

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities No. XI: 1 January 1996 - 30 June 1996

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Introduction

This is the eleventh in the series of reports on developments in the field of EC international trade law.¹ This report covers developments that occurred during the six months period from 1 January to 30 June 1996.

I. World Trade Organization and OECD

The World Trade Organization entered its second year. Implementation of the new WTO rules generally has gone reasonably well. The renewed elaborate dispute settlement procedures appear to fulfil their task. The results of a number of important multilateral trade negotiations in the past months contrasts sharply with this success. The negotiations on financial services, maritime transport, telecommunications, and shipbuilding have been failures or at best mixed successes.

A. Maritime Transport

The WTO negotiations on maritime services failed to be completed as scheduled on 1 July 1996. This is largely attributed to the attitude of the US. The WTO Members

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1 The first report was published in 1/2 *EJIL* (1990) 337-364, the second in 1 *EJIL* (1991) 166-199. The third report was published in 2 *EJIL* (1991) 146-176, the fourth report in 3 *EJIL* (1992) 372-421, the fifth in 4 *EJIL* (1993) 283-304 and the sixth in 4 *EJIL* (1993) 588-606. The seventh report was published in 5 *EJIL* (1994) 285-311, the eighth in 5 *EJIL* (1994) 572-599, the ninth in 6 *EJIL* (1995) 287-316 and the tenth in 7 *EJIL* (1996) 300-351.

committed themselves not to take measures with a restrictive effect on maritime services prior to the resumption of the negotiations. This standstill commitment, however, is merely a political principle without legally binding force.

B. Negotiations on Telecommunications

The negotiations for a global agreement on the liberalisation of the telecommunications sector were extended to 15 February 1997 because the United States concluded that no 'critical mass' of offers for liberalisation had been attained. The US considered that especially the most developed developing countries should submit better offers to liberalise their markets before it is prepared to commit itself to market access.

The European Community disagreed with the US. The new deadline will enable the parties to reach an agreement after the presidential elections in the United States have taken place. In the meantime, the offers that are on the table remain 'frozen'.

C. Shipbuilding

The United States decided to delay its ratification of the OECD Agreement on Shipbuilding. Amendments have been tabled within the US Congress on the draft law implementing the Agreement, which would extend guarantees to the US shipbuilding industry through 1999. This, however, is incompatible with the text of the Agreement.

As a result of the Americans' refusal to ratify the Agreement as it stands, the Community prolonged its subsidies programme for the EC shipbuilding industry.

D. OECD Multilateral Agreement on Investment

Contrary to the negotiations listed above, the negotiations within the OECD framework for the Multilateral Investment Agreement (MAI) are progressing satisfactorily. The talks are aimed at setting standards as high as possible. The MAI will be open to non-OECD Members. It may prove to be the nucleus for a WTO agreement to be negotiated in the future.

There are three main issues involved in the negotiations: national treatment, investment protection, and dispute settlement. As far as the latter is concerned, the agreement will probably contain binding arbitration clauses for dispute settlement between governments.

One aspect of the agreement still to be worked out is its relation with WTO rules. Negotiators hope to reach an agreement by the time of the May 1997 OECD ministerial meeting.

E. Initiative for an Information Technology Agreement

The United States and the Community tried to obtain consensus among the members of the Quad Group (US, EC, Japan and Canada) for an agreement to abolish worldwide all customs tariffs on information technology by the year 2000. This initiative, however, has been less successful than hoped for. There are several reasons for this.

First, at the time of writing the Community continues to resist abolishing its (rather high) customs tariffs on such products without being compensated in some form or another.

Second, the Community threatened to block the initiative if the US and Japan extended their bilateral agreement on market access to the Japanese semiconductor market without taking due account of Community interests. The American and Japanese sides did in fact reach two agreements, one of them an agreement between the respective governments and one being an inter-industry understanding. In both cases the Japanese Government succeeded quite successfully in avoiding too specific commitments, and it seems therefore possible that this issue will not be an unsurmountable hurdle for the ITA initiative.

Last, many of the United States' APEC partners have been less than enthusiastic about the plan, claiming their information technology industries are at an infant stage and cannot afford to lose tariff protection.

F. New Generation Trade Issues

1. Social Standards and Trade

The new-generation trade issues remained at the centre of debate and this does not surprise, with preparations for the first WTO Ministerial Meeting (December 1996, Singapore) in full swing.

The Community favours adding some contentious issues to the WTO's agenda in Singapore. Foremost of these is the relation between international trade and minimum labour standards.² By way of preparation, the Commission prepared its own study on the subject (international organisations such as the OECD and the ILO had already done so) and stuck to its conclusion that the matter should at least be discussed in Singapore.³

Proponents of such a linkage stress that any linkage between international trade and social standards is not intended to rob lesser-developed countries of their legitimate comparative labour cost-advantages. Rather, so this argument goes, the question is rather that the labour cost in a certain country should be equitable in relation

2 The Community has already taken a first step in adopting social standards and trade linkages in its revised Generalised Scheme of Preferences.

3 Doc. COM(96)402/4 of 23 July 1996.

to its level of development. Since this is very hard to determine by reference to economic factors, champions of a social standards/trade linkage argue that the best method for determining the right level of labour cost is through free negotiations between labour forces and employers. This, however, presupposes that workers can freely negotiate, organise, and are adult. Advocates of the linkage therefore generally favour limiting the social standards concerned to the following: the right to association and to bargain collectively, the abolition of forced labour,⁴ the minimum age for employment, and maybe also the prohibition of discrimination on the basis of sex.

These views (or views leading to similar results) are heavily contested from different corners. The main thrust against even opening the debate comes from Asian countries, although similar feelings are entertained by the UK Government.

2. *Environmental Standards and Trade*

The possible linkage between environment and trade seems better accepted than the introduction of social standards. Indeed, within the WTO a Committee on Trade and Environment (CTE) is studying the issue. In February Commissioners Brittan and Bjerregaard presented a communication to Council and Parliament on the relation between environment and trade.⁵ The communication is notable for its comparatively free-trade bias. The basic message of the paper is that liberalisation of international trade and enforcement of necessary environmental standards are compatible: 'more environment' does not necessarily mean 'less trade' – quite the contrary.

It is notable, however, that the Commission, in exceptional circumstances, seems to favour extraterritorial application of trade restrictions referring to processes and production methods, even if the products themselves are not harmful to the environment:

The need to ensure that environmental protection can be enforced when there is the risk of irreparable harm to the environment of another state or the global commons, while at the same time dispelling the risk of giving leeway to possible protectionist abuses, is the most challenging task of the international community in the debate on trade and the environment. The Commission considers that there may be specific exceptional circumstances in which the rules of the multilateral trading system should not preclude the adoption of relevant trade measures against a country which is violating some fundamental legal duties under international environmental law, such as the obligation to ensure that activities within its jurisdiction do not cause damage to the environment of other States and the obligation to co-operate to conserve, protect and restore the health and integrity of the Earth's ecosystem . . . But trade measures must be based on rigorous scientific evidence, be proportional to the objectives sought and implemented in a transparent manner: they should be considered as last resort measures, once attempts to find other bilateral and multilateral solution [sic] have been exhausted.

4 Note that GATT 1947 already allowed GATT Members to adopt measures relating to the products of prison labour (Article XX(e)).

5 Doc. COM(96)54 of 27 February 1996.

II. Customs Classification: The Harmonised System

A series of amendments to the Harmonised System Convention (HS) entered into force. The Harmonised System forms the basis for the customs nomenclature of most countries in the world and is therewith the backbone of all customs laws.

As a result of the amendments, the Commission announced that a number of classification opinions have ceased to be valid.⁶

III. Accessions, Associations and Free-Trade Agreements

A. Associations with Central European Countries: The Europe Agreements

1. General Developments

On 10 June the Community finally signed the association agreement with Slovenia. It is not yet foreseen when the agreement will enter into force (it must be ratified by the EC as well as all its Member States). On the same day, the country applied for EC Membership. The Czech Republic entered such an application earlier this year.

