adding cost of production and an 8% profit margin. The Commission found a 40.6% dumping margin for Russia and 34.4% for Lithuania.

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For injury purposes the Commission cumulated the imports from Lithuania and Russia. The Commission calculated injury margins of 17.5% and 26.5% for Lithuania and Russia respectively (based on underselling with 10% profit).

The undertaking aspect of the case raised some interesting issues which merit special attention.

- (1) The Commission considered undertakings a preferred option over duties in case of a regional industry proceeding. The reason provided was that a duty cannot be levied solely on the imports into one Member State of a customs union. To do so would have the unintended effect of protecting the remainder of the Community industry which has not requested such protection.
- (2) Secondly, the type of undertakings was in question. Whereas the UK industry preferred price undertakings the Commission opted for quantity undertakings. The UK producers argued that quantity undertakings do not address the problem of inadequate pricing levels. The Commission however considered that a price-based solution could end up excluding Russian and Lithuanian imports from the UK market. Moreover the Commission found that a quantitative undertaking would allow exporters to maintain a certain level of production by remaining in the UK market while at the same time removing the injury caused to UK producers. Finally, such quantity undertakings would not be anti-competitive because many other East-European countries exported the product to the UK.
- (3) The quantity level was established by reducing the 1992 import figure by 40%. Subsequently, this volume was equally split between Russia and Lithuania.
- (4) Finally, the Commission stressed that any breach of undertaking would immediately be followed by the imposition of duties (Article 10(6)). In this regard, the Commission already specified the level of duty that would apply in such a situation. Duties would be based on the injury margins because these were lower than the margins of dumping (Article 13(3)). Translated into specific duties the respective Lithuanian and Russian imports would face duties of £11.50 and £16 per tonne.

With regard to Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan, the Commission terminated the proceeding. The reason was the absence of imports from these countries during the investigation period.

Ammonium nitrate from Lithuania and Russia, OJ (1994) C 158/3 (initiation)

The complainants suggested Hungary as the reference country. The case is bizarre because a mere three weeks before the Commission had concluded the regional industry proceeding against the same product from the same countries (see above). Apart from wasting the European Commission's time and money one may wonder whether such a belated complaint from the rest of the Community industry does not violate Article 5(6) of the Basic Anti-Dumping Regulation: if the 'immediate' information obligation applies to EU Member States it should *a fortiori* apply to a Community industry. Failure to comply would result in losing the right to protection.

Polyester yarn from Taiwan and Turkey, OJ (1994) C 164/4 (review)

After the notice of impending expiry, a complaint was filed that removal of the measures would lead to recurrence of injury. Moreover, the complainants alleged significant dumping margins.

Acrylic fibres from Mexico, OJ (1994) L 143/1 (termination of review)

The review was originally initiated because of claims of no dumping and *de minimis* market share. After investigation the Commission found neither injury nor any indication that repeal of anti-dumping measures would lead again to injury or threat thereof. Accordingly, the duties and undertakings were repealed.

3.5" microdisks from Hong Kong and Korea, OJ (1994) L 146/1 (extension provisional)

LAECs from Korea and Taiwan, OJ (1994) L 152/1 (definitive)

The Council confirmed the provisional findings.

Artificial corundum from China, OJ (1994) L 155/8 (provisional)

The Commission found that the undertakings had been violated. In accordance with Article 10(6), provisional duties were imposed on the basis of the facts established before acceptance of the undertaking. Accordingly, the Commission imposed a 30.8% provisional duty.

Certain flat-rolled products of iron or non-alloy steel (cold-rolled) from the former Yugoslavia, OJ (1994) C 178/20 (expiry)

Ammonium nitrate solution from Bulgaria and Poland, OJ (1994) L 162/16 (provisional)

For the two Polish producers investigated normal value was established on the basis of the facts available because the Commission determined that the costs reported did not accurately reflect the real situation. The 'facts available' were also relied on for one producer's export sales. The dumping margins found for the two producers were: ZAK 40% and ZAP 33.8%.

For Bulgaria, the Czech and Slovak Republics served as the reference country. The odd situation that two countries served as one reference country was justified by the Commission by considering that, during most of the investigation period, the former Czechoslovakia constituted one country. For Bulgaria the Commission established a 33.3% dumping margin.

