

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities IX: 1 July 1994 – 31 December 1994

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Introduction

This is the ninth in the series of reports on developments in the field of EU international trade law.¹ This report covers developments that occurred during the six-month period 1 July 1994 to 31 December 1994.

1. GATT/World Trade Organization

Ratification

The Uruguay Round agreements were duly ratified and entered into force on 1 January 1995 as scheduled.²

In the United States the new Republican majority in Congress was able to force through some ominous amendments to the US implementing legislation. Most important was the agreement between Senator Dole and the US administration on possible withdrawal of the US from the WTO.³ In short, the agreement foresees a WTO Dispute Settlement Review Commission consisting of five federal appellate judges. The Commission will review WTO dispute settlement reports to determine whether the panel exceeded its authority or acted outside the scope of the agreement. If there are three affirmative determinations in any five-year period, any member of each House may introduce a joint resolution to disapprove US participation in the WTO – and if the resolution is enacted by Congress and signed by the President, the United States would commence withdrawal from the WTO Agreement.

* Akin, Gump, Strauss, Hauer, Feld & Dasse, Brussels.

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. The seventh report was published in 5 *EJIL* (1994) 285-311, and the eighth in 5 *EJIL* (1994) 572-599.

2 OJ (1994) L 336.

3 Text in 11 *ITR* (1994) at 1865.

In the EU, the Court of Justice had to pronounce on the division of responsibilities between the EC and the Member States. The Court's Opinion 1/94 was issued on 15 November 1994. The Court's view that all trade in goods is an exclusive EC competence is not surprising. The contentious issues were rather the trade in services (covered by the GATS) and trade-related aspects of intellectual property (TRIPS).

As far as services are concerned, the Court recognized that services whereby neither the deliverer nor the recipient of the service displaces himself, can be equated to trade in goods and therefore fall under the exclusive competence of the Community. Other services, however, do not fall under the scope of Article 113 of the EC Treaty and consequently GATS is a mixed agreement to be ratified by the EC Member States as well.

The Court arrived at a similar conclusion for intellectual property rights. Thus TRIPS is also a mixed agreement.

The Court's Opinion will have many practical implications. The Institutions are currently working on a code of conduct which must regulate the participation of the Member States in WTO activities. A problem which was noted by the Court may arise in the context of WTO dispute settlement: the EC may have to cross-retaliate in a dispute in which only one Member State was involved, and *vice versa*.

On 22 December the Council of Ministers formally adopted the various measures required for final EU approval of the results of the Uruguay Round negotiations. Alongside the ratification of the Uruguay Round agreements, the Council also adopted the Uruguay Round implementing legislation, which is discussed *infra* in sections 3 and 4.

Implementation

The new organization had quite a rough start: it took rather a long time for the WTO Members to agree to a compromise on the composition of a number of WTO bodies. Only on 21 March 1995 was the deadlock on the person of the Director-General broken when the US backed EU candidate Ruggiero. Mr Ruggiero was confirmed by the WTO Council two days later.

New Trade Issues

Two topics acquired special interest in 1994. First, many politicians in the United States and in some EC Member States consider the relation between social standards and trade to become a major topic for debate within the WTO. Second, the relation between environment and trade has acquired prominence and is also expected to dominate much of the discussion within the WTO in the coming years.

2. Accession and EEA

Austria, Finland and Sweden decided to join the EU as of 1 January 1995, whereas Norway for the second time by referendum declined membership. As a result, only Norway and Iceland – apart from the EU – remain as members of the EEA. At present there are no concrete plans to adapt the EEA to this new situation.

Of course, the accession had some consequences for the external commercial relations of the Community.

First, apart from a few exceptions in the case of Finland,⁴ the new Member States adopted the Community commercial defence instruments, customs law and Common Customs Tariff in full without any transition period.⁵

Second, the institutional balance shifted slightly. As a result of the accessions, a qualified majority in the Council and in the bodies subject to it requires now 62⁶ out of 87 votes. The votes are divided as follows:

Belgium	5	France	10	Austria	4
Denmark	3	Ireland	3	Portugal	5
Germany	10	Italy	10	Finland	3
Greece	5	Luxembourg	2	Sweden	4
Spain	8	Netherlands	5	United Kingdom	10

It follows that in the case of qualified majority voting, a blocking minority constitutes 26 votes. For instance, two big Member States and two smaller ones may be sufficient to block a proposal.

Sweden and Finland are likely to be more inclined to free trade. The balance in matters concerning commercial defence thus tilted somewhat in favour of those Member States critical of the EC's use of commercial defence instruments.

3. Dumping

3.1 General Developments

A new basic anti-dumping Regulation was adopted.⁷ The new Regulation follows the text of the Uruguay Round Anti-Dumping agreement relatively closely. We discuss only the most important changes.⁸

Normal Value

Compared with the former Regulation, Article 2(1) no longer considers discounts and rebates a factor to determine the 'price actually paid or payable', but treats them as an adjustment to ensure a fair comparison. This change is not necessarily an improvement; if it implies that discounts and rebates will not always be deducted, the consequence would be that prices and costs would no longer be compared at the ex-factory level.

Article 2(6) closely follows the provisions of the Agreement. There are, however, two differences. First, the Regulation inverts paragraphs (i) and (ii) of Article 2(2)(2) of the Uruguay Round Anti-Dumping Agreement. Second, the Regulation adds the words 'in the ordinary course of trade' in Article 2(6)(ii), a limitation which does not appear in Article 2(2)(2)(i) of the Agreement. Community practice suggests that the Commission may use

- 4 For Finland a transitional regime exists for the basic customs tariff for some products (Article 99 and Annex XI of the Accession Treaty).
- 5 The accession treaty can be found in OJ (1994) C 241/9, and OJ (1995) L 1.
- 6 The figure of 62 was adopted by Article 8 of the Decision of the Council of the European Union of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union. OJ (1995) L 1/1.
- 7 OJ (1994) L 349/1.
- 8 For more detail see Vermulst and Waer, 'The Post-Uruguay Round EC Anti-dumping Regulation: After a Pitstop, Back in the Race', 29 *JWT* (1995) 53.

these words to justify sales below cost and to calculate the profit margin on that of profitable sales only. If this is indeed correct, this may be contested in the WTO.

Level of Trade

The changes in the level of trade issue are probably more important. Article 2(10)(d) now provides that:

[a]n adjustment for differences in level of trade, including any differences which may arise in OEM (Original Equipment Manufacturer) sales, shall be granted where, in relation to the distribution chain in both markets, it is shown that the export price, including a constructed export price, is at a different level of trade to the normal value and the difference has affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. The amount of the adjustment shall be based on the market value of the difference.

The text of the Regulation poses a problem in the case where a foreign producer *only* sells through related distributors in his home market to end-users or dealers, and to distributors in the EC. It would seem that it will then be virtually impossible to prove the existence and amount of the level of trade difference.

A further notable point regarding the level of trade issue is Article 2(4) of the Uruguay Round Anti-Dumping Agreement, which obliges the EC authorities to

indicate to the parties in question what information is necessary to ensure a fair comparison [and not to] impose an unreasonable burden of proof on those parties.

The new Regulation did not adopt this provision. EC practice concerning the burden of proof issue has been controversial in the past, and it appears that this will not be different under the new Regulation.

Injury: Cumulation

Most notable is Article 3(4) of the Regulation. This provision, which closely follows Article 3(3) of the Uruguay Round Anti-Dumping Agreement, provides that where imports of a product from more than one country are simultaneously subject to anti-dumping *investigations*, the effects of such imports shall be cumulatively assessed only if it is determined that:

- (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) and that the volume of imports from each country is not negligible;
- (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

Procedure: De minimis Volume

Article 5(7) provides that a complaint shall be rejected where there is insufficient evidence of dumping or injury and that proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3%, or more, of Community consumption.

The Commission thus applies a market share test instead of an import test. While this seems like a positive development, it may prove more difficult to administer (reliable market share data are often more difficult to obtain without the help of the EC industry).