2. Harmonised Rules of Preferential Origin

The Commission finalised a harmonised set of preferential origin rules to replace the relevant protocols to the association treaties (Europe Agreements) with Central European countries, with Switzerland and the EEA. The new protocols introduce diagonal cumulation among these countries.⁷ This means, in short, that for the determination of whether a product originates in one beneficiary, parts of that product produced in other beneficiaries are counted as originating. For instance, if televisions are produced in Hungary, Polish television parts in them will be counted as Hungarian for the determination of the origin of the television. Such determination of preferential origin determines whether a product enjoys the tariff preferences set out in the agreement concerned.

It may be expected that, as a result of the diagonal cumulation system, more products will benefit from these free-trade agreements and that trade among the beneficiary countries will be stimulated.

It is not yet known when the new harmonised protocols will enter into force.

⁶ OJ (1995) C 350/13.

⁷ Among Hungary, the Czech and Slovak Republics, Poland and the Community diagonal harmonisation already exists.

B. Associations with Mediterranean Countries

1. *New Association Agreements*

The EC concluded its association agreement with Morocco. The agreement will establish a free-trade area in twelve years time.

The European Parliament adopted the Association Agreement with Israel. Meanwhile, the interim agreement between the EC and Israel was published.⁸ It entered into force retroactively on 1 January 1996. Israel concluded with the Community two supplementary agreements mutually extending rights in the field of procurement by telecommunications operators and government procurement, respectively.⁹

Negotiations between the Community and Egypt for a free-trade agreement became deadlocked as a dispute erupted on the degree of liberalisation of trade in agricultural products. The new agreement should establish an association, but the time-schedule and exact scope have not yet been agreed upon.

The Council approved the Commission's negotiating brief for a similar association agreement with Algeria.

2. *Customs Union with Turkey*

The EC-Turkish customs union had a rough start in the first months of 1996.¹⁰ A territorial dispute between Turkey and Greece concerning some tiny islands in the Aegean Sea led the latter to threaten to block any decision relating to the customs union. This matter was resolved.¹¹

During a WTO meeting on 29 January 1996 many Asian countries strongly criticised the imposition of a textile quota by Turkey vis-à-vis them. Turkey is under an obligation to impose such a quota as a result of its customs union with the Community. The Asian textile exporters, spearheaded by Malaysia and Hong Kong, consider the quota to violate the GATT 1994 agreement.

3. *Preferential Rules of Origin*

The Community amended the protocols on preferential origin rules of the agreements with Andorra, Algeria, Jordan, Lebanon, Syria and Egypt.¹² The amendments

8 OJ (1996) L 71.

9 OJ (1996) C 162/11 and 18, respectively.

10 See Vermulst and Driessen, 'Commercial Defence Actions and Other International Trade Developments in the European Communities X: 1 January - 31 December 1995', 7 *EJIL* (1996) at 333. The Decision establishing the customs union is published in OJ (1996) L 35.

11 The Commission published a proposal for a Council Decision on voting in the Association Council (OJ (1996) C 84/14).

12 OJ (1996) C 88.

are necessary to take account of the accession of Austria, Finland and Sweden to the Community. The preferential origin rules determine when products can enjoy tariff preferences under the agreements.

C. Agreements with Former Soviet Republics

The Community made good progress in concluding partnership and cooperation agreements with the former Soviet republics. In the first half of 1996, such agreements were negotiated with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Uzbekistan.

The Interim Agreements with Kazakhstan, Moldova, Russia and Ukraine entered into force.

D. Others

The Community negotiated a bilateral framework treaty with Korea.¹³ The agreement is a 'mixed agreement', which means that, as well as the EC, also every Member State will have to ratify it. Among other things, the agreement commits Korea to liberalise its telecommunications and investment rules, as well as its financial services. The agreement does not go beyond mutual MFN treatment. There are therefore no preferences or free trade area arrangements foreseen.

The agreement between the EC and Mercosur was published.¹⁴ The Community and Mercosur have initiated talks on the liberalisation of trade between them. In the EC-Mercosur agreement signed last year, provisions for such liberalisation of trade were adopted, which must now be implemented.

Negotiations for a new cooperation with Mexico are scheduled to start this spring. It remains to be seen to what extent the agreement will liberalise trade between the EC and Mexico; the Mexican government, supported by Spain and some other Member States, is pushing for tariff preferences.

Negotiations with South Africa for a free-trade agreement with that country continue. The Community's offer is based on asymmetrical liberalisation of trade: the Community proposes to abolish tariffs on most industrial products over a period of three years, while South Africa would have six years to do the same.

The Community concluded cooperation agreements with Vietnam and Nepal.¹⁵ Both agreements are based on MFN treatment (although Vietnam and Nepal enjoy preferences under the Community's GSP). The Community further concluded an agreement on quantitative limits on textile products from Vietnam.¹⁶

13 OJ (1996) C 188/11.

14 OJ (1996) L 69. A more or less similar framework agreement with Chile was negotiated.

15 OJ (1996) L 136/28 and OJ (1996) L 137/14, respectively.

16 OJ (1996) L 322/18.

The Commission obtained a mandate to negotiate a framework trade and cooperation agreement with Australia. The agreement will be non-preferential and will cover cooperation in a wide range of areas. The parties expect that the negotiations can be wrapped up by the end of this year.

The European Commission opened negotiations with FYROM (Macedonia) with a view to negotiate a trade and cooperation agreement. The agreement will probably not establish an association between the EC and Macedonia. It is not yet sure whether it will contain tariff preferences (Macedonia is a GSP beneficiary).

IV. Developments in the Field of Anti-Dumping Law

A. General Developments

1. Legislation

The new basic anti-dumping Regulation was published on 6 March 1996.¹⁷ The Commission had proposed the new Regulation because the text of its predecessor contained many translation errors. The Regulation is expected to be amended as a result of the GATT panel report on *Audio tapes in cassettes* (see below).

The Council extended the suspension of certain anti-dumping duties on products imported into the Canary Islands.¹⁸

2. ATC Panel Report and the Level of Trade Problem

As we reported earlier, it is unlikely that the GATT panel report on *Audio tapes in cassettes* will be adopted.¹⁹ The Commission seems to be steering to a compromise solution whereby the panel report is vetoed, but the basic anti-dumping Regulation is amended to take some of the panel's main concerns into account. The proposal for the amendment concerned was published in June 1996.²⁰

The provisions of the basic Regulation to be amended concern the allowances to make the export price and normal value comparable. The proposed amendment consists of replacing Article 2(10)(d) and of adding a new Article 2(10)(j).

The proposed amendment would introduce a number of changes. First, the proposed new wording of Article 2(10)(d) of the basic anti-dumping Regulation will make it easier for exporters to prove that different levels of trade exist.

17 OJ (1996) L 56/1.

18 OJ (1996) L 51/1.

19 We refer to Vermulst and Driessen, *supra* note 10 at 304-305.

20 OJ (1996) C 159/6.

Second, in relation to the current Article 2(10)(d) a practical problem for exporters claiming a level of trade allowance has been that it is unclear how exactly to calculate the 'market value' of overhead expenses (costs). The new text is an improvement since it allows quantification of the adjustment based on differences in cost.

While it is a positive development that the new provision no longer refers to the market value as a basis for quantification, it is at the same time regrettable that the new provision does not provide any guidance on how exactly the allowance should be calculated other than that 'a special adjustment may be granted.'

The proposal also suggests adding a new Article 2(10)(j) which would provide that:

'[a]n adjustment may also be made for differences in other factors provided it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers take account of such differences on their own market by agreeing to prices which are distinct from those agreed on the same market when there are no such differences.'

This new catch-all article seems intended to address the basic criticism of the GATT panel that the limitative enumeration of the allowances in the basic anti-dumping Regulation was a GATT violation.

Although in theory this provision would seem to address the criticism of the GATT panel, it remains to be seen whether the European Commission will adopt a reasonable interpretation of this provision in practice.

3. Fourteenth Annual Report on Anti-Dumping and Anti-Subsidy Activities

The Commission issued its annual report on anti-dumping and anti-subsidy activities covering events in 1995.²¹ From the report it transpires that by the end of 1995 147 anti-dumping and anti-subsidy measures were in force, ten of which were undertakings. The report further stresses that these measures affected 0.83% of total imports into the Community.