The dumping margins exceeded the injury margins (calculated on the basis of underselling including a 5% profit). Duties were expressed in the form of a floor price in combination with a specific duty.

4. Other Commercial Policy Instruments

Apart from the changes to the Basic Anti-Dumping Regulation, the following changes to the commercial policy instruments were adopted by the Council:

4.1 Commercial Policy Instrument (CPI)

We recall that the CPI dates from 1984.¹⁵ In its older form the CPI consisted of two procedures aimed at:

¹⁵ Council Regulation (EEC) No. 2641/84 on the strengthening of the Common Commercial Policy with regard in particular to protection against illicit commercial practices, OJ (1984) L 252/1.

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- responding to illicit commercial practices of third countries with a view to removing the injury resulting therefrom (the so-called 'A-procedure' or 'A-track procedure');
- ensuring the full exercise of the EU's rights with regard to the commercial practices of third countries (the 'B-procedure' or 'B-track procedure').

These procedures were intended to enable the Commission to react in cases when Community trade interests are threatened but no other common trade instruments (for e.g., the Anti-Dumping Regulation) can be applied.

The Council now adopted a Regulation¹⁶ which effectively abolishes the differences between the 'A' and 'B' procedures; in the future the procedural rules for 'A' will cover both situations.

The original B-procedure, which in the old text was intended to deal specifically with ensuring the 'full exercise of the Community's rights with regard to the commercial practices of third countries' (i.e., commercial practices *within* those countries), is concerned with *unwanted* rather than *illicit* practices. By merging both procedures, the Community has declared the procedure originally intended for dealing with illicit practices applicable to *unwanted but legal* practices.

The new regime for the CPI will only enter into force on the day of entry into force of the Agreement establishing the World Trade Organization.

4.2 Quotas and Safeguard Measures

The Council adopted a new, common system for quantitative quotas and safeguard measures. The new system consists of general legislation concerning quotas, special legislation concerning textile products and legislation concerning state-trading countries.

General

The Council adopted Regulation 518/94¹⁷ abolishing national quantitative quotas and introducing Community-wide quotas. In a related move, it introduced a system for the management of Community quotas and a system for the management of Community quotas *vis-à-vis* state-trading countries. Finally, separate legislation has been adopted concerning the highly protected textile trade.

In the past, the Member States administered together some 6,000 national quotas. These will all be abolished. In the future, the only authority entitled to introduce quantitative quotas will be the European Commission following the agreement of a consultative committee (Article 6 of Regulation 518/94). In principle, quotas cover the whole of the EU territory; quotas restricted to parts of the EU will be allowed only exceptionally. This is no eyebrow raiser, as it is a logical consequence of the internal market.

Regulation 518/94 introduces a procedure for the imposition of safeguard or surveillance measures which is modelled on the procedure used in dumping and subsidies proceedings.

16 Council Regulation (EC) No. 522/94 of 7 March 1994 on the streamlining of decision-making procedures for certain Community instruments of commercial defence and modifying the relevant Council Regulations, OJ (1994) L 66/10.

17 Council Regulation (EC) No. 518/94 of 7 March 1994 on common rules for imports and repealing Council Regulation (EC) No. 288/82, OJ (1994) L 67/77.

If quantitative quotas have been imposed, Regulation 520/94¹⁸ lays down the procedure to be followed for the distribution of quotas. The Commission is obliged to publish a notice of opening of quotas in which it should announce:

- the method chosen for allocating the quota;
- the delay before quotas will be opened;
- the conditions for acceptance of a request;
- the addresses of the national authorities to which requests must be directed.

State-trading Countries

Regulation 519/94¹⁹ contains a list of quantitative quotas which are maintained against the state-trading countries mentioned in Annex I of the Regulation. Apart from these, and textiles (which fall outside the Regulation's scope), the basic principle is that all other imports are not subject to quantitative quotas. Another Annex of the Regulation lists the products which are under surveillance.

The procedure for the imposition of quantitative quotas or surveillance measures is in many respects similar to that introduced by Regulation 518/94. Article 8(2) obliges the Commission to 'take account of the particular economic system' of state-trading countries. Additionally, the Commission may introduce surveillance measures '[w]here the Community's interests so require' (Article 9(1)); this contrasts with the more strict preconditions required by Article 9 of Regulation 518/94. Finally, the Commission has more sweeping powers to set safeguard measures than it has in the case of imports from non-state-trading countries.