Anti-absorption

The former Article 13(11) was changed in three respects:

- before anti-absorption duties are imposed, the dumping margins must be re-calculated;
- changes in the normal values will be taken into account where evidence of such changes is produced by the exporter; and
- anti-dumping duties will not be treated as a cost where export prices are constructed when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.

Refunds

The refund procedure under the former Regulation was cumbersome. Partly as a result of the Uruguay Round Anti-Dumping Agreement, and partly as a result of criticisms levelled against the old procedure, the relevant provisions have been thoroughly revised.

A practical and welcome improvement is the extension of the deadline for the application for a refund to six months (formerly three months) from the date on which the amount of definitive duties to be levied was duly determined by the authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty (normally the date of customs clearance).

Second, Article 11 of the Regulation now stipulates that refunds shall normally take place within twelve months, and at most within eighteen months after the application was filed. From a practical perspective the provision that EC authorities should normally pay the authorized refund within ninety days is also welcome.

Finally, if the Commission decides to construct the export price it may not deduct the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.

Sampling

Article 17 of the Regulation gives fairly detailed rules on sampling. The Commission has the final say in the selection of parties, types of products or transactions. However, preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided such parties make themselves known and make *sufficient information* available, within three weeks of initiation, to enable a representative sample to be chosen.

Anti-circumvention

The EC's anti-circumvention clause is a modified version of the relevant provision in the Dunkel text. Under the Regulation's Article 13, anti-dumping duties imposed under the Regulation may be extended to apply to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place.

It seems that Article 13(1) will be an independent basis to apply anti-dumping duties in cases of simple circumvention. The application of this Article will then in practice largely

depend on what is understood to be 'sufficient due case or economic justification' for certain processes and works.

Article 13(2) introduces a *iuris* and *de iure* presumption of circumvention if:

[a]n assembly operation in the Community or a third country:

- (i) [...] started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and
- (ii) the parts constitute 60% or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost; and
- (iii) the remedial effects of the duty are being undermined, in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

The 70% value of parts test in the Dunkel draft was replaced by a 60% test. Further, the *ex-factory cost*⁹ of the Dunkel draft was replaced by the *manufacturing cost*. The difference between the two are the selling, general and administrative expenses incurred in the factory.

Anti-circumvention was a hotly contested issue during the Uruguay Round negotiations. For this reason the Uruguay Round Anti-Dumping Agreement does not contain any provision on it. However, the Uruguay Round Final Act contains a Decision on Anti-Dumping, which states *inter alia* that:

while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on a specific text.

For these reasons the Ministers decided 'to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution'. The Decision is an interpretive statement connected to the Uruguay Round package. It is therefore questionable whether its literal meaning allows for a right of WTO Members to take unilateral measures in this field. The EC's provision is all the more piquant, as previous EC anti-circumvention legislation has been struck down by a GATT panel.¹⁰

Suspension of Anti-dumping Measures

Article 14(4) – in short – provides that, in the Community interest, protective measures may be suspended for a period of nine months by Commission decision. The suspension may be extended for a period of maximally one year if the Council so decides, by simple majority, on a proposal from the Commission.

The Registration Procedure

The registration procedure is a new element in EC anti-dumping law. Article 14(5) provides that the Commission may, after consultation of the Anti-Dumping Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may

⁹ The Dunkel draft therefore excluded profit.

¹⁰ *Imports of Parts and Components*, 37 BISD (1991) at 132.

subsequently be applied against these imports from the date of such registration. Imports may be made subject to such registration following a request from the Community industry which contains sufficient evidence to justify such action. Imports may not be made subject to registration for a period exceeding nine months.

The registration procedure essentially allows the Community to apply duties retroactively in the following five situations: 'massive dumping', violation of or withdrawal from undertakings, newcomer review, anti-absorption involving re-examination of normal values, and circumvention.

Amendment to the Basic Anti-dumping Regulation

The Council further adopted a Regulation amending the new basic anti-dumping Regulation.¹¹ The new text makes it clear that on-going investigations are still covered by the old law instead of the new Regulation.

3.2 Administrative Determinations

Tapered roller bearings from Japan, OJ (1994) C 181/7 (initiation)

Following a complaint by the Federation of European Bearing Manufacturers' Associations the Commission initiated an anti-dumping proceeding against alleged dumping of tapered roller bearings including cone and tapered roller assemblies ('TRBs').

Furazolidone from China, OJ (1994) L 174/4 (provisional)

This case was the result of a complaint lodged by the sole Community producer Orphahell BV, a Dutch company representing the total community production of the product concerned. The basis for normal value was constructed normal value following a finding by the Commission that the surrogate Indian producer had domestically sold at a loss during the investigation period. The result was a dumping margin of 93%. As the injury margin was 70.6%, the duty was set by reference to the injury margin of 70.6%.

Monosodium glutamate from Indonesia, Korea, Taiwan, Thailand, OJ (1994) C 187/13 (initiation of review)

This review request came from the EC producer which is alleging increased dumping and increased injury.

Refined antimony trioxide from China, OJ (1994) L 176/41 (termination)

The surrogate country used was the United States. The surrogate company was Anzon Inc. of Philadelphia, which happened to be a wholly owned subsidiary of Cookson UK, one of the EC complainants. The dumping margin found was 43.2%. Nevertheless, the case was terminated on the basis of no injury. Although the Community industry had suffered from smaller production and capacity utilization, as well as declining sales, prices, market share and employment, the Commission found that the cooperating Community producers had achieved relatively high profits. The Community industry had therefore not suffered material injury.

¹¹ OJ (1995) L 41/2.

Hematite pig-iron from Brazil, Poland, Russia and Ukraine, OJ (1994) L 182/37 (definitive)

The Commission essentially confirmed its findings and imposed definitive measures accordingly. Polish producers offered an undertaking but this was rejected on grounds of equality of treatment and on the basis of the fact that the measures proposed, i.e. a variable duty, would effectively have the same effect as a minimum price undertaking.

Calcium metal from China and Russia, OJ (1994) L 184/15 (extension)

The provisional anti-dumping duty was extended for an additional period of two months.

Furfuraldehyde from China, OJ (1994) L 186/11 (provisional)

The case was initiated pursuant to a complaint lodged by Furfural Español, the only producer of furfuraldehyde in the Community. The surrogate country was Argentina. The dumping margin found by the Commission was 62.6%. The injury margin was not provided in the Regulation. However, the Regulation does contain a statement clarifying that the average CIF price of Chinese exports would have to be increased by about a half in order to allow the Community producer to sell at profitable prices. The Commission imposed a duty of ECU 352 per tonne.

DRAMs from Japan, OJ (1994) C 206/4 (notice of impending expiry)

The Commission gave notice that the anti-dumping measures imposed with respect to DRAMs from Japan are about to expire.

Cotton yarn from Brazil and Turkey, OJ (1994) L 191/3 (amendment)

This was a newcomer review requested by three Turkish companies. On the normal value side, the Commission used constructed normal value; on the export side, the Commission used the price payable to the exporters concerned for the product in question by independent imports in the EC. It would seem, although it is not clear from the Regulation, that the Turkish exporters had not actually exported yet and that therefore the Commission used contractual prices agreed upon between the exporters and the importers. Dumping margins found varied between 5.3% and 5.2%. The Regulation was amended accordingly.

Polyester yarn from Indonesia, India and Thailand, OJ (1994) C 209/2 (initiation)

This case involves polyester textured filament yarn (PTY). It followed in the footsteps of a sunset review that is going on with respect to Taiwan and Turkey. However, contrary to the sunset review, this case involves only PTY and not POY.