B. Administrative Determinations

1. Dihydrostreptomycin from China, OJ (1996) C 1/4 (initiation interim review)

This interim review was initiated following an interim review request by a Dutch importer, acting on behalf of itself and one of the Chinese exporters. The request was based on the fact that the original EC producer had apparently stopped production of DHS while another EC producer allegedly manufactured another type of DHS.

21 Commission Doc. COM(96) 146 final of 8 May 1996.

2. *Microwave Ovens from China, Korea, Malaysia, Thailand, OJ (1996) L 2/1 (definitive)*

Chinese MWOs were all exported through selling organizations in Hong Kong. Export prices were therefore based on the prices charged by the Hong Kong selling companies, after deduction of direct selling expenses incurred by them. The Hong Kong selling companies were therefore treated as part of the exporting network, which is arguably the correct approach.

The Commission further rejected individual treatment requests by the two Chinese producers and computed one margin only of 12.1%.

As far as Korea was concerned, the Commission again took the position that only explicitly agreed payment terms may be taken into account, thereby implicitly refusing to accept the Korean open account system:

[a]s far as differences in selling expenses in the form of credit costs for differences in payment terms are concerned, the general approach taken at the provisional stage is confirmed. This approach allowed for the granting of an allowance for differences in payment terms if it was demonstrated by the parties concerned that these differences affect price comparability. In this context it was considered that payment terms that can affect prices paid by a customer only where the payment terms are agreed at the date of sale, *i.e.* the date of the conclusion of the sales contract or the date of the invoice at the latest. It is only in such circumstances that the cost of credit associated with the payment terms can be considered to have influenced the buyer's decision.

Dumping margins for the Korean producers were as follows:

- Daewoo	9.4%
- LG Electronics	18.8%
- Korea Nisshin	24.4%
- Samsung Korea	3.3%

For Malaysia and Thailand, the dumping margins amounted to 29% (Samsung Malaysia) and 14.1% (Acme Thailand) respectively.

As far as the definition of the domestic industry is concerned, one EC producer located in the EC after the 1 January 1995 enlargement argued that it should be included in the definition of the EC industry. The EC industry, on the other hand, argued that it should not be included because it was not part of the EC during the investigation period. The Commission ducked the issue by determining that the EC complainants in any event represented a major part of the industry.

Imports from all countries under investigation were cumulated.

As injury margins were in all cases higher than the dumping margins, the duties were based on the dumping margins.

3. *Calcium Metal from China, OJ (1996) C 2/2 (initiation interim review)*

The review was initiated by the Commission *sua sponte* because of the special competitive situation in the EC market.

4. Artificial Corundum from China, OJ (1996) C 7/5 (initiation interim review)

The review requested by CEFIC on dumping grounds was turned into a full-fledged interim review by the Commission in view of the fact that the measures had been in force already for more than four years and were therefore due to expire in less than one year.

5. Linear Tungsten Halogen Lamps from Japan, OJ (1996) C 7/8 (expiry)

6. Hematite Pig Iron from the Czech Republic, OJ (1996) L 12/5 (definitive; acceptance undertaking)

The Commission found a dumping margin of 34.3% for the Czech producer *Vitkovice*, but imposed a variable duty, based on the injury threshold. It further accepted an undertaking from the cooperating producer *Vitkovice*.

7. Monosodium Glutamate from Indonesia, Korea, Taiwan, OJ (1996) L 15/20 (definitive; termination Thailand)

The Commission found that all cooperating producers had violated the price undertakings on the basis of rather indirect and controversial evidence:

[a] number of importers supplied the requested information on resale prices and costs and this information was verified at the premises of those importers which agreed to cooperate further in the investigation. It was found that these latter importers, which had sourced the product concerned from the cooperating exporters in Korea, Indonesia and Taiwan, had all sold the product concerned on the Community market at a loss during the period investigated and, in some cases, the resale price did not even cover the purchase price. This was a regular pattern of pricing behaviour, spanning the entire investigation period, for which no convincing reason could be advanced other than the existence of compensatory arrangements. In addition, clear evidence was found during the verification visits to certain importers that the undertakings accepted from *Miwon Co. Ltd* (Korea) and *PT Indomiwon Citra Indi* (Indonesia) had been violated, i.e. that the import prices were not at the level of the price undertakings as demonstrated. In the case of the Indonesian company, the violation was evidenced by the issue of credit notes relating to sales of the product concerned and, in the case of the Korean company, on the existence of correspondence referring to prices substantially below the undertaking price.

Although this statement sounds innocuous enough, actually the key argument that the MSG was sold at a loss by the importers is based on the assumption that the importers on resale of this item not only must recover their direct costs but also all their indirect costs (SGA) which for a small item such as MSG seems debatable.

The Commission therefore decided to construct export prices and, not surprisingly, came up with substantial dumping margins, as follows:

PT Indomiwon Citra Inti, Indonesia	64.7%
Cheil Foods & Chemicals, Korea	13.3%

Miwon Co. Ltd, Korea	32.7%
Tung Hai Fermentation Ind., Taiwan	44.2%
Ve Wong Corporation, Taiwan	52.4%

Thailand was decumulated because of *de minimis* market share. With the exception of one producer, all duties were based on the lower injury margins and duties imposed were as follows:

Indonesia	0.334 ECU/kg
Korea	
– Cheil Foods & Chemicals	0.129 ECU/kg
– Miwon Co. Ltd	0.286 ECU/kg
Taiwan	0.289 ECU/kg

8. *Small-Screen Colour Televisions from Hong Kong, OJ (1996) C 19/7 (notice impending expiry)*

9. *Ferro-silico-manganese from Russia, Ukraine, Brazil, South Africa, OJ (1996) L 18/1 (amendment definitive)*

The South African company Highveld Steel and Vanadium Corporation Limited had offered an undertaking which the Commission had accepted. However, almost concurrently with the adoption of the Regulation imposing definitive duties, Highveld withdrew its undertaking.

The Council, in an unusually quick display of action, *i.e.* in little over three months, managed to issue an amendment to the Regulation subjecting Highveld to a minimum price duty of 492 ECU/tonne, and this with retroactive effect until the date of publication of the registration notice.

10. *Refractory Chamottes from China, OJ (1996) L 21/1 (definitive)*

The Council imposed a definitive variable duty.

11. *Certain Tube or Pipe Fittings, of Iron or Steel, from China, Croatia, Thailand, OJ (1996) L 23/1 (extension provisional)*

12. *Artificial Corundum from Hungary, Poland, former Czechoslovakia, Brazil, former Yugoslavia, Russian Federation, Ukraine, OJ (1996) C 24/5 (notice impending expiry)*

13. Coumarin from China, OJ (1996) L 28/1 (extension provisional)

14. Bicycles from Indonesia, Malaysia, Thailand, OJ (1996) L 32/1 (extension provisional)

15. Certain Grain Oriented Electrical Sheets from Russia, OJ (1996) L 42/7 (definitive; acceptance undertaking)

The definitive determination largely followed the provisional one. However, interestingly, the Commission accepted a joint costing method for costing first- and second-choice material:

[i]n their submission, the Russian exporters argued that in the calculation of the target price for first-quality material, the Commission should have reduced the cost of production by the extra revenue resulting from the sales of second-choice material.

It has to be observed that first and second-choice material result from the same production process with exactly the same inputs for raw materials, labour, energy and other costs. Consequently, different specific costs of production for first- and second-choice material do not exist. To credit the lower sales revenue of second-choice material to the total cost of production, as was suggested by the Russian exporters, would in fact artificially increase the cost of the remaining first-quality product. This would be so because, in following this method suggested, the cost of producing the second-choice material would logically have to be attributed to the cost of first-choice material.

Therefore, the Commission has determined the target price for first-choice material on the basis of the average cost of production (that for first- and second-choice material taken together) as applied by the Community producers in their accounting practices, plus a reasonable profit of 5% on turnover.'