Textiles

A new regime on textile imports was necessitated by the conclusion of the Uruguay Round and the Agreement on Textiles and Clothing which will succeed the Multi-Fibre Agreement, and by the conclusion of the internal market. The new Regulation 517/94²⁰ merges the old, separate regimes for state-trading countries and for China. It covers textile imports from all countries not covered by bilateral agreements, protocols or other arrangements (the biggest part of the textile trade is covered by such agreements).²¹

18 Council Regulation (EC) No. 520/94 of 7 March 1994 establishing a Community procedure for administering quantitative quotas, OJ (1994) L 66/1. See also Commission Regulation (EC) No. 738/94 of 30 March 1994 laying down certain rules for the implementation of Council Regulation (EC) No. 520/94 establishing a Community procedure for administering quantitative quotas, OJ (1994) L 87/47.

19 Council Regulation (EC) No. 519/94 of 7 March 1994 on common rules for imports from certain countries and repealing Council Regulations (EC) Nos. 1765/82, 1766/82 and 3420/83, OJ (1994) L 67/89. See also Commission Regulation (EC) No. 747/94 of 30 March 1994 establishing administration procedures for quantitative quotas on certain products originating in the People's Republic of China, OJ (1994) L 87/83, and Notice to the Community importers of certain products originating in the People's Republic of China subject to quantitative quotas, OJ (1994) C 94/22.

20 Council Regulation (EC) No. 517/94 of 7 March 1994 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules, OJ (1994) L 67/1. See also Commission Regulation (EC) No. 934/94 of 27 April 1994 establishing rules for management and distribution with regard to certain textile quotas established under Regulation (EC) No. 517/94, OJ (1994) L 107/19.

21 The Community concluded with most of the important textile-producing countries new agreements on quotas for the imports into the EU of textile products in the years 1993-1995 (OJ (1994) L 110;

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In a related move the Council decided to adopt the protocol extending the operation of the Multi-Fibre Agreement until 31 December 1994.²²

5. GSP

The Commission announced on 2 June 1994 the principles of the new draft GSP Regulation.²³ The Commission has in the meantime adopted a formal proposal which is currently under negotiation among the Member States. Therefore, this section will discuss the proposal as it has been formally presented to the Council.²⁴

5.1 General

The Commission proposes to introduce a GSP scheme for 1995-1997. The advantage of more year planning would be the greater predictability of the scheme. Furthermore, in the new approach tariffication is the central concept: all tariff ceilings and fixed duty-free amounts will be abolished and replaced by one tariff per product/country.

The goods subject to tariff preferences are all goods listed in Annexes I/1, I/2 and I/3 to the proposal. These goods would in principle benefit from tariff preferences of 80%, 40% and 0% (respectively) times the MFN tariff. However, important exceptions exist to this basic principle.

5.2 Country/Sector Graduation

The Achilles' heel of the Commission's proposal is the principle of sector/country graduation (Article 4 of the proposal). Annex II to the proposal gives a list of products/sectors and countries. Annex VII lists all GSP beneficiaries which in 1993 had a Gross National Product (GNP) per capita of \$6,000 or more.

The sectors of the countries listed in Annex VII will be 'graduated out' of the system. This means that the preferential margin will be halved in 1996 and abolished in 1997. For instance, umbrellas will in principle benefit from a 40% x MFN tariff for all GSP beneficiaries. The preferential margin (the difference between the preferential tariff and the MFN rate) is then $100\% - 40\% = 60\%$.

However, Annex II lists umbrellas with (*inter alia*) South Korea. Because South Korea is also listed as a country whose inhabitants earn more than \$6,000 per annum, the preferential margin of 60% will be halved in 1996, which effectively puts Korean umbrellas on a 70% x MFN tariff. From 1 January 1997 Korean umbrellas are subject to the normal MFN tariff.