Polyester staple fibre from Belarus, OJ (1994) C 212/5 (initiation)

Advertising matches from Japan, OJ (1994) C 214/9 (initiation)

Potassium permanganate from the former Czechoslovakia, OJ (1994) C 227/5 (notice of impending expiry)

Urea from Romania and the former Yugoslavia, OJ (1994) C 239/3 (notice of expiry)

3.5" microdisks from Hong Kong and Korea, OJ (1994) L 236/2 (definitive)

The dumping margins found were as follows:

<i>Hong Kong:</i>	
Jackin Magnetic Company Ltd.	7.2%
Plantron (HK) Ltd.	6.6%
Technosource Industrial Ltd.	13.3%
<i>Korea:</i>	
SKC	8.1%

The Commission found that there had been a low level of cooperation on the part of the Hong Kong producers and therefore considered it necessary to impose a residual duty on Hong Kong at the relatively high level of 27.4%. The definitive duties imposed corresponded to the dumping margins found.

3.5" microdisks from Malaysia, Mexico and the USA, OJ (1994) C 246/4 (initiation)

This new proceeding followed in the footsteps of two prior proceedings aimed at Japan, Taiwan and China, and Hong Kong and Korea respectively. The product description is the same as in the previous cases.

Certain watch movements from Malaysia and Thailand, OJ (1994) L 236/1 (extension)

Ferro-silicon from Brazil, OJ (1994) L 240/28 (amendment)

This amendment followed a request by the Brazilian company Rima Electrometalurgia S.A. It may be remembered that in 1991 the Council had imposed a definitive anti-dumping duty of 12.2% on Rima. Rima had gone to the European Court of Justice, which on 7 December 1993 declared Article 13 of the relevant EC Regulation void. In 1992, however, the Commission had already initiated a review of the old Regulation which had led, in 1993, to an amended anti-dumping duty of 20.5% for Rima. Bizarrely, this review was published two days after the Judgment of the Court. Rima then requested that this amended duty be repealed pursuant to Article 176 of the EC Treaty, which requires an institution whose act has been declared void by the Court to take the necessary measures to comply with the Judgment of the Court. The Commission examined the implications of the Judgment for the presently applicable duty and established that the situation of Rima had not changed in any relevant manner from that prevailing at the time of the first reviews and which led the Court to declare that the duty on Rima should be annulled. As a consequence of the annulment of the duty, Rima was not subject to any anti-dumping duty at the time the review was opened.

The Council was of the opinion that under these circumstances, Rima should not be subject to any duty higher than the one imposed before the first review as, given that it did not export to the Community during the investigation period for the second review, it had no reason to believe that circumstances concerning Rima had changed during the second review. The anti-dumping duty of 20.5% imposed on Rima was therefore repealed with effect from the date that the Regulation entered into force.

Video tapes in cassettes from Hong Kong and Korea, OJ (1994) C 260/10 (initiation of review)

The case concerns the initiation of a sunset review.

Colour television receivers (CTVs) from Malaysia, China, Korea, Singapore and Thailand, OJ (1994) L 255/50 (provisional)

This was one of the biggest cases in the history of EC anti-dumping law, with more than twenty-nine foreign producers cooperating in the proceeding. The Commission found that all CTVs constituted one like product. This finding was somewhat inconsistent with an earlier case in which the Commission had decided that small screen televisions, i.e. televisions with a diagonal screen size of more than 15.5 cm but not greater than 42 cm had constituted a separate like product. A second important difference with the previous proceeding against small screen colour televisions (SCTVs) from Korea, China and Hong Kong was that this time, the Commission, in all cases, based normal values on constructed normal value. The reason given by the Commission was that there were differences in broadcasting standards involved. Of course, such differences had also existed in the original proceeding but in that proceeding, were considered an insufficient reason not to use domestic prices.

Origin

A very important aspect of the proceeding was the importance that was attached by the Commission to the origin issue. It had been known from the outset of the investigation that CTVs frequently incorporate components and parts originating in countries other than the country of manufacture or assembly of the finished product, with the result that CTVs may be considered as originating in a country other than the country of manufacture or assembly. The Commission had therefore initiated the proceeding in respect of products exported from or originating in the countries concerned and the notice of initiation had stated that the question of origin of the CTVs was to be addressed in the course of the investigation. In particular, import figures concerning Japan and Hong Kong, adjusted to reflect the origin established during the investigation, were considered a determining factor to decide the definitive status of those two countries within the framework of the proceeding. In the questionnaires addressed to foreign producers and exporters, the Commission had devoted a special section to the determination of origin. The information provided in these sections by the exporters and producers was used to determine the origin of the CTVs, in accordance with the product specific origin rule on radio and television receivers.

The Commission stressed that the findings in the CTV case were established only for the purpose of the present anti-dumping investigation and more particularly, for the purposes of determining the appropriate normal values and establishing the sources of injury. The findings were restricted to the investigation period and might well be different from the origin of the CTVs concerned before or after the investigation period. The Commission made the following determinations regarding the origin of the CTVs concerned:

1. All CTVs exported from Korea had Korean origin.
2. The vast majority of CTV exports from Malaysia and Singapore originated in these countries. However, a small number of the CTVs exported in Malaysia originated in Japan, or in a country included neither in the complaint nor in the proceeding. A small number of the CTVs exported from Singapore actually originated in Korea and Taiwan.
3. The majority of CTVs exported from Thailand originated in Thailand whilst some originated either in Malaysia, Korea and Japan or in a country included neither in the complaint nor in the proceeding. Due to the limited information provided by one of the Thai producers, the origin of this company's exports to the Community was based on that declared to the Community customs authorities.
4. In Turkey, of five cooperating companies only one was found to be exporting CTVs of Turkish origin. Virtually the total output of three companies was found to originate in

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Korea, whilst the fifth company's output did not originate in any of the countries included in the complaint or in the proceeding.

On the basis of these findings, re-distribution of quantities exported to the Community was then made among exporting countries. Exports of non-cooperative producers were assumed to have the origin of the country from which they had been exported. The findings on origin also formed the basis for normal values, export prices and injury calculation purposes. Thus, for example, a TV produced in Thailand but with Japanese origin would be excluded from the calculation. On the other hand, a television produced in Singapore, for example, with Korean origin, would be included in the Korean calculations. In practice, the origin of televisions depends often on the origin of the colour picture tube.

Finally, with respect to China, the Commission faced a high level of deficient information and therefore, as the best information available, used the working assumption that the origin declared to the Community customs authorities was correct.

It may be noted that this approach was completely different from the approach used previously in SCTVs where the Commission had essentially completely ignored *origin* for the purpose of calculating dumping and assessing injury.

Dumping

In the questionnaires, the Commission had given all interested parties the possibility to provide data with respect to the top 60% best selling sales by volume. Where interested parties had done so, the Commission accepted the 60%. However, where interested parties had provided information on all sales, the Commission used all sales for dumping margin calculation purposes. As was already discussed above, the Commission generally used constructed normal values because of worldwide differences in broadcasting and reception systems. Furthermore, there were many different models. Requests that the Commission use export prices to third countries were rejected. The dumping margins found by the Commission were as follows:

<i>Malaysia:</i>	
Makonka	12.4%
Orion	18.2%
Technol Silver	33.5%
<i>CTVs assembled in Thailand of Malaysian origin:</i>	
GoldStar Mitr	25.0%
World Electric	17.3%
<i>Thailand:</i>	
Samsung	29.7%
Teletex	33.6%
Thomson	14.7%
<i>Singapore:</i>	
Hitachi	16.3%
Funai	0%
Philips	24.6%
Sanyo	21.2%
Thomson	12.2%
<i>Korea:</i>	
Daewoo	18.8%
GoldStar	16.8%
Samsung	18.0%

CTVs assembled in Turkey of Korean origin:

Profilo	0%
Bekoteknik	7.7%
<i>China:</i>	28.8%

With respect to injury margin calculations, the Commission stated that if it used the price undercutting method the percentage increases would be as follows: for Korea, up to 54%; for Malaysia, up to 23.4%; for Thailand, up to 29.89%; for Singapore, up to 23.68%; for China, up to 62.14%. In most cases therefore, the dumping margins were lower than the injury margins. The provisional duties finally imposed were as follows:

Korea:

Daewoo	18.8%
GoldStar	16.8%
Samsung	18.0%
Profilo (CTVs assembled in Turkey)	0
Bekoteknik (CTVs assembled in Turkey)	7.7%
Residual duty	18.8%

Malaysia:

Makonka	12.4%
Orion	12.7%
Technol Silver	7.5%
GoldStar Mitr (CTVs assembled in Thailand)	23.4%
World Electric (CTVs assembled in Thailand)	13.5%
Residual duty	23.4%

Singapore:

Thomson	3.7%
Sanyo	13.1%
Philips	4.8%
Hitachi	0
Funai	0
Residual duty	23.6%

Thailand:

Teletech	29.8%
Thomson	3.1%
Samsung	14.3%
Residual duty	29.8%

<i>China:</i>	28.8%
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Welded tubes of iron or non-alloy steel from Serbia and Montenegro, OJ (1994) C 283/3 (notice of impending expiry)

Outer rings of tapered roller bearings from Japan, OJ (1994) C 292/5 (initiation of a review)

This is a regular Article 14 review. The request is based on allegations on increased dumping and increased injury.