This is an area where the Commission has taken inconsistent positions in the past and a more uniform approach would be helpful.

The Commission imposed a definitive duty of 40.1%, but accepted undertakings from three Russian producers.

16. Cotton Fabric from China, India, Indonesia, Pakistan, Turkey, OJ (1996) L 42/16 (termination)

The proceeding was initiated following withdrawal of the complaint by the EC complainant Eurocoton.

17. Synthetic Staple Fibre Fabric from India, Indonesia, Pakistan, Thailand, OJ (1996) L 42/18 (termination)

Again, the proceeding was initiated following withdrawal of the complaint by the EC complainant Eurocoton.

18. Unbleached Cotton Fabrics from China, Egypt, India, Indonesia, Pakistan, Turkey, OJ (1996) C 50/3 (initiation)

In a blatant move, the Commission initiated this massive proceeding against unbleached or grey cotton fabrics one day after terminating the proceeding against cotton fabrics *tout court* and moved full speed ahead with the investigation because of the new deadlines.

19. Bariumchloride from China, OJ (1996) C 62/2 (notice expiry)

20. Polyester Staple Fibre from Belarus, OJ (1996) L 54/10 (provisional)

The Commission used Taiwan as surrogate country and found a dumping margin of 43.5%. As the injury margin was even higher, a duty of 43.5% was imposed.

21. Certain Types of Electronic Microcircuits Known as DRAMs (dynamic random access memory memories) from Japan, Korea, OJ (1996) L 55/1 (extension suspension)

The suspension was extended for a one year period, *i.e.* until March 1997.

22. Polyester Fibres and Polyester Yarns from Turkey, OJ (1996) C 86/6 (notice impending expiry)

23. Urea from Venezuela, OJ (1996) C 90/2 (notice impending expiry)

24. Furazolidone from China, OJ (1996) L 77/1 (repeal definitive)

The EC complainant informed the Commission that it had decided to cease production. The Commission considered there to be no further reasons to maintain definitive anti-dumping duties because Community production of furazolidone had ceased and the sale and import of the product had been banned.

25. Certain Tube or Pipe Fittings, of Iron or Steel, from China, Croatia, Thailand, OJ (1996) L 84/1 (definitive)

The Commission found the following dumping margins:

China	58.6%
Croatia	58.6%

Thailand

- Awaji	39.5%
- Benkan	51.3%
- TTU	63.4%

The Commission accepted undertakings from the three Thai producers and from one Croatian producer and imposed residual duties as follows:

China	58.6%
Croatia	38.4%
Thailand	58.9%

26. Certain Tube or Pipe Fittings, of Iron or Steel, from China, Croatia, Thailand, OJ (1996) L 84/46 (acceptance undertakings)

27. Synthetic Fibre Ropes from India, OJ (1996) C 102/16 (initiation)

28. Coumarin from China, OJ (1996) L 86/1 (definitive)

Arguments of the provisional Regulation were by and large rehashed and a definitive duty imposed of 3,479 ECU/tonne.

29. Certain Television Camera Systems from Japan, OJ (1996) C 104/9 (review)

This is the initiation of an anti-absorption investigation involving the Japanese producers Ikegami and Sony.

30. Hematite pig-iron from Brazil, Poland, Russia, Ukraine, Czech republic, OJ (1996) C 104/11 (review)

31. Bicycles from Indonesia, Malaysia, Thailand, OJ (1996) L 91/1 (definitive)

The Commission stated explicitly in the Regulation that it had refused to provide so-called pre-disclosure. Such pre-disclosure, while not legally mandatory, is often provided as a matter of practice prior to the imposition of provisional duties, to give interested parties the opportunity to check the Commission calculations and point out clerical errors. It is submitted that this is a laudable practice, useful for all parties concerned, and there seems to be no compelling reason why requests for such disclosure must be denied.

Unfortunately, however, it seems that for bureaucratic reasons, requests are in fact increasingly denied, often leading to imposition of unjustifiably high provisional dumping margins, although this will be discovered only after the fact.

The Regulation imposing definitive duties explains the Commission's position in great detail and could serve as an example for some other cases. It also makes repeated use of the best information available rule, apparently because of lack of cooperation from interested parties. Perhaps as a result thereof, the definitive dumping margins overall are quite high:

Indonesia

- PT Inera Sena	0.4%
- PT Jawa Perdana Bicycle Industry	27.7%
- PT Wijaya Indonesia Makmur Bicycle	21.9%
- PT Federal Cycle Mustika	28.4%
- PT Toyo Asahi Bicycle Industries	28.4%

Malaysia

- Akoko Sdn Bhd	23.1%
- Berjaya Cycles Sdn Bhd	37.3%
- Greenworld Systems Sdn Bhd	27.7%
- Lerun Group Industries Berhad	37.3%
- Rolls Rally Sdn Bhd	25.3%

Thailand

- Bangkok Cycle Industrial Co. Ltd	17.7%
- Siam Cycles Mfg Co. Ltd	38.9%
- Thai Cycles Industry Co. Ltd	13%
- Victory Cycle Co. Ltd	13.3%

Definitive anti-dumping duties imposed corresponded to these dumping margins with the exception of the residual duties which were 29.1% in the case of Indonesia, 39.4% in the case of Malaysia and 39.2% in the case of Thailand.

32. Certain magnetic disks (3.5" microdisks) from Malaysia, Mexico, United States, OJ (1996) L 92/1 (definitive)

The definitive duties imposed were as follows:

Malaysia

- Mega High Tech	12.8%
- Diskcomp	26.4%
- all others	46.4%

Mexico

44%

United States

44%

The companies 3M, TDK and Verbatim were excluded from the application of the duties.

33. *Certain Types of Electronic Microcircuits known as EPROMs (erasable programmable read only memories) from Japan, OJ (1996) L 92/4 (extension suspension)*

The suspension was extended for a one year period, *i.e.* until April 1997.

34. *Luggage and Travel Goods from China, OJ (1996) C 111/4 (initiation)*

The Commission announced its intention to resort to sampling on the side of the EC industry.

35. *Briefcases and School Bags from China, OJ (1996) C 111/6 (initiation)*

The Commission announced its intention to resort to sampling on the side of the EC industry.

36. *Bicycles from China, OJ (1996) L 98/3 (initiation importing country anti-circumvention investigation)*

This is the first importing country anti-circumvention investigation initiated by the Commission.

37. *Unwrought Magnesium from Russia, Ukraine, OJ (1996) L 100/1 (extension provisional)*

38. *Video Tapes in Cassettes from China, OJ (1996) C 119/3 (notice impending expiry)*

39. *Video Cassette Recorders from Korea, Singapore and Key Components thereof from Korea, OJ (1996) L 101/19 (termination)*

The case was terminated following withdrawal of the complaint by the EC industry.

40. *Handbags from China, OJ (1996) C 132/4 (initiation)*

The Commission announced its intention to resort to sampling on the side of the EC industry.

41. *Audio Tapes in Cassettes from Japan, Korea, OJ (1996) C 132/6 (notice of expiry)*

42. Synthetic Fibres of Polyester from India, OJ (1996) C 132/6 (notice)

The Commission noted a name change of one of the interested parties.

43. Silicon Carbide from the Ukraine, OJ (1996) C 135/4 (initiation interim review)

The review request was made by a Ukrainian exporter which alleged absence of dumping.

44. Furfuryl Alcohol from China, Thailand, OJ (1996) L 112/18 (termination)

The case was terminated following the withdrawal of the complaint by the EC producer.