For countries whose GNP/capita is less than \$6,000 the situation is different. If sectors from these countries are listed in Annex II, the preferential margin will be halved in 1997. For instance, textile products from India are listed in Annex II. The basic preference for textile products is 80% x MFN tariff. The preferential margin is then $100\% - 80\% = 20\%$.

see for most Central and East European States, OJ (1994) L 123). The implementing Regulation for textile imports from countries with which special arrangements exist is Council Regulation 3030/93, OJ (1994) L 275/1, as amended by Regulation 195/94, OJ (1994) L 29/1.

22 Council Decision of 16 May 1994 concerning the conclusion of the Protocol maintaining in force the Arrangement regarding international trade in textiles (MFA), OJ (1994) L 124/11.

23 Communication of the European Commission on the future of the GSP and the position of more developed beneficiary countries.

24 COM (94) 337 final of 7 September 1994.

India is obviously not a \$6,000/capita country. As a result, the preferential margin will be halved from 1 January 1997, which leads to a preferential tariff of 90% for Indian textile.

5.3 Solidarity

Quite apart from graduation, the Commission further proposes the introduction of a solidarity principle. If the imports of a GSP beneficiary exceed 25% of the imports of all GSP beneficiaries in that sector, that sector in that country would be excluded from the system from 1 January 1996. This has attracted criticisms from a number of Member States, and rightly so: first, it is not clear whether '25%' refers to the total *value* or to the total *weight* of products. Further, the division of products into *sectors* raises questions: one could reduce or increase the impact of certain imports by re-defining the sector to which they belong. Is all textiles (Combined Nomenclature, chapters 50-60) one sector? Is cotton (Combined Nomenclature, chapter 52) one *sector*? Should the division of Annex II be used?

Strangely, the relevant rules as to what the 'solidarity principle' entails are not laid down in the Articles of the proposed Regulation itself, but in the covering note. Since the covering note of a legislative proposal does not have any legal standing, one may hope that the Council will alter this legally rather peculiar way of drafting in the final text.

5.4 Incentives

By way of exception to the graduation and solidarity mechanisms the Commission further foresees the introduction of incentives. Again, the percentages are not listed in the proposal itself but in the covering letter, and this would need to be improved upon.

The Commission proposes to grant an extra 20% x MFN rate preference to countries which adopt and apply ILO Conventions No. 87 (Freedom of Association and Protection of the Right to Organise Convention), No. 98 (Right to Organise and Collective Bargaining Convention), and No. 138 (Minimum Age Convention). This would mean that, if e.g. a certain product from Mali is normally subject to a 50% x MFN tariff and Mali fulfils the social conditions stated above, the preferential tariff would be lowered to 30% x MFN rate.

For certain wood products an additional incentive is proposed to comply with standards set by the International Tropical Timber Organization.

5.5 State of Play of the Proposal

The Commission's proposal has not yet (October 1994) been unanimously accepted by the Member States. In particular, the UK has argued that a system based on full country graduation (i.e., the total exclusion of certain countries) would be more manageable than the sector/country approach proposed by the Commission. It is possible that the Council will follow the UK in this, in which case the final legislation may be very different from the principles proposed by the Commission. A decision by the Council is not expected before November 1994.

6. Association Agreements

The Europe Agreements concluded between the EU and Hungary and Poland entered into force on 1 February 1994.²⁵ The Agreements foresee consultations of the Association Council in case one of the parties plans to take anti-dumping or safeguard measures.

The Commission further adopted a ECSC Decision on the procedures to be applied for the execution of the association treaties with Hungary and Poland in relation to trade in coal and steel products.²⁶ On the basis of this Decision, special consultation procedures for commercial defence actions are established analogous to those instituted by the Europe Agreements.

At almost the same time the amendments to the trade and association agreements with Central Europe proposed by the European Council of Copenhagen came into force.²⁷ The European Council of 21-22 June 1993 had approved additional trade-liberalising measures towards the Central European countries with which the EU has concluded Europe or Interim Agreements (Poland, the former Czechoslovakia, Hungary, Romania and Bulgaria).

7. Court Cases

Case C-368/92, Administration des Douanes v. Solange Chiffre, [1994] ECR I-605

Solange Chiffre had imported leather clothing originating in India and sought benefits under the Generalised System of Preferences. The goods had originally been destined for Czechoslovakia and Poland, which at the time had special agreements with India. Under these agreements, Indian traders of Czechoslovak and Polish products paid in kind. Because there was no market for the goods in Czechoslovakia and Poland, they were sold to (*inter alia*) France and shipped directly to France. As a result of this arrangement the Form A,²⁸ which was issued by Indian customs to attest the Indian origin, stated as countries of destination Czechoslovakia and Poland.