Dicumyl Peroxide from Japan, OJ (1994) C 292/6 (expiry)

Artificial Corundum from China, the Russian Federation, Ukraine, OJ (1994) L 270/24 (amendment)

The Commission had in 1994 imposed a provisional duty on the Chinese producers because it had had reason to believe that the undertakings given by the exporters had been violated. The rate of duty was set at 30.8%. Following the imposition of provisional anti-dumping duties, an offer by the Chinese exporters to give a new undertaking was rejected because of the violation of the previous undertaking. The case is interesting because the Commission explained, in some detail, why it generally would not accept an undertaking by a company found to have violated a prior undertaking. The reasons given by the Commission were as follows:

[o]nce an undertaking has been violated, whether in terms of procedure or substance, or, as in this case, both, there is normally no valid reason for the Commission to maintain or renew the undertaking. By not complying with the terms of the undertaking, exporters know and accept in advance the consequences that may flow therefrom. In this case, it was established that all six Chinese exporters violated the terms of the undertaking in one way or another. In addition, it was established that the CCC, which has acted as cosignatory of the undertaking and has represented all of the six exporters concerned before the Commission, could not be relied upon to ensure the correct functioning of the undertaking in respect of those exporters. This undertaking has therefore proved unreliable as a whole. The Council thus considers that the imposition of a definitive duty of all six Chinese exporters is in the interest of the Community, in order to prevent injury to the Community industry from imports into the Community that are no longer effectively controlled by an undertaking.

The duty of 30.8% was therefore considered applicable to all Chinese exports.

Calcium metal from China, Russia, OJ (1994) L 270/27 (definitive)

Definitive anti-dumping duties were imposed at the rate of ECU 2,074 per tonne for China and 2,120 per tonne for imports originating in Russia.

Methenamine from Bulgaria, the former Czechoslovakia, Poland and Romania, OJ (1994) C 297/6 (notice of impending expiry)

Small-screen colour television receivers from Korea, OJ (1994) C 303/3 (notice of impending expiry)

Urea ammonium nitrate solution from Bulgaria, Poland, OJ (1994) L 280/1 (extension)

Furazolidone from China, OJ (1994) L 285/1 (definitive)

The provisional duty of 70.6% was confirmed. The Community producer had requested the imposition of retroactive duties on the grounds that importers were aware that the exporters were practising dumping and that there had been material injury caused by sporadic dumping in the form of massive imports of furazolidone in a relatively short period prior to the imposition of provisional anti-dumping duty. The Commission examined this claim but found that it was not substantiated by any evidence showing the awareness of dumping practices on the part of the importers or any indications of the existence of sporadic dumping. In these

circumstances, there were no grounds to impose retroactive anti-dumping duties. The Council therefore decided not to impose retroactive anti-dumping duties.

Furfuraldehyde from China, OJ (1994) L 298/31 (extension)

Potassium permanganate from China, OJ (1994) L 298/32 (definitive)

This was a sunset review. The surrogate country was the United States. The Commission found a dumping margin of 81.26 per kg. As the injury margin was higher, the amount of duty imposed was set by reference to the dumping margin.

It will be clear that the Commission, in accordance with standard practice, therefore updated the findings with respect to dumping and injury on the basis of the results pertaining during the investigation period.

3.5" microdisks from China, OJ (1994) L 304/38 (refund application)

This refund application was lodged by Verbatim, an importer of 3.5" microdisks produced and exported by Swire Magnetics. The applicant's claim was based on the allegation that export prices from the exporter were such that dumping either did not exist or that the rate of duty appropriate to the imports in questions was lower than the 39.4% duty imposed. The Commission exceptionally agreed to give individual treatment to Swire Magnetics. Thus, it took account of the exceptional circumstances referred to in the application, which involved past transactions between a captive supplier and sole customer. Furthermore, the exporter ceased producing and trading the product concerned in the first quarter of 1994. This meant that the main reasons for *not* granting individual treatment, i.e. the possibility of circumventing the duties by channelling exports through sources with lower rates and the risk of undermining the remedial effect of the anti-dumping measures taken, did not exist in this case. The surrogate country chosen was Taiwan. The dumping margin found was 12.4% and the Commission therefore agreed to a refund of 27% on imports released into free circulation in the Community between 24 November 1993 and 15 February 1994, imported by Verbatim.

DRAMs from Japan, OJ (1994) C 373/12 (notice of intention to carry out a review)

Photo albums from Korea, OJ (1994) C 338/2 (notice of impending expiry)

Ammonium nitrate from Lithuania and Russia, OJ (1994) C 343/9 (initiation of review)

Mixed yarns from India, OJ (1994) L 320/1 (amendment)

This was a newcomer review lodged by some thirty Indian companies. It was turned into a regular Article 14 review. In the course of the investigation, the Commission found that:

- (i) there had been a substantial increase in imports into the Community of the product concerned, (from 3,000 tonnes in the original investigation period to 11,000 tonnes in the year 1992), which could only be attributed to those producers concerned by the original investigation or other unknown companies;
- (ii) export prices on average had decreased by more than 25% since 1989;
- (iii) the Indian rupee over the same period had devalued by 70%;
- (iv) the Indian economy had been progressively liberalized leading to the removal of numerous internal barriers to trade, of taxes and of refund schemes.

The potential impact of the last two elements on the price of the like product on the domestic market (increase in price of imported raw materials and certain reductions in import taxes)

and the general development of the export price, put into question the continuing validity of the original findings regarding dumping based on the situation in 1989; the increased volume of exports cast doubt on the continuing representativity of the sample used at that time to establish normal value and export price.

In these circumstances, the Commission considered that a review of the dumping margins established for all Indian producers was warranted.

In view of the large number of exporters, it was considered appropriate to resort to sampling. Sampling took place on the criteria of volume of export and domestic sales of the like product, product-type mix both in India and the Community, size of the companies and their locations. On this basis the Commission selected five producers which covered approximately 33% of the exports from India to the Community. The relevant Indian trade association, SRTEPC, was informed of the sample selected and did not object. However, three individual producers maintained a request that individual dumping calculation be carried out for them. This request was granted by the Commission services. The Commission therefore verified eight companies. The dumping margins found by the Commission varied between 0% and 1.97%. The Commission decided that these dumping margins should be regarded as *de minimis*. In view of the *de minimis* dumping margins, the Commission decided to amend the Regulation in order to provide that the duties imposed on imports of yarn from India should cease to apply.