45. Welded Wire Mesh from the Federal Republic of Yugoslavia, Republic of Bosnia-Herzegovina, Former Yugoslav Republic of Macedonia, OJ (1996) C 136/10 (expiry)

46. Certain Electronic Weighing Scales from Japan, OJ (1996) C 149/7 (notice)

47. Polyester Textured Yarn from Indonesia, Thailand, OJ (1996) L 128/3 (provisional; termination India)

Dumping margins found were as follows:

India

- Akai Impex Ltd	42.9%
- Bahuma Polytex Ltd	0.3%
- Century Enka Ltd	23%
- DCL Polyester Ltd	3.4%
- Indo Rama Synthetics (India)	25%
- Raymond Synthetics Ltd	7.2%
- Reliance Industries Ltd	6.5%
- all others	42.9%

Indonesia

- PT Hadtex Indosyntec	10.2%
- PT Indo Rama Synthetics	4.6%
- PT Polysindo Eka Perkasa	15.5%
- PT Susilia Indah	14.7%
- PT Vastex Prima Industries	22%
- all others	22%

Thailand

- Sunflag (Thailand) Ltd	29.6%
- Tuntex (Thailand) PCL	7.9%
- Chareonsawatt Stretched Yarn	20.2%
- all others	29.6%

In conformity with standard practice, however, India was subsequently excluded because its exports represented only 0.9% of EC consumption during the investigation period. As far as Indonesia and Thailand are concerned, the duties were based on the dumping margins.

48. *Oxalic Acid from India, China, OJ (1996) C 155/5 (notice impending expiry)*

49. *Gas-fuelled, Non-refillable Pocket Flint Lighters from Japan, Korea, OJ (1996) C 155/6 (notice impending expiry)*

50. *Powdered Activated Carbon from China, OJ (1996) L 134/20 (definitive)*

The definitive dumping margin found was 69.9%. However, the duty was based on the lower injury margin of 38.6% and a specific duty of 323 ECU/tonne imposed.

51. *Polyester Staple Fibres from Belarus, OJ (1996) L 139/16 (extension provisional)*

52. *Polyester Worn from Taiwan, Turkey, OJ (1996) L 141/45 (amendment)*

This investigation covered both polyester textured yarn (PTY) and partially oriented yarn (POY), an input product for the manufacture of PTY. The Commission re-confirmed earlier findings that these were two different like products.

Three Taiwanese POY producers with respect to whom 'no dumping' findings had been established in the original investigation argued that this of necessity meant that they could not now be included in the POY *sunset review* investigation. This argument was accepted. It was further found that Taiwanese POY exports represented only 0.4% of EC consumption and only 0.1% if the exports of the three 'non-dumping' producers were excluded. The Commission therefore decided that there was no likelihood of recurrence of injury as far as Taiwanese POY exports were concerned.

The following anti-dumping duties were imposed:

POY:

Turkey

- Sasa Artificial and Synthetic Fibres Adana	3.3%
- Korteks-Mensucat Sanayi Ve Ticaret	3.3%

- Nergis-Tekstil Sanayi Ve Ticaret	3.3%
- Others	6.8%
PTY:	
Taiwan	
- Lea Lea Enterprise Co. Ltd Taipei	12.9%
- Nan-Ya Plastics Corporation Taipei	10.6%
- Shingkong Synthetic Fibres Corp. Taipei	7%
- Zig Sheng Ind. Co. Ltd	7%
- Far Eastern Textiles Ltd Taipei	6.6%
- Chung Shing Textile Co. Ltd Taipei	5.5%
- others	16.1%
Turkey	
- Sasa-Artificial and Synthetic Fibres Adana	8.7%
- Nergis-Tekstil Sanayi Ve Ticaret A.S.	8.3%
- Korteks-Mensucat Sanayi Ve Ticaret A.S.	7.6%
- others	15.2%

The Taiwanese companies Tuntex Distinct Corp., Taipei, and Hsin Pao Corp., Taipei, were excluded.

53. *Espadrilles from China, OJ (1996) C 178/2 (expiry)*

54. *Certain Asbestos Cement Pipes from Turkey, OJ (1996) C 178/2 (expiry)*

55. *Dihydrostreptomycin from China, OJ (1996) C 188/4 (notice impending expiry)*

V. Other Commercial Policy Instruments

A. Countervailing Duties

The Commission initiated an interim review of the countervailing duties and undertaking on ball bearings from Thailand but exported to the EC from another country.²² The review is caused by the expiry of certain Thai export subsidy measures.

The notice of impending expiry concerning the undertaking relating to the countervailing duties on polyester fibres and polyester yarns from Turkey was published.²³

22 OJ (1996) C 7/6.

23 OJ (1996) C 116/7.

B. Quota and Safeguard Measures

1. Textile products

The new Annexes to Regulation 3030/93 were published.²⁴ These contain the new quantitative restrictions on imports of textile products for the period 1995-1997. Annex II of the Regulation lists the exporting countries concerned. Annex IV gives the applicable quantitative limits per textile category per country. Last, Annex VII states the quota applicable for re-imports under outward processing arrangements.

In a separate development, the EC concluded textile agreements with a number of Central and Eastern European states, Thailand and China, with a view to adjust EC textile quota to the accession of Austria, Finland and Sweden to the EC.²⁵

2. Other products

The quota for Chinese car radios and gloves were replaced by surveillance procedures.²⁶ Quantitative restrictions on non-textile and non-agricultural products mainly concern certain products from China: certain footwear, tableware, kitchenware of glass, china or ceramic, and certain toys.

The Council amended EC legislation on quantitative quota.²⁷ The Commission had discovered that it was unable to timely redistribute unused parts of quota. Therefore, if it is now found that it is impossible to redistribute such quantities in time, the Commission must now decide on their possible distribution during the following quota period. In a related development, rules were adopted for the redistribution of quota which were not fully used in 1995,²⁸ with a separate notice containing implementing rules,²⁹ and a Regulation setting out the rules for the allocation to traditional and non-traditional importers.³⁰ In a related development, the Commission adapted the distribution of quota on products from China to recent increases thereof.³¹ Some other changes were technical.³²

The Council also amended the form to be used for imports of products under surveillance.³³ Under the surveillance procedure, products are registered

24 OJ (1995) L 323.

25 OJ (1996) L 81.

26 OJ (1996) L 103/1.

27 OJ (1996) 21/6.

28 OJ (1996) L 86/57.

29 OJ (1996) C 104/5.

30 OJ (1996) L 121/8.

31 OJ (1996) L 153/14.

32 The Commission changed the wording of the statement to be given by applicants for quota for certain Chinese products (OJ (1996) L 131/47). More importantly, the addresses of certain national authorities in charge of issuing import licenses changed.

33 OJ (1996) 21/7.

so that it can be decided whether it is necessary to impose safeguard measures on them.

In the steel sector, the Commission introduced surveillance measures for certain steel cables.³⁴ If imports of such cables from third countries continue to take place against low prices, the Community may decide to adopt safeguard measures.

Last, the Commission adopted renewed quantitative restrictions on garlic from China.³⁵

C. Trade Barriers Regulation

The Commission suspended a proceeding under the Trade Barriers Regulation against Thailand.³⁶ The Commission had initiated a proceeding against that country after a complaint had been submitted that sound recordings were being massively pirated in Thailand. Now that Thailand has demonstrated that it has taken serious action against the problem, no further action is necessary.

One month later the Commission adopted a strategy paper³⁷ mapping out a more assertive policy for the defence of the Community's commercial interests in third countries. Part of the new policy is the creation of databases on obstacles to trade hindering Community producers. With the help of an Action Group appointed within the Commission, the Commission will select the most effective trade instruments at its disposal to fight such trade barriers.

In a related development, the Commission is preparing WTO action against Korea, accusing that country of maintaining buy-national preferences in its telecommunications sector.

D. Injurious Shipbuilding Instrument

The injurious pricing instrument entered into force.³⁸ It applies from the date of entry into force of the OECD Agreement on Shipbuilding. However, in principle it does not apply to vessels contracted for after 21 December 1994 and for delivery more than five years from the date of contract.³⁹

34 OJ (1996) L 103/6.

35 OJ (1996) L 119/12.

36 OJ (1996) L 11/7.

37 Communication to the European Council, European Parliament and Social Committee and Committee of the Regions *The Global Challenge of International Trade: a Market Access Strategy for the European Union* of 14 February 1996.

38 OJ (1996) L 56/21. See section I.C, above, as well as Vermulst and Driessen, *supra* note 10 at 331.

39 See for the exception Article 16 of the Regulation.

E. Other Commercial Defense Laws

The Council amended the list of dual-use goods subject to export restrictions.⁴⁰ Furthermore, a corrigendum to the basic dual-use legislation was adopted.⁴¹

The Council repealed legislation making the notification of exports and imports of crude oil and gas to third countries compulsory.⁴² The legislation had already been suspended in 1981.