When Solange Chiffre submitted it to French customs, GSP treatment was refused on the basis that the goods were not destined for the EU. Solange Chiffre was consequently fined for not paying the customs duties. The question before the Court was, whether the benefit of GSP is lost when the declaration of origin states a country of destination other than the EU or one of its Member States.

The Court answered this question positively. The origin certificate is the

only means by which the customs authorities of the Member States can ensure that the rules of the Community tariff preference system concerning the origin of goods have been complied with by the exporter.

The Court only accepted an exception to this rule if a retrospective origin certificate is issued. Because an origin certificate issued by the Indian authorities is only valid for the country mentioned as the country of destination, no origin certification is deemed to have been issued as far as EU law is concerned. As a result, the country of origin may issue a retrospective origin certificate if a situation of an exceptional nature occurs.²⁹ Because the Court considered

25 The association treaties can be found in OJ (1993) L 347 and 348.

26 OJ (1994) L 32/3 and 32/6.

27 OJ (1994) L 25.

28 As requested by Regulations No. 3749/83 and 693/88 (see now Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, OJ (1993) L 253/24-25 and 307).

29 Under present law: Article 81 of Regulation 2454/93.

exchange operations such as those between India and Central Europe to be exceptional situations, Solange Chiffre should have applied for a retrospective origin certificate from the Indian authorities.

Case C-29/93, Ospig Textil-Gesellschaft W. Ahlers GmbH & Co. v. Hauptzollamt Bremen-Freihafen, [1994] ECR I-1963

Ospig had imported jackets from Taiwan and during customs clearance declared them for their invoice value less quota charges. These quota charges had been incurred because the Community has concluded an export restraint agreement with Taiwan covering such jackets and the Taiwanese exporter had to buy quotas from a holder of quotas in that country.

German customs considered the quota charge to be part of the value of the goods when they were presented at customs and assessed the payable customs tariff on that basis.

In a previous case (*Case 7/83, Ospig v. Hauptzollamt Bremen-Ost*, [1984] ECR 609), the Court had considered that charges in respect of third-party quotas which are available and transferable under the law of the country of export should not be included in the valuation for customs purposes. According to German customs the problem in the present case was that Taiwan neither regulated nor prohibited the trade in quotas.

According to the German court that referred the case to the European Court of Justice, a related problem was, that if importers were entitled to deduct quota charges, they would be tempted to present commissions paid to intermediaries as quotas charges (commissions must be added to the value for declaration).

The Court first confirmed its finding in the earlier *Ospig* case that the value for customs purposes includes all sums paid or payable as a condition of the sale of goods imported by the purchaser to the vendor or by the purchaser to a third country in order to fulfil one of the vendor's obligations.

The amounts to be taken into account are listed by Community legislation (now Article 32 of the Community Customs Code). It then continued by concluding that the purpose of this rule, which is to establish a fair, uniform and neutral system of customs valuation, is different from the objective of Community rules controlling the quantities of imports of textile imports.

Contrary to the parties in the case, the Court considered the question whether trade in quotas in Taiwan is legal, immaterial; the inclusion in the customs value of quota charges which are not the subject of legal trade would give rise to an unwarranted disparity between importers who are in economically similar positions. As to the risk of abuse, the Court did not consider this to be a real danger because the onus of providing proof on the customs value is on the importer.

Case C-30/93, AC-ATEL Electronics Vertriebs GmbH v. Hauptzollamt München-Mitte, not yet published

The case concerns anti-dumping duties on DRAMs from Japan. The proceeding initially covered DRAMs classified in the EC's nomenclature under heading *ex 85.21 D*. During the period between the notice of initiation and the provisional anti-dumping duties the Community's nomenclature changed with respect to DRAMs. Then, by virtue of a new amendment to the nomenclature, CN heading 8542 1171 was withdrawn and replaced by headings 8542 1141, 8542 1143 and 8542 1145.