Ferro-silico-manganese from Russia, Ukraine, Brazil, South Africa, OJ (1994) L 330/15 (provisional)

With respect to Russia and the Ukraine, Brazil was used as a surrogate country. With respect to Brazil, normal values were calculated on a monthly basis in view of the high inflation rates. This information was used for Russian and Ukrainian producers. Dumping margins found were as follows:

<i>Russia:</i>	57.4%
<i>Ukraine:</i>	52.8%
<i>Brazil:</i>	
Group formed by Companhia Paulista de Ferro-Ligas and Sibra Electrosiderurgica Brasileira	40.6%
<i>South Africa:</i>	
Highveld Steel and Vanadium Corporation Ltd.	45.3%
Samancor Ltd.	57.8%

For injury margins, the Commission used the price underselling method and the following injury thresholds were found:

<i>Russia:</i>	82.8%
<i>Ukraine:</i>	70.7%
<i>Brazil:</i>	
Group formed by Companhia Paulista de Ferro-Ligas and Sibra Electrosiderurgica Brasileira	70.9%
<i>South Africa:</i>	
Highveld Steel and Vanadium Corporation Ltd.	57.4%
Samancor Ltd.	55.6%

The dumping duties finally imposed were as follows: 57.4% for ferro-silico-manganese originating in Russia, 52.8% for ferro-silico-manganese originating in Ukraine, 40.6% for ferro-silico-manganese originating in Brazil, 55.6% for ferro-silico-manganese originating in South Africa with the exception of that produced by Highveld Steel and Vanadium Corporation Limited to which the rate 45.3% was given.

Ammonium nitrate from Bulgaria, Poland, OJ (1994) L 350/20 (definitive); (1994) L 350/115 (undertakings)

Undertakings were accepted from the cooperative producers.

Ball-bearings from Thailand, OJ (1994) L 371/10 (refund application)

These refund applications were lodged by companies belonging to the Minebea group. In one instance, the Commission rejected a refund application because it was submitted after the three-month deadline. The normal value was constructed on the basis of Minebea Singapore's sales in Singapore. The export prices were also constructed because the importers are companies related to Minebea. The Commission deducted anti-dumping duties paid as a cost and found a dumping margin which exceeded the dumping duty. The applications were therefore rejected.

4. Other Commercial Policy Instruments

4.1 Countervailing Duties

General

A new Regulation governing countervailing duties was adopted.¹² While in the past anti-dumping and anti-subsidy proceedings were covered by the same Regulation 2423/88, the Uruguay Round Subsidies Agreement necessitated separate anti-subsidies legislation.

The main focus of the Regulation is to curb export subsidies, although many subsidies which are not primarily intended for export promotion may also fall under the scope of the Regulation.

The Regulation not only tackles subsidies given by the national government, but also subsidies given by sub-national levels of government.

Definition of Subsidy

For a subsidy to be liable to attract countervailing duties it is necessary that:

- the subsidy falls within the description given in Article 2 of the Regulation. That means that:
 - (a) there must be a financial contribution by a government in the country of origin or export, i.e. where:
 - (i) a government practice involves a direct transfer of funds or a potential direct transfer of funds or liabilities;
 - (ii) government revenue that is otherwise due, is foregone or not collected;¹³

¹² OJ (1994) L 349/22.

¹³ In this regard, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in an amount not

- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government:
 - makes payments to a funding mechanism, or
 - entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i) to (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments; *or*
- (b) there is any form of income or price support within the meaning of Article XVI of the GATT 1994;
 - and a benefit is thereby conferred.

Specificity

For the subsidy to be countervailable, it must be specific. The Regulation in Article 3(2) gives detailed rules when a subsidy is to be considered specific. In brief, this is the case when the granting authority, or the legislation involved, limits the subsidy to certain companies. If subsidies are awarded on the basis of neutral, and objectively applied criteria, they are not specific. The criteria must be clearly spelled out so as to be verifiable. If there are, notwithstanding these principles, reasons for the Commission to believe that the subsidy is specific (notwithstanding the appearance to the contrary), a factual test is to be applied. The Commission will then consider other factors such as: use of the subsidy programme by a limited number of certain companies, predominant use by certain companies, the granting of disproportionately large amounts to certain companies, etc. (Article 3(2)(c)). Further, subsidies limited to certain enterprises within a designated geographical region are specific. On this last criterion, however, a number of exceptions are made. Finally, Article 3(4) declares the following two types of subsidies specific:

- subsidies contingent, in law or in fact, upon export performance;
- subsidies contingent, in law or in fact, upon the use of domestic over imported goods.

Article 3(6) treats three types of subsidies as non-countervailable:

- (a) subsidies which are not specific within the meaning of Article 3(2) and (3);
- (b) subsidies which are specific, but which meet the conditions of Article 3(7), 3(8) and 3(9);
- (c) the element of subsidy which may exist in any of the measures listed in Annex IV to the Regulation.

The second exception relates to three types of subsidies: R&D subsidies (Article 3(7)), regional subsidies (Article 3(8)), and environmental subsidies (Article 3(9)).

Calculation of the Amount of the Subsidy

The amount of countervailable subsidies must be calculated by reference to *the benefit conferred to the recipient* (the old Regulation used the 'cost to the government' approach). The amount is calculated per unit of subsidized product imported into the Community.

in excess of those which have been accrued, is not deemed to be a subsidy, provided that such an exemption is granted in accordance with the provisions of Annexes I to III to the Regulation.

With respect to the calculation of the benefit to the recipient, Article 4(2) provides different methods for four types of subsidization:

- (a) *government provision of equity capital* shall be considered as conferring a benefit where the investment can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin and/or export;
- (b) *a government loan* shall be considered as conferring a benefit where there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain on the market. The benefit then is the difference between the two;
- (c) *a governmental loan guarantee* shall be considered as conferring a benefit where there is a difference between the amount that the firm receiving the guarantee pays on the governmentally-guaranteed loan and the amount that the firm would pay for a comparable commercial loan in the absence of the governmental guarantee. The benefit then is the difference between the two amounts, adjusted for any differences in fees;
- (d) *provision of goods or services or purchases of goods by a government* shall be considered as conferring a benefit where provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of the remuneration must be determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Procedure

Similar to anti-dumping law, the Community authorities must determine that material injury to the EC industry has been caused by the subsidies.

Anti-subsidy proceedings are initiated by a complaint on behalf of the Community industry of the product concerned. The complaint remains secret until an investigation is initiated. The Commission will, before it initiates a proceeding, attempt to reach a mutually acceptable solution with the government concerned. Some special rules govern the initiation of proceedings (we refer to Article 7 of the Regulation). The Commission must initiate the proceeding within forty-five days after receipt of the complaint.

If the Commission finds that imported products benefit from countervailable subsidies, injury to the EC industry is caused thereby, and the Community interest calls for intervention, provisional measures may be imposed. These consist of a security which is conditional for the release of the goods.

Anti-subsidy proceedings may end in different ways. The Commission may decide that it is not in the EC's interest to impose countervailing duties. Alternatively, the Commission may accept an undertaking offered by the government concerned. This is an agreement between the government and the EC in which the government concerned undertakes to cease the subsidy. Finally, definitive countervailing duties may be imposed.

Under certain circumstances, retroactive collection of duties is made possible. This possibility already existed under the old law, but was never used. Now the Regulation includes more extensive provisions on the registering of imports during the provisional phase.

Similar to anti-dumping law, it is possible to request reviews and refunds once definitive duties have been imposed.

In the past, the EC was very reluctant to use its anti-subsidy legislation because it itself is a massive provider of subsidies (especially in the agricultural sector). As a result of the

Uruguay Round package, the Community will have to reduce its subsidies and will therefore have less to fear from retaliations by other States. The EC Commissioner in charge of external commercial policy, Sir Leon Brittan, announced that the EU will increasingly use the instrument of countervailing duties.

Administrative Determinations

Ball-bearings from Thailand, OJ (1994) L 247/1 (amendment of duties); OJ (1994) L 247/29 (amendment of undertaking)

The Commission had initiated a review of the undertaking given by the Royal Thai Government. Reason for the review was the allegation that the Royal Thai Government no longer demanded that the complete production should be exported in order to qualify for the export subsidy. This raised the question whether the subsidy was still countervailable. Further, the exporters alleged that there had been a change in the rate of export tax levied by the Thai Government.

The Commission did not accept the first argument. In practice the subsidy was still contingent upon export of at least 80% of production, and the exporters concerned had not changed their market behaviour in this respect.