The Commission is studying the scrap copper market.⁴³ The Community's copper processing industry alleged that India and Korea maintain a tariff structure for copper scrap which puts the Community at a disadvantage.

VI. Generalised Scheme of Preferences

A. A New Agricultural GSP

After the thorough revision of the GSP scheme for industrial products,⁴⁴ it was the turn of the agricultural GSP to be revised.⁴⁵ The Commission issued its proposal in March 1996.⁴⁶ The representatives of the Member States agreed within three months on the contents of the new text, which was published in June.⁴⁷

It is not strange that the adoption of the agricultural scheme took less time than that of its industrial counterpart. The Commission's proposal was based on the same principles as the new industrial scheme, and the Member States agreed to this approach from early on. As a result, many of the provisions in the Regulation are copied *mutatis mutandis* from the industrial scheme. The negotiations mainly focused on the contents of the lists of Annex I to the scheme.

As with the industrial scheme, the products covered by it are divided in very sensitive, sensitive, semi-sensitive and non-sensitive products. To each category corresponds a basic preferential rate (85%, 70%, 35% x the MFN rate, and zero, respectively). A list of country/product groups will lose one-half of their tariff preferences on 1 January 1997, and all benefits from 1999 (Annex II).

40 OJ (1996) L 52/1.

41 OJ (1996) L 52/18.

42 OJ (1996) L 80/1 and 2.

43 OJ (1996) C 148/4.

44 See Vermulst and Driessen, 'Commercial Defence Actions and Other International Trade Developments in the European Communities IX: 1 July 1994-31 December 1994', 6 *EJIL* (1995) at 307 and Waer and Driessen, 'The new EU Generalised System of Preferences: a workable compromise in the EU - but a better deal for developing countries?', *JWT* 1995/4, 97-124.

45 The new agricultural scheme is discussed in detail by Driessen, 'On Very Sensitive Cauliflowers and the (P)re-cooked EU Agricultural Generalised Scheme of Preferences', *JWT* 1996/6, 169-182.

46 Doc. COM(96) 87 final of 8 March 1996, published in OJ (1996) C 163/1.

47 OJ (1996) L 160.

A difference with the industrial scheme is that there is no special sector/country graduation for the richest GSP beneficiaries (Although Article 6 of the Regulation foresees the exclusion of the richest beneficiaries from 1998).

As in the industrial scheme, there are special tariff preferences for least-developed countries and countries combatting drugs. As far as the second category is concerned, it must be noted that the list of countries concerned is considerably larger than in the industrial Regulation. Even so, some other countries such as, for instance, Thailand, had requested inclusion on that list.

B. Other Developments in the Field of GSP

On 31 October 1995 the Commission published two notices specifying explicitly which sector/country pairs in the industrial GSP were excluded per 1 January 1996 under the 'graduation mechanism'.⁴⁸ The Commission also adopted a Regulation adapting the GSP to changes in the EC's customs nomenclature.⁴⁹

In the field of GSP rules of origin, Vietnam's membership of ASEAN should be noted. Article 73 *et seq.* of Regulation 2454/93⁵⁰ provide for cumulation of GSP origin among members of ASEAN, CACM and the Andean Community, respectively. Vietnam became part of the cumulation system for ASEAN countries in the middle of 1996.⁵¹

VII. Court cases

1. *Case C-245/95, Commission vs NTN Corporation and Koyo Seiko Co. Ltd, Orders of the Court, [1996] ECR 553 and 559*

This proceeding is a follow-up to the Judgment in Joined cases T-163/94, *NTN Corporation vs Council*, and T-165/94, *Koyo Seiko vs Council*.⁵² In that proceeding, the Commission's injury methodology used in an anti-dumping proceeding concerning ball bearings larger than 30 mm from Japan had been resoundingly defeated.

The Commission appealed the Judgment to the European Court of Justice. The original complainant in the anti-dumping proceeding, FEBMA, sought leave to intervene before the Court, but was denied because it had missed the deadline for doing so. The Japanese producer NSK Ltd and its subsidiaries, on the other hand, were admitted to intervene (with the exception of one subsidiary).

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

49 OJ (1995) L 308/32.

50 The Regulation implementing the Community Customs Code, OJ (1993) L 253, as amended by OJ (1994) L 346/1.

51 OJ (1996) C 184/4.

52 [1996] ECR II-1381; see Vermulst and Driessen, *supra* note 10 at 335.

2. Case C-120/94, Commission vs Greece, Order of the President of the Court of 19 March 1996, not yet published

In 1992 the European Community recognised the Former Yugoslav Republic of Macedonia (FYROM). However, a dispute erupted between that state and Greece concerning the use of the name 'Macedonia' and the use in FYROM's flag of the Star of Vergina, which covered the sarcophagus of the Macedonian king Philip II (the father of Alexander the Great) and as such, is considered by Greece a national Hellenic symbol. Moreover, suspicions lingered in Athens that its three-million citizen neighbour harboured territorial designs on the Greek region of Macedonia, which borders FYROM on the South East. Negotiations between both states were for a long time not successful in solving these problems and in February 1994 Greece decided to pressure FYROM by imposing a trade blockade on it. Greece invoked, among others, Article 224 of the EC Treaty which allows EC Member States to take extraordinary measures in case of, *inter alia*,

the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

The European Commission opposed the measures and, after negotiations with Greece had failed, asked the European Court of Justice for provisional measures. This was rejected by the Court.⁵³ The case then went its normal course until, in the autumn of 1995, Greece reached an agreement with FYROM which caused lifting of the trade sanctions. The Commission subsequently informed the Court that it had lost its interest in the matter. Greece, on the other hand, requested the Court to continue the proceeding since it might be held liable by third parties for damages caused by the blockade. The Court rejected this and ended the case while ordering the Commission to pay the costs.

3. Case C-25/94, Commission vs Council, Judgment of 19 March 1996, not yet published

The Council of Fisheries Ministers decided on 22 November 1993 that the Member States could vote in the United Nations Food and Agriculture Organization (the FAO) on the adoption of the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (hereinafter: the Agreement).

In 1991 the FAO had admitted the Community as a Member alongside the EC Member States. Under FAO rules, the Community was the sole entity entitled to vote in matters concerning fisheries. The Community at the time made a declaration to this effect. Within the Community, the Council and Commission solved the insti-

⁵³ Case C-120/94 R, *Commission vs Greece*, [1994] ECR I-3037.

tutional issue by adopting an arrangement regarding preparation for FAO meetings, statements and voting.

A first draft of the Agreement had included clauses on the registration of vessels, a matter within the domain of the EC Member States. These were, however, deleted in later versions. The Member States nevertheless considered that the Member States were entitled to vote on the Agreement and the Committee of Permanent Representatives (COREPER) adopted a decision accordingly. The Council adopted this decision, while noting in its minutes that the question on who should have the power to implement the Agreement remained to be decided upon.

The Court fully supported the Commission. COREPER had no right to decide on the voting issue. The subject-matter of the Agreement clearly falls within the scope of the Community. The Council's decision laid down in its minutes on the implementation of the Agreement is without legal significance. The Court subsequently annulled the decision to adhere to the Agreement.

4. Case C-99/94, Robert Birkenbeul GmbH & Co KG vs Hauptzollamt Koblenz, Judgment of 28 March 1996, not yet published

Multi-phase electric motors from Czechoslovakia were in the middle of the 1980's subject to anti-dumping measures. These measures consisted of a minimum price system, whereby the anti-dumping duty payable was calculated as the difference between the minimum price for that type of motor and the actual export price. There were no specific provisions concerning motor parts.

Birkenbeul imported parts (shafts and rotors) of such motors, and built the motors, often on customers' specifications, in Germany. Customs there took the view that the motor shafts and rotors had the *essential characteristics* of assembled motors, and classified them as such.⁵⁴ Consequently, the shafts and rotors attracted the anti-dumping measures.