Following this new change in the nomenclature, the Commission adopted Regulation 165/90 imposing a provisional anti-dumping duty.³⁰ However, this Regulation used CN

30 OJ (1994) L 20/5.

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heading 8542 1171 (which by then had already been replaced). The Commission subsequently published a corrigendum to Regulation 165/90 taking into account the correct classification.³¹ Council Regulation 2112/90 imposing definitive anti-dumping duties and collecting definitively the provisional duty used the new correct nomenclature.³²

AC-ATEL had imported DRAMs under heading 8542 1143 after the corrigendum was published, but before the imposition of definitive duties. The importer maintained that anti-dumping duties on DRAMs falling under CN heading 8542 1143 were only imposed by the Regulation imposing definitive duties, because a corrigendum cannot amend a Commission Regulation.

The Court did not follow AC-ATEL. The scope of the legislation, according to the Court, had been clear from the beginning of the proceeding. Thus, seen in context there was no reason to consider the corrected Regulation 165/90 invalid.

Case C-35/93, Develop Dr Eisbein GmbH & Co. v. Hauptzollamt Stuttgart-West, [1994] ECR I-605

In this case, the question arose as to when an article is to be considered as imported 'unassembled or disassembled' for purposes of customs classification. Eisbein, which imported kits of photocopiers in parts for assembly in its factory in Germany, argued that these should be classified as 'parts and accessories' of photocopiers. German customs on the other hand, considered that Rule 2(a) of the General rules for the interpretation of the combined nomenclature³³ was applicable and that the imports were to be considered as disassembled or unassembled photocopiers. The difference was material because of the anti-dumping duty on photocopiers.

Eisbein relied on paragraph VI of the Explanatory Notes concerning that Rule to the nomenclature of the Customs Cooperation Council (nowadays paragraph VII of the Explanatory notes to the Harmonized Commodity Description and Coding System of 1986), which states that 'unassembled articles':

means articles the components of which are to be assembled either by means of simple fixing devices ... provided only simple assembly operations are involved.

Eisbein further noted that the Court had defined '*simple assembly operations*' in the *Brother* case³⁴ as operations which do not require staff with special qualifications or specially equipped factories for the purposes of the assembly.

The Court did not accept Eisbein's contention. It stated that the interests of legal certainty demand that, in principle, criteria for the classification of goods should be based on objective characteristics of the product. Consequently, the manufacturing process is only decisive when the tariff heading description explicitly refers to it. The Court further stated that paragraph VI does not have legal force and is merely an instrument for the interpretation of the nomenclature. The Court therefore did not even touch upon the definition of 'simple assembly operations' and the relevance of the *Brother* case.

31 OJ (1994) L 38/44.

32 OJ (1994) L 193/1.

33 OJ (1993) L 241/11.

34 C-26/88, *Brother International v. Hauptzollamt Giessen*, [1989] ECR 4253. Note that the *Brother* case concerned rules of origin, not classification.

Case C-6/94, Descom Scales Manufacturing Co. Ltd. v. Council (Order of the President of the Court), [1994] ECR I-867

The Council imposed definitive anti-dumping duties on electronic weighing scales from Singapore and Korea in 1993 (Regulation 2887/93).³⁵ Descom sought the annulment of the anti-dumping duties and requested at the same time suspension of the operation of Regulation 2887/93.

The President of the Court refused Descom's request. The President recalls that three cumulative conditions must be fulfilled for a suspension: circumstances must exist which give rise to urgency; the pleas of fact and law relied upon must establish a *prima facie* case for such a measure; and finally, the balance of all the interests concerned should be in favour of granting them.

According to the President of the Court, the burden of proof lay on Descom to show that it would indeed suffer irreparable damage beyond the normal effects of the anti-dumping duty. Further, the damage alleged by Descom was not specific to that company, and partly caused by other market circumstances. Hence the request for a Court Order was rejected.