The Commission calculated the amount of countervailable subsidies on the basis of the new data, amended the countervailing duty for ball-bearings produced in Thailand but exported to the Community from another country, and accepted a modified version of the undertaking.

Ball-bearings from Thailand, OJ (1994) C 348/5 (initiation of review)

The Commission got *prima facie* evidence that certain import tax exemptions had ceased in Thailand. Since this influences the amount of countervailable subsidies, a review of the countervailing duty and the undertaking was initiated.

4.2 Quotas and Safeguard Measures

General

The EC adopted a new Regulation on safeguard measures.¹⁴ This Regulation covers all imports other than textiles and other than imports from state-trading countries. The Regulation replaces Regulation 518/94.

If import trends call for surveillance or safeguard measures, the Commission must initiate a proceeding by publishing a notice in the Official Journal. Interested parties may then request to be heard. The Commission must come to a conclusion within nine months after the initiation of the investigation. It may propose to either terminate the proceeding, or to impose surveillance or safeguard measures.

When products are subject to surveillance measures, an import document is necessary for their import. Safeguard measures take the form of quantitative quotas.

During the investigation, the Commission may impose provisional safeguard measures if the situation warrants this. Provisional safeguard measures take the form of an increase of customs duties.

¹⁴ OJ (1994) L 349/53.

Surveillance or safeguard measures may only be taken if the EC industry suffers *serious injury* (for safeguard measures) or a *threat of serious injury* (surveillance measures). The Regulation lists the factors which must be assessed for the injury determination (volumes and prices of imports, etc.).

Textiles

Regulation 3289/94¹⁵ amends EC legislation on quotas on textile products within the scope of the Multi-Fibre Arrangement (from 1 January 1995: the WTO Agreement on Textiles and Clothing).

At present the textile trade which is subjected to the MFA regime is regulated by EC Regulation 3030/93.¹⁶ Regulation 3289/94 amends Regulation 3030/93 by bringing all textile trade with WTO Members under its scope (in as far as this has not yet been liberalized under the WTO Textile Agreement).

Regulation 3289/94 further brings the provisions on safeguard measures in line with the WTO Agreement.

4.3 New Instrument

The Council adopted Regulation 3286/94¹⁷ containing the successor of the Commercial Policy Instrument. Regulation 3286/94 regulates the procedures within the EC to activate the World Trade Organization's dispute settlement mechanisms.

The main difference with the old Commercial Policy Instrument is the added third track. In the old Regulation, any person acting on behalf of the Community industry as well as any Member State could complain about illicit practices causing injury either in the third country concerned or in the EC. This situation has changed somewhat.

Regulation 3286/94 adds the possibility for *individual enterprises* to lodge complaints against injury caused by obstacles to trade that has an effect on the market of the *third country*. In order for the complaint to be admissible, the obstacle to trade must be the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement (in practice this will largely, albeit not totally, correspond to the WTO agreements).

Complaints on behalf of the *European industry* may be lodged concerning adverse trade effects of obstacles to trade on the market of a third country. While for such complaints concerning third countries the requirements are on the one hand more stringent (the complainant must represent the Community industry), they are, on the other hand, lighter where it concerns the effects of the alleged obstacles to trade.

Along with companies or the Community industry, Member States may also submit complaints to the Commission (however, in practice this only happens at the instigation of the industry in that Member State).

If the Commission obtains the approval from a committee of Member States' representatives, it will initiate the examination by publishing a notice in the Official Journal.

If the Community considers it necessary, the procedure may end in activation of dispute settlement mechanisms. These will normally (although not necessarily) be dispute settlement procedures under the World Trade Organization.

15 OJ (1994) L 349/85.

16 OJ (1993) L 275/1.

17 OJ (1994) L 349/71.

Council Regulation 356/95¹⁸ corrected some evident mistakes in the Regulation (the original published text stated that it entered into force on 1 January 1996 whereas this should be 1 January 1995).

4.4 Pre-shipment Inspection

Regulation 3287/94¹⁹ implements the Uruguay Round Agreement on Pre-shipment Inspection. The Regulation lays down rules for pre-shipment entities operating in the Community. Such entities control, for the account of governments of third countries, the price, quality or quantity of goods destined for these countries.

Pre-shipment entities must convey certain information on their activities to the Commission. The Regulation further sets rules for pre-shipment inspections. Pre-inspection entities must offer an opportunity for exporters to appeal decisions or to submit grievances.

Finally, the Regulation envisages the formation of panels to deal with conflicts arising out of the functioning of pre-shipment entities.

5. GSP

The Council adopted a new GSP.²⁰ While the main principles of the Commission's proposal survived, it was altered substantially in many of the details (the proposal was discussed in the eighth report in this series).²¹ We will briefly discuss the main points.

5.1 General

The new GSP will cover four years (1995-1998) instead of three as proposed by the Commission. The modulation approach with basic preferential rates was maintained, but the preferential rates were amended as follows (the category *very sensitive products* is new):

- very sensitive products (textile, clothing, ferro-alloys): 85% x MFN tariff;
- sensitive products: 70% x MFN tariff (the Commission proposed 80%);
- semi-sensitive products: 35% x MFN tariff (the Commission proposed 40%);
- non-sensitive products: 0% x MFN tariff.

As in the old GSP, duties have been totally suspended on imports from the Andes countries (Colombia, Venezuela, Ecuador, Peru and Bolivia) and the least-developed countries.

5.2 Country/Sector Graduation

The Member States reached a political compromise in November 1994 which made it possible for the Commission to maintain the country/sector graduation approach. However, the graduation provision was considerably strengthened:

18 OJ (1995) L 41/3.

19 OJ (1994) L 349/79.

20 Council OJ (1994) L 348/1.

21 Graafsma and Driessen, 'Commercial Defence Actions and Other International Trade Developments in the European Communities VIII: 1 January 1994 - 30 June 1994', 5 *EJIL* (1994) 572 at 589.

- sectors in Annex II of the proposal listed with a country also listed in Annex VII, will lose half their preferential margin from 1 April 1995, and all preferences from 1 January 1996;
- sectors in Annex II of the proposal listed with a country *not* listed in Annex VII, will lose half their preferential margin from 1 January 1997, and all preferences from 1 January 1998.

For instance, the basic preferential tariff for footwear (CN chapter 64) is 70% x MFN tariff (because footwear is listed as a sensitive product). The basic preferential margin is thus $100 - 70 = 30\%$. Now, footwear is listed on Annex II with South Korea, Brazil, Thailand, China and Indonesia. South Korea is also listed on Annex VII as a country with a GNP per capita exceeding 6,000 US dollars. Consequently, the preferential margin for footwear from Korea was halved from 1 April 1995.²² The preferential margin will thus become: $100 - (30 \div 2) = 85\%$. From 1 January 1996 the preferential margin for footwear from Korea will be zero, which means that the full MFN tariff will be applicable.

In the case of footwear from Indonesia the situation is a bit different. Footwear from Indonesia is listed on Annex II, but Indonesia is *not* listed on Annex VII. Consequently, the preferential margin will be halved from 1 January 1997, leading to a preferential tariff of 85%. From 1 January 1998, footwear from Indonesia will be subject to the full MFN tariff.

Finally, it should be noted that the Regulation states in Article 6 that the most advanced beneficiary countries shall be excluded from the GSP from 1 January 1998 on the basis of 'objective, clearly defined criteria' which will have to be proposed by the Commission in the course of 1997.

5.3 'Solidarity Mechanism'

The Commission originally proposed the exclusion of sector/countries which constituted more than 25% of all exports from beneficiary countries to the EC. While the name *solidarity mechanism* was dropped, the idea survived as Article 5(1).²³ This provision is mainly – although not exclusively – intended to deal with the large take-up of GSP benefits by China.

A new clause was inserted (Article 5(2)) which excludes from the graduation mechanism sector/countries constituting less than 2% of all imports from beneficiary countries. The new Article excludes all sector/countries listed in Annex VI of the proposal. Finally, Article 5(4) effectively excludes Korean textiles from GSP benefits.