Birkenbeul contested the classification on the following grounds: first, the shafts and rotors themselves were not sufficient to constitute a functioning motor. Some important parts were missing, representing 30.35% of the price of a finished motor, while the total value-added to the imported shafts and rotors was 43.57%. Birkenbeul could get substantial discounts on the importation of just shafts and rotors but, since a minimum price anti-dumping duty was levied, this merely caused the payable anti-dumping duties to go up. The combined effect was that it was cheaper for Birkenbeul to import complete motors (since these would be priced above the minimum price) than just motor parts.

⁵⁴ Compare Rule 2 (a) of the *General Rules for the Interpretation of the Combined Nomenclature*: 'Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article...'

The question arising was, whether normal customs classification rules are decisive for the application of anti-dumping measures in case the anti-dumping Regulation itself is unclear. The Court answered this in the negative, especially in the light of the fact that the minimum prices were listed for all motor types falling under the scope of the Regulation, but not for motor parts.

5. Case C-299/94, Anglo Irish Beef Processors International and Others vs Minister for Agriculture, Food and Forestry, Judgment of 28 March 1996, not yet published

In 1990 Anglo Irish had concluded a contract with the government of Iraq under which they were to deliver beef to that country. Under Community agricultural rules (Regulation 3665/87), they were entitled to an export refund. This was paid in advance by the British authorities. Anglo Irish started to ship the beef in May 1990 but the Iraqi authorities only give permission for importation on 3 August 1990.

On 2 August 1990 Iraq invaded Kuwait. The Security Council condemned the invasion on the same day, followed by the European Community two days later. The Community further announced trade measures against Iraq. On the sixth the Security Council imposed an embargo on trade with Iraq. The European Community implemented this on 8 August 1990 by adopting Regulation 2340/90, in force retroactively from 7 August 1990.

Anglo Irish' beef was at the time in transit in Turkey. That country, however, refused to let it cross the border with Iraq and Anglo Irish subsequently sold the beef to countries qualifying for less export refunds.

It was beyond dispute that the circumstances had constituted *force majeure* for Anglo Irish. The question now came up, whether Anglo Irish was still entitled to the full export refund. The British authorities considered that the difference between the original export refund and the amount which was actually due should be refunded by Anglo Irish.

The Court followed the British authorities: the system of export refunds allows exporters to retain their export refund if the exports have been lost in transit by *force majeure*; however, if they are exported to another country as a result of *force majeure* exporters are only entitled to the export refund pertaining to that country.

6. Joined Cases C-153/94, The Queen vs Faroe Seafood Co. Ltd and Føroya Fiskasøla L/F, and C-204/94, The Queen vs Commissioners of Customs and Excise ex parte John Smith and Celia Smith trading as Arthur Smith, Judgment of 14 May 1996, not yet published

Crustaceans and molluscs can be imported into the Community without customs duties if they originate in the Faroe Islands. The defendants in these two joined cases had imported crustaceans caught on Faroe ships. The ships had been manned by Faroese, but had also had a number of Canadian trainees on board. This did not stop

the Faroese authorities issuing EUR.1 certificates testifying that the shellfish concerned originated in the Faroe Islands and was consequently eligible for preferential customs treatment.

Customs in the United Kingdom checked the preferential origin, discovered the Canadian trainees, and took the position that the shellfish were not Faroese. It subsequently started with post-clearance recovery of the customs duties. The question was now, whether the good faith of the Faroese authorities could help the British importers.

The Court found that, if a country wrongly issues EUR.1 certificates in good faith, and the importers relied thereon, Customs in the Member States still are entitled to start with post-clearance recovery. It is not necessary for Customs to refer such disputes to the EC's Origin Committee.

A second problem was that part of the debt was over three years old. Community law limits post-clearance recovery to a three-year deadline. Under English law, there is a rule under which the debt should be considered as one whole, and consequently, would be irrecoverable completely if part of it was older than three years. The Court of Justice found that, while national law may not call into question the fundamental basis of the rule requiring post-clearance recovery, or render such recovery impossible or excessively difficult, it remains a matter of national law to decide on this issue.

A problem complicating things was that during processing the crustaceans fished by the Faroese ships had been mixed with crustaceans from other non-EC countries. The Court held that, in such cases, the crustaceans can only be regarded as originating in the Faroe islands if the exporter can prove that they were physically separated from the non-originating ones.

Last, the Court found that in this case the presence of Canadian trainees did not affect the Faroese origin of the shellfish.

7. Case T-162/94, NMB France and Others vs Commission, Judgment of 5 June 1996, not yet published

Dumping is in principle defined as the difference between the normal value and the export price. The normal value is normally calculated by reference to the domestic sales price or, where such price is not available, by adding cost of manufacture, selling, general and administrative expenses and a reasonable profit. The export price is calculated on the basis of the price to the first independent customer.

The Commission had imposed anti-dumping duties on ball bearings produced by the Japanese/Singaporean company NMB. NMB had exported the ball bearings to its subsidiaries in the Community, and the Commission had calculated the export price by 'netting back' from the price ex-subsidiaries to ex-factory level.

After imposition of the anti-dumping duties NMB had adapted its export prices and normal value and, thinking its dumping margin should now be lower, the com-

pany applied for a refund of dumping duties paid in excess. The Commission again calculated the ex-factory export prices by deducting all costs incurred from factory up to the sale to the first independent customer. In the process it deducted the anti-dumping duty paid by NMB's subsidiaries as a cost. By doing this, the Commission still found a considerable dumping margin and consequently refused the refunds. NMB fought the decision in court but the European Court of Justice followed the Commission's logic.⁵⁵

The issue at stake here is known in anti-dumping law literature as the 'duty as a cost' problem.⁵⁶ A very simple example may illustrate what is at stake. Suppose that the domestic sales price of NMB, calculated ex-factory, is 105, and the price charged by its EC importers is 110. From factory up to EC border the product attracted 5 more in shipping and other costs. The mark-up of the related importer (import tariff, the importer's selling, general, administrative costs and profit) is 10. The Commission will find that the normal value is 105, while the ex-factory export price will be calculated by deducting from the price ex-subsidiary the costs incurred after the product left the factory: $110 - 10 - 5 = 95$. The dumping amount will then be $105 - 95 = 10$. The CIF EC border price is $95 + 5 = 100$. This leads to a dumping margin of $10 + 100 = 10\%$. Assuming the injury margin is higher, this will be the anti-dumping duty. The 10% duty is intended to bring the export price to a level where the goods are no longer dumped. Indeed, if the export price had been equal to the normal value (105), then the CIF EC border price would also have been 110, *i.e.*, $105 + 5$.

If the importer had not been a related company, NMB could have increased its ex-factory export price by 10. The Commission would then find an invoice from NMB to the importer for $105 + 5 = 110$. The normal value having remained stable, there would be no dumping ($105 - 105 = 0$) and the importer would have been reimbursed for the 10% anti-dumping duty he paid over the CIF price. However, the Commission cannot do this since the importer is a subsidiary of NMB and prices charged from one to the other are therefore considered not to be at arm's length.

The consequences are serious: suppose that, after imposition of the anti-dumping duty, NMB decides to sell *ex-subsidiary* for 120 (an increase of 10). NMB applies for a refund, and the Commission still finds that the normal value is 105.⁵⁷ The ex-factory export price is calculated by first deducting the mark-up of the importer: $120 - 10 = 110$. Then the Commission deducts the anti-dumping duty: $110 - 10 = 100$. After deduction of the transport costs (5), the ex-factory export price remains 95. In other words, even though the company increased its prices by 10, the dumping margin has not altered at all!

55 Case C-188/88, *NMB and Others vs Commission*, [1992] ECR I-1689.

56 See Vermulst and Waer, *E.C. Anti-Dumping Law and Practice*, (1996) at 133 *et seq.*

57 In fact, the normal value had gone down in the case of NMB but this does not influence our example.

The Community's methodology is highly contentious. In fact, in the *NMB* Case cited above, the company argued that the export price should be much higher than what is needed to remove the dumping, if the company wants to obtain a refund: indeed, it should make a 'double jump'.