35 Council Regulation (EEC) No. 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea, OJ (1994) L 263/1.

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8. Appendix: Anti-Dumping Decisions and Regulations

Table Anti-Dumping: January 1994 – June 1994							
Product	Exporting Country	Initiation	Initiation of Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Flat-rolled products of iron or non-alloy steel (cold-rolled)	former Yugoslavia						OJ C 7/3 (impending expiry); OJ C 178/20 (expiry)
Unwrought magnesium	Kazakhstan, Russia and Ukraine	OJ C 11/4					
Cotton fabrics	China, India, Indonesia, Pakistan and Turkey	OJ C 17/3					
Synthetic staple fibre fabric	India, Indonesia, Pakistan and Thailand	OJ C 17/4					
Bed linen	India, Pakistan, Thailand and Turkey	OJ C 21/8					
Hematite pig-iron	Brazil, Poland, Russia and Ukraine			OJ L 12/5			
Isobutanol	Russia			OJ L 24/1 (extension)			
Bicycles	Indonesia, Malaysia and Thailand	OJ C 35/3					
Tube or pipe fittings	China, Croatia, Slovakia, Taiwan and Thailand	OJ C 35/4					

Table Anti-Dumping: January 1994 – June 1994							
Product	Exporting Country	Initiation	Initiation of Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Ethanolamine	USA				OJ L 28/40		
Copper sulphate	Bulgaria and former Soviet Union						OJ C 37/4 (expiry)
Paracetamol	China						OJ C 39/4 (expiry)
Gum rosin	China						OJ L 41/50 (termination)
Urea	former Czechoslovakia and former USSR		OJ C 47/3 (sunset review)				
VCRs	Korea and Japan						OJ C 48/12 (impending expiry)
LAECs	Korea and Taiwan			OJ L 48/10	OJ L 152/1		
Urea	USA, Austria, Hungary, Kuwait and Malaysia						OJ C 54/9 (expiry)
Urea	Romania and former Yugoslavia (Croatia)		OJ C 54/9 (intention to review)				
Gas-fuelled, non-refillable pocket flint lighters	Japan, China, Korea and Thailand				OJ L 54/1 (amendment)		
Synthetic hand-knitting yarn	Turkey						OJ L 55/58 (termination)

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Table Anti-Dumping: January 1994 - June 1994							
Product	Exporting Country	Initiation	Initiation of Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Peroxodisulphates	China	OJ C 64/4					
Active powdered carbon	China	OJ C 64/5					
Polyester yarns	Indonesia				OJ L 59/19, 21, 23, 25, and 27 (refund)		
Fluorspar	China				OJ L 62/1		
3.5" microdisks	Hong Kong and Korea			OJ L 68/5; OJ L 146/1 (extension)			
Polyester yarns	Indonesia		OJ C 74/3				
Electronic weighing scales	Japan		OJ 74/4 (anti-absorption review)				
Ferro-silicon	South Africa and China				OJ L 77/48		
Potassium chloride	Belarus, Russia and Ukraine				OJ C 80/1 (amendment)		
Aspartame	USA		OJ C 115/4				
Portland cement	Poland, Czech Republic and Slovak Republic	OJ C 117/3					
Isobutanol	Russian Federation				OJ L 87/3		
Television camera systems	Japan			OJ L 40/23 (extension)	OJ L 111/106		
Silicon carbide	Norway, China, Poland, Russia and Ukraine				OJ L 94/21	OJ L 94/32 (undertakings: China, Poland, Russia and Ukraine; termination: Norway)	

Table Anti-Dumping: January 1994 – June 1994							
Product	Exporting Country	Initiation	Initiation of Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Ball-bearings	Japan				OJ L 101/7 (amendment)		
Calcium metal	China and Russia			OJ L 104/5			
Electronic weighing scales	Singapore		OJ C 129/6 (initiation of absorption review)				
Grain-oriented electrical sheets	Russia	OJ C 138/8					
Coumarin	China	OJ C 138/9					
Hematite pig-iron	Czech Republic	OJ C 139/7					
Videotapes	Korea and Hong Kong		OJ C 142/2 (intention of review)				
Dicumyl peroxide	Japan						OJ C 121/5 (impending expiry)
Light sodium carbonate	Bulgaria, Poland, and Romania						OJ C 121/6 (expiry)
Hematite pig-iron	Brazil, Poland, Russia and Ukraine			OJ L 112/19 (extension)			
Watch movements	Malaysia and Thailand			OJ L 120/3			
Ammonium nitrate	Lithuania, Russia, Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan					OJ L 129/24 (undertakings: Lithuania and Russia; termination: Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan)	