5.4 Incentives

The Commission's proposals for the introduction of social and environmental incentives were the major victims of the compromise. The Regulation now merely obliges the Commission to submit a proposal in 1997. The incentive preferences, if adopted, would enter into effect from 1 January 1998.

22 Somewhat superfluously, a notice to this extent was published in the Official Journal (OJ (1995) C 80/3).

23 Somewhat confusingly, the 'solidarity mechanism' is now also called 'graduation mechanism' in the Regulation.

5.5 Others

The GSP further contains a provision enabling the Community to withdraw preferences from products causing damage to the EC industry and a provision on the concurrence of anti-dumping measures and GSP benefits. Further, the EC may suspend preferences from countries which are found to commit disloyal trade practices. Articles 9 through 12 foresee an investigation procedure in the case where a beneficiary country practices one of the following:

- forced labour as defined in the Geneva Conventions of 1926 and 1956 and ILO Conventions Nos. 29 and 105;
- export of goods made by prison labour;
- manifest shortcomings in customs controls on export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money laundering;
- fraud or failure to provide administrative cooperation as required for the verification of certificates of origin Form A;
- manifest cases of unfair trading practices on the part of a beneficiary country, including discrimination against the Community and failure to comply with obligations under the Uruguay Round to meet agreed market-access objectives.

The GSP for agricultural products is laid down in a separate Regulation and is essentially a prolongation of last year's scheme.²⁴

6. Association Agreements

Several trade agreements were concluded with Central European countries. The association agreements with Romania,²⁵ Bulgaria, Slovakia²⁶ and the Czech Republic entered into force.²⁷ The Agreements foresee consultations of the Association Council where one of the parties plans to take anti-dumping or safeguard measures.

Free trade agreements between the EC and Estonia and Latvia were concluded by the EC.²⁸ These agreements will be the first step towards an association.

7. Court Cases

Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food ex parte S.P. Anastasiou (Pissouri) Ltd. and Others, [1994] ECR I-3087

Cyprus was *de facto* divided in 1974. One year later the Turkish community proclaimed the Turkish Republic of Northern Cyprus which, however, was not recognized by any State other than Turkey. The present case arose because the EC-Cyprus Association Agreement covers both the Greek and Turkish parts of the territory.

The protocol on rules of origin to the Association Agreement demands EUR.1 movement certificates to be issued by the Cypriot authorities declaring the origin of products when these

24 OJ (1994) L 348/57.

25 See also OJ (1994) L 257/31.

26 See for the Slovak Republic and the Czech Republic also OJ (1994) L 341.

27 They can be found in OJ (1994) L 357, 358, 359 and 360, respectively.

28 OJ (1994) L 373, 374 and 375, respectively.

are exported to the EC. Further, EC legislation demands phytosanitary documentation to be issued by the Cypriot authorities for agricultural produce that is exported to the EC.

Exporters in the Turkish part of Cyprus had exported citrus products to the United Kingdom accompanied with EUR.1 certificates issued from 'the part of Cyprus north of the UN Buffer Zone'. Some phytosanitary certificates had been issued by the 'Republic of Cyprus - Ministry of Agriculture'. All these documents, however, were issued by the local authorities in Northern Cyprus which, of course, were not recognized by the Southern Cypriot Government.

An action was brought by Southern Cypriot exporters who argued that the UK authorities were not entitled to accept these origin declarations since the only authority empowered to issue them was the Greek Cypriot Government. The UK High Court of Justice, Queen's Bench Division referred the matter to the Court of Justice.

The Commission had held since 1975 that origin and phytosanitary documents issued by the authorities of the Northern Cypriot community indeed satisfied the requirements of the Association Agreement as long as these documents had not been issued on behalf of the 'Turkish Republic of Northern Cyprus' or another equivalent designation.

The European Court of Justice did not follow the Commission. It observed that the system of movement certificates is founded on mutual reliance and cooperation between customs authorities. For such a system to operate it is necessary that the administrative procedures are fully complied with. That, however, is not possible in the case of Northern Cyprus, since the Community does not recognize the authorities in that part of the island. The Court came *mutatis mutandis* to the same conclusion where it concerns phytosanitary certificates. Consequently, it is no longer possible for Northern Cypriots to issue their own origin certificates for exports to the EC.

Case C-75/92, Gao Yao (Hong Kong) Hua Fa Industrial v. Council, [1994] ECR I-3179

This case illustrates the problems which may occur in EC anti-dumping law when the producer and the exporter are not entirely the same company.

Gao Yao (Hong Kong), which was registered in Hong Kong, imported and re-exported the total production of Gao Yao (China), a producer of pocket lighters in the People's Republic of China. In 1990 an anti-dumping proceeding was initiated against pocket lighters from Japan, China, Korea and Thailand.²⁹ The complaint had identified among the producers Gao Yao (China). The Commission subsequently sent a questionnaire to this company. In the questionnaire response the Commission was asked to direct all correspondence to Gao Yao (China)'s 'sales office' in Hong Kong, i.e. to Gao Yao (Hong Kong).

The Commission determined a dumping margin of 17.84% for China. It noted that it had not taken sales on the Hong Kong market into account. Gao Yao (Hong Kong) argued that the Commission should have established the normal value for Gao Yao on the basis of its sales in Hong Kong.³⁰ Thus the question was raised, whether the lighters were merely transhipped through Hong Kong, or whether Gao Yao (Hong Kong) should be considered as

29 OJ (1990) C 89/3. Provisional duties were imposed in 1991 (OJ (1991) L 133/20); definitive duties in the same year (OJ (1991) L 326/1).

30 Article 2(6) of the old basic anti-dumping Regulation (2423/88) reads that: 'Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia*, where the product is merely transhipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export'.

an exporter with production facilities located in China. In the first case, Article 2(6) of Regulation 2423/88 would not be relevant and the Commission's practice would be correct; in the latter case, Article 2(6) would be applicable, which (in this case) would lead to a rather different dumping margin.

The whole case, however, was ruled on the issue of admissibility. Advocate General Lenz argued that – while Gao Yao (Hong Kong) was nowhere mentioned in the Regulation imposing definitive anti-dumping duties – that company formed an economic entity together with Gao Yao (China).

The Court did not follow its Advocate General. It first recalled its jurisprudence that companies which are individually affected by a Regulation imposing anti-dumping duties may challenge it before the Court. For a producer or exporter to be individually affected it is necessary that the company is 1) identified in the anti-dumping Regulation concerned, or 2) that it is concerned by the preliminary measures, or 3) that the company is an importer whose resale prices for the goods in question are used for determining the export price. The Court concluded simply that Gao Yao (Hong Kong) fell in none of these categories. The company's application was thus not admissible.

Case C-340/93, Klaus Thierschmidt GmbH v. Hauptzollamt Essen, [1994] ECR I-3917

In many respects this case was similar to the *Ospig II* case which also involved textile quotas and Taiwan, and which was discussed in the eighth edition of this report.³¹ There was, however, one principal difference: in the case of *Ospig*, the Taiwanese exporter had had to buy export quota from a third party, for which *Ospig* was charged, whereas in the case of *Thierschmidt* a charge was made on the invoice by the exporter for his own quota. The question asked of the Court, however, was similar: should the quota charge be counted as part of the customs value? In *Ospig I*³² the Court had decided that charges for quota purchased from third parties are not part of the customs value.

It could be argued that the situation should be the same in the case where an exporter charges for part of his own quota: textile exporters prefer to have equal treatment of textile for which quota must be purchased from third parties, and textile for which they possess quota themselves.

However, the Court did not follow this line of reasoning: while the purchase of third party quotas entails charges (costs) for the exporter, this is not the case with own quotas. Consequently, the only effect of not including own quota charges in the customs value would be the artificial understatement of the latter. The Court further found that quota charges not included in the customs value do not need to be indicated separately in the declaration of customs value. Finally, the Court decided that its Ruling is valid not just for imports from Taiwan, but generally from countries on whose textile exports the EC has imposed quotas.