The text of the basic anti-dumping Regulation adopted as a consequence of the WTO Anti-Dumping Agreement is nowadays more permissive on the subject, requiring that

where it is decided to construct the export price ... it shall calculate it with no deduction for 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 (Article 11(10)).

Article 9.3.3 of the Agreement, which is worded somewhat differently, requires the Commission in refund cases to 'calculate the export price with no deduction for the amount of anti-dumping duties paid,' provided 'conclusive evidence' is provided of

any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices.

This leaves opportunities for interpretation, which is unsurprising since it was a compromise formula introduced after intense debates during the Uruguay Round.

Back to *NMB*. After it lost its first court case on this issue, it applied for a new series of refunds. These applications were made before the WTO Agreement and the new basic anti-dumping Regulation entered into force. When these applications too, were totally or partially rejected as a result of the 'duty as a cost rule', *NMB* again took to the Court.

With no success. The Court of First Instance observes that Article 2.4 of the Agreement (which deals with the construction of the export price) presupposes the 'duty as a cost' rule. Even worse, the refunds were decided when the 1979 Anti-Dumping Code was in force and in any event the new Agreement could not have saved *NMB*.

NMB then argued that the 'duty as a cost rule' discriminates between related and unrelated importers. While the first have to make a 'double jump' in their pricing to obtain a refund, unrelated importers only need make a single jump.

The Court of First Instance did not take up the issue and, while referring to the earlier Judgment, argued that GATT/WTO law allows construction of the export price in cases where importers are related to exporters.

The Judgment is a regrettable one. As *NMB* pointed out, the 'duty as a cost' rule effectively increases the CIF EC border price level sufficiently to eradicate the dumping margin.

8. *Case C-205/94, Binder GmbH & Co International vs Hauptzollamt Stuttgart-West, Judgment of 13 June 1996, not yet published*

Regulation 426/86 established a system for protecting the Community producers of processed fruits and vegetables, which allowed for 'appropriate measures' to be taken in case 'by reason of imports, the Community market ... is exposed or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty.' The assessment whether the Community market was indeed experiencing or threatened with such disturbances should take particular account of the volume of imports, the volume and prices of Community products on the EC market, and any downward trends in prices of imports.

The Commission fixed in 1990 a minimum import price for, *inter alia*, frozen strawberries from Poland. The background to the measure was that Poland no longer respected a voluntary export restraint agreement. Where prices of imports fell below the minimum price, a countervailing charge was levied. The Regulation introducing it was extended several times.

Binder imported strawberries from Poland under the minimum price and had to pay the countervailing charge. Binder subsequently challenged the validity of the Regulation introducing the countervailing charge, arguing that no threat of serious disturbances existed and that the conditions for introducing the countervailing measures were therefore not fulfilled. Binder further argued that the rise of imports of strawberries from Poland was due to a lack of availability of one type in the Community.

The Court did not follow Binder. According to the Court, the Commission did not commit a manifest error of judgment given that Binder had failed to adduce evidence to corroborate its view on market shortages. Furthermore, average prices for strawberries declined between 1989 and 1991.

After considering that the measure was properly motivated, the Court went on to discuss whether it was proportional. Binder had argued that the countervailing charge should have distinguished between different varieties of strawberries. Moreover, the Commission had used the 'green ECU' for the conversion of the minimum price from ECU to national currencies. In practice this led to an extra price increase.

The Court again did not follow Binder. After noting that the Polish authorities were unable to issue export certificates for different kinds of strawberries, it observed that the Council Regulation on which the countervailing charge was based prescribes use of the green ECU. Last, it was not established that the measure exceeded the price level required to make it effective.

Last, Binder argued that the measure had been in force for too long. This plea was rejected as unfounded as well.

VIII. Appendix: Anti-Dumping Decisions and Regulations

Table Anti-Dumping: 1 January - 30 June 1996						
Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Undertaking	Termination; Expiry
Dihydrostreptomycin	China	C 1/4 ⁵⁸				C 188/4 ⁵⁹
Microwave ovens	China, Korea, Malaysia, Thailand			L 2/1		
Calcium metal	China	C 2/2 ⁵⁸				
Artificial corundum	China	C 7/5 ⁵⁸				
Linear tungsten halogen lamps	Japan					C 7/8 ⁶⁰
Hematite pig iron	Czech Republic			L 12/5	L 12/5	
Monosodium glutamate	Indonesia, Korea, Taiwan			L 15/20 (definitive Indonesia, Korea, Taiwan)		L 15/20 (Thailand)
Small-screen colour televisions	Hong Kong					C 19/7 ⁵⁹
Ferro-silico-manganese	Russia, Ukraine, Brazil, South Africa			L 18/1 (amendment)		
Refractory chamottes	China			L 21/1		
Pipe fittings	China, Croatia, Thailand		L 23/1 ⁶¹	L 84/1	L 84/46	
Artificial corundum	Hungary, Poland, former Czechoslovakia, Brazil, former Yugoslavia, Russia, Ukraine					C 24/5 ⁵⁹

58 Initiation of review.

59 Notice of impending expiry.

60 notice of expiry.

61 Extension of provisional duties.

Commercial Defence Actions and Other International Trade Developments

Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Undertaking	Termination; Expiry
Coumarin	China		L 28/1 ⁶¹	L 86/1		
Bicycles	Indonesia, Malaysia, Thailand		L 32/1 ⁶¹	L 91/1		
Grain oriented electrical sheets	Russia			L 42/7	L 42/7	
Cotton fabric	China, India, Indonesia, Pakistan, Turkey					L 42/16
Synthetic fabric	India, Indonesia, Pakistan, Thailand					L 42/18
Unbleached cotton fabric	China, Egypt, India, Indonesia, Pakistan, Turkey	C 50/3				
Bariumchloride	China					C 62/2 ⁶⁰
Polyester staple fibre	Belarus		L 54/10; L 139/16 ⁶¹			
DRAMs	Japan, Korea			L 55/1 ⁶²		
Polyester fibres and yarns	Turkey					C 86/6 ⁵⁹
Urea	Venezuela					C 90/2 ⁵⁹
Furazolidone	China					L 77/1
Synthetic fibre ropes	India	C 102/16				
Televisions camera systems	Japan	C 104/9 ⁵⁸				
Hematite pig-iron	Brazil, Poland, Russia, Ukraine, Czech republic	C 104/11 ⁵⁸				
3.5" microdisks	Malaysia, Mexico, USA			L 92/1		
EPROMs	Japan			L 92/4 ⁶²		
Luggage and travel goods	China	C 111/4				

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Product	Exporting Country	Initiation	Provisional Duty	Definitive Duty	Undertaking	Termination; Expiry
Briefcases and school bags	China	C 111/6				
Bicycles	China	L 98/3 ⁶³				
Unwrought magnesium	Russia, Ukraine		L 100/1 ⁶¹			
Video tapes	China					C 119/3 ⁵⁹
Video cassette recorders (K, S) and key components thereof (K)	Korea, Singapore					L 101/19
Handbags	China	C 132/4				
Audio tapes in cassettes	Japan, Korea					C 132/6 ⁶⁰
Synthetic fibres of polyester	India			C 132/6		
Silicon carbide	Ukraine	C 135/4 ⁵⁸				
Furfuryl alcohol	China, Thailand					L 112/18
Welded wire mesh	FR Yugoslavia, Bosnia-Herzegovina, FYROM					C 136/10 ⁶⁰
Electronic weighing scales	Japan			C 149/7		
Polyester textured yarn	Indonesia, Thailand, India		L 128/3 (Indonesia, Thailand)			L 128/3 (India)
Oxalic acid	India, China					C 155/5 ⁵⁹
Gas-fuelled, non-refillable pocket flint lighters	Japan, Korea					C 155/6 ⁵⁹
Powdered activated carbon	China			L 134/20		
Polyester yarn	Taiwan, Turkey			L 141/45 (amendment)		
Espadrilles	China					C 178/2 ⁶⁰
Asbestos cement pipes	Turkey					C 178/2 ⁶⁰

63 Initiation anti-circumvention investigation.