Case C-430/92, Netherlands v. Commission, ECR [1994] I-5216

The Community adopted in 1991 a new scheme for the association of overseas countries and territories (OCTs) with the EC (OCT Decision).³³ Article 101 of the OCT Decision abolishes EC tariffs for products originating in OCTs. Annex II of the OCT Decision lays down the rules for determining when a product is originating in an OCT.

31 Graafsma and Driessen, *supra* note 21, at 592.

32 Case 7/83, *Ospig v. Hauptzollamt Bremen-Ost*, [1984] ECR 609.

33 Council Decision of 25 July 1991 on the association of overseas countries and territories with the European Community, OJ (1991) L 263/1.

Sometimes it may be difficult for an industry in an OCT to fulfil the origin rules of Annex II, especially when the product concerned is technical. In order to make it not too difficult for OCTs to export to the EC under the OCT Decision, that Decision therefore contains a derogation clause (Article 30): 'Derogations may be requested where the development of existing industries or the creation of new industries justifies them'. Further, the derogation should not cause serious injury to the EC industry. Article 30 lays down the procedure: the Member State or the OCT must send the application to the Chairman of the Origin Committee (a regulatory committee established under Regulation 802/68; see now Article 247 of the Common Customs Code).³⁴ The request must contain, *inter alia*, the form depicted in Annex 9 to Annex II of the OCT Decision.

A salient detail in this procedure is the deadline laid down in Article 30(8) of the OCT Decision: if the Commission has not taken a decision on the request within sixty working days after the Chairman of the Origin Committee received the request, the request shall be considered as accepted. It was this provision which caused the dispute.

The Dutch Government had requested a derogation for the production of video tapes in the Dutch Antilles. Its request had included the Annex 9 form. This was received on 1 June 1992. Four days later the Commission sent a note to the Origin Committee expressing its reservations and drawing attention to the fact that the sixty-day period had started on 1 June 1992. However, on 31 July of the same year the Commission wrote to the Dutch Government requesting more information and stating that the sixty-day period would only start to count from the point in time when this information was received. On 7 October the Dutch representative in the Origin Committee stated that the sixty-day period had passed and that the request was therefore deemed to be accepted. The Commission subsequently refused the request and it is this decision which the Dutch Government sought to annul.

And with success. The Court distinguished formal and substantive requirements of a request for a derogation. While the Annex 9 form is a formal requirement, this does not preclude the Commission from seeking further information. However, such a request for further information cannot suspend or delay the sixty-day deadline. The Court notes that the Commission, if it does not possess enough information, may take a decision on the basis of the information which it has. The Court found further support for its view in the wording of Article 30(1) of the OCT Decision, which states that the Community 'shall respond positively to all requests which are duly justified'. The Court concluded that the provisions 'regarding the definition of "originating products" are therefore to be interpreted in the light of that fundamentally favourable approach of the Community towards the OCT and to requests which are not liable to cause serious injury to an economic sector in the Community'. The Commission decision was therefore annulled.

C-401/93, GoldStar v. Hauptzollamt Ludwigshafen, not yet published

In 1988 the Commission issued Regulation 2275/88 classifying certain semi-finished video recorders (mecadecks) under Combined Nomenclature heading 8521 1039 ('magnetic video recorders: other').³⁵ As a consequence of an opinion of the Customs Cooperation Council, however, the Commission adopted Regulation 3085/91,³⁶ after which mecadecks were classified under CN heading 8522 90 ('Parts and accessories of headings 8519 to 8521: other').

GoldStar had imported mecadecks from 1988. When the Commission classified these products under CN heading 8521 1039, they started to attract a customs duty of 14% (instead

34 OJ (1992) L 302.

35 OJ (1988) L 200/10.

36 OJ (1991) L 291/12.

of the 5.8% for parts of video recorders). When the Commission issued Regulation 3085/91, the 5.8% became again applicable. GoldStar subsequently claimed a reimbursement for the customs duties which, in its opinion, had been overpaid between the entry into force of Regulation 2275/88 in 1988 and Regulation 3085/91. This was refused by German customs. In the court proceeding that ensued, the German court asked for a preliminary ruling, *inter alia*, on the question whether Regulation 2275/88 was valid in so far as it classified mecadecks as video recorders.

The Court – not following Advocate General Jacobs – considered that the Commission had committed a manifest error of appraisal when it had classified mecadecks as video recorders. The Court's arguments are twofold: first, the description of CN heading 8521 refers to 'apparatus' whereas Regulation 2275/88 refers to a 'mechanical assembly for a video recording or reproducing apparatus'. The Court observes that – next to the mecadeck – a video recorder also contains essential electronic parts. Further, the Court draws attention to the fact that the mecadeck represents only 30–40% of the value of the finished apparatus. Thus, in view of the distinction in the Combined Nomenclature between the classification of parts of video recorders and finished apparatus, the Commission made a manifest error of appraisal in 1988.

Opinion 1/94 (Competence to conclude the WTO Treaty and its Annexes), not yet published

We refer to the discussion of the Opinion of the Court in Section I.

8. Appendix: Anti-Dumping Decisions and Regulations

Table Anti-Dumping: July 1994 – December 1994							
Product	Exporting Country	Initiation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Tapered roller bearings	Japan	C 181/7					
Furazolidone	China			L 174/4	L 285/1		
Monosodium glutamate	Indonesia, Korea, Taiwan, Thailand		C 187/13				
Refined antimony trioxide	China						L 176/41
Hematite pig-iron	Brazil, Poland, Russia, Ukraine	L 182/37					
Calcium metal	China, Russia			L 184/15 ³⁷	L 270/27		
Furfuraldehyde	China			L 186/11 L 298/31 ³⁷			
DRAMs	Japan		C 373/12 ³⁸				C 206/4 ³⁹
Cotton yarn	Brazil, Turkey				L 191/3 ⁴⁰		
Polyester yarn	Indonesia, India, Thailand	C 209/2					
Polyester staple fibre	Belarus	C 212/5					
Advertising matches	Japan	C 214/9					
Potassium permanganate	former Czechoslovakia						C 227/5 ³⁹

37 Extension of provisional duties.

38 Intention to review.

39 Notice of impending expiry.

40 Amendment of definitive duties.

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Table Anti-Dumping: July 1994 – December 1994

Product	Exporting Country	Initiation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Urea	Romania, former Yugoslavia						C 239/3
3.5" microdisks	Hong Kong, Korea				L 236/2		
3.5" microdisks	Malaysia, Mexico, USA	C 246/4					
Watch movements	Malaysia, Thailand			L 236/1 ³⁷			
Ferro-silicon	Brazil				L 240/28 ⁴⁰		
Video tapes	Hong Kong, Korea		C 260/10				
Colour televisions	Malaysia, China, Korea, Singapore, Thailand			L 255/50			
Welded tubes of iron or non-alloy steel	Serbia and Montenegro						C 283/3 ³⁹
Outer rings of TRBs	Japan		C 292/5				
Dicumyl peroxide	Japan						C 292/6
Artificial corundum	China, Russia, Ukraine				L 270/24 ⁴⁰		
Methenamine	Bulgaria, former Czechoslovakia, Poland, Romania						C 297/6 ³⁹
Small-screen colour televisions	Korea						C 303/3 ³⁹

Table Anti-Dumping: July 1994 – December 1994

Product	Exporting Country	Initiation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination Expiry
Urea ammonium nitrate solution	Bulgaria, Poland			L 280/1 ³⁷			
Potassium permanganate	China				L 298/32		
3.5" microdisks	China				L 304/38 ⁴¹		
Photo albums	Korea						C 338/2 ³⁹
Ammonium nitrate	Lithuania, Russia		C 343/9				
Mixed yarns	India				L 320/1 ⁴⁰		
Ferro-silico-manganese	Russia, Ukraine, Brazil, South Africa			L 330/15			
Ammonium nitrate	Bulgaria, Poland				L 350/20	L 350/115	
Ball bearings	Thailand				L 371/10 ⁴¹		