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# CAUSE-OF-INJURY ANALYSIS IN EUROPEAN ANTIDUMPING ACTIONS

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## ABSTRACT

To IMPOSE ANTIDUMPING duties consistently with the WTO, a national antidumping authority must show that the dumping has *caused* injury to the domestic industry producing a like product. Antidumping methodology splits this requirement into two component questions:

a. does the local industry producing a like product display symptoms of injury?; and
b. are these symptoms caused by dumping?

The European Commission is good at finding positive answers to question (a) but less good at answering (b). An Annex to this paper provides a detailed examination of ten recent cases. It finds that the Commission's conclusions with respect to question (b) are questionable in at least five of the ten.

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## 1. SYMPTOMS OF INJURY

An industry without signs of injury is unlikely to obtain antidumping assistance. The Uruguay Round Anti-dumping Agreement (ADA), however, provides substantial scope for discovering symptoms. Art 3.4 says:

> "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

This non-exhaustive list is long enough that even an industry that might generally be thought to be in good health could show negative on some indicators. Inclusion in the list of "the magnitude of the margin of dumping", in particular, opens a path to a finding that dumping has injured an industry that is in a prosperous state.

## 2. CAUSATION OF INJURY

The requirement that dumping be shown to have caused injury has a long and uneven history in the GATT/WTO. Article VI of GATT (1947) does not condemn dumping as such: "The contracting parties recognise that dumping … is to be condemned if it causes or threatens material injury to an established industry…" .

The Kennedy Round Antidumping Code, in 1967, expressly required that dumping be "demonstrably the principal cause" of the injury. This strong requirement was weakened in the succeeding Tokyo Round in 1979, which required merely that "injuries caused by other factors must not be attributed to the dumped imports". The preamble to the Tokyo Round Code did state, however, (in words regrettably lost in the Uruguay Round) that, "*antidumping practices* should not constitute an unjustifiable impediment to international trade" (emphasis added). Only after identification of *that* threat did it go on to say that, "antidumping duties may be applied to dumping *only* if such dumping causes or threatens material injury …" (emphasis added).

The Uruguay Round Code, which is still in force, uses firmer language once more. Article 3.5 of the Uruguay Round ADA, which embodies the current WTO rules, says that:

> "It must be demonstrated that the dumped imports are, through the effects of dumping … causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

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These injunctions, though, may fail to be effective. An antidumping authority that has proved to its own satisfaction that dumping has occurred, and that has demonstrated that the national industry competing with those imports displays symptoms of injury, may doubt the need for rigorous enquiry into the cause of the injury. Had the dumped product been sold at higher prices, the domestic industry would have been able to sell more, or sell at a higher price or both. Isn't it *obvious* that dumping injures the industry? Such thoughts may lead to lackadaisical cause-of-injury investigations.

## 3. THE COMMISSION'S METHODOLOGY

To establish that dumping has caused the symptoms it points to, the Commission often relies on claims of "price undercutting" by the alleged dumper -- sales of the dumped product at prices below those charged by the Community industry. Examination of price undercutting is authorised by the WTO (ADA Article 3.2), but price undercutting is not illegal *per se*. The argument is that the dumper would not have been able to undercut had he not been dumping. Thus, the Commission's findings of dumping play a central role in the Commission's demonstration that the injury was caused by "dumping".

In a typical investigation, the Commission attempts to show that the troubles of the Community Industry (CI) and the onset of dumping and price undercutting are simultaneous or that dumping and price undercutting preceded the injury. It then lists alternative hypotheses as to how the injuries of the CI might have been caused, usually dismissing them as insignificant.

This methodology has several problematic features. Their full force does not appear until actual application of the methodology is examined – as is done in the Annex to this paper.

Before turning to practice, though, two of these problematic features can usefully be noted. Both are defects in the way the Commission converts facts or asserted facts into statements about causation. They are that:

a. The basic data cited by the Commission typically is that imports have increased and output and profitability of the CI have fallen. These observations are *consistent* with the hypothesis that dumping has caused the injury.

   Consistency, though, is a weak requirement. That a pig is in a field outside Munich on one day, and in a yard in Frankfurt the next, for example, is *consistent* with the hypothesis that it flew between the two. But the stated facts are very far from being *proof* of that proposition.

   That imports have increased and that the CI displays symptoms of injury are consistent with an increase in the attractiveness of foreign products for reasons other than dumping, or with injuries to the CI from domestic sources -- excessive wage increases, for example, or increases in the price of other inputs, or a loss of discipline in the production process – even with damage brought about by a deliberate increase in CI prices (which is not a possibility to be lightly dismissed when the reward for such action is an anti-dumping duty).

   If the Commission examines the possibility that the CI is responsible for its own injuries at all, it is typically as an afterthought. But the major symptoms of self-injury match those of dumping. The Commission should therefore pay greater attention to the possibility of self-injury.

b. The notion of "price undercutting" is full of problems. Price undercutting as used by the Commission implies that identical products sell at different prices in the same market. That is possible, but it is not a state of affairs to be merely assumed.

Both issues call for more detailed examination.

## 3.1 SELF-INJURY

To put the central point in simple analytical terms, a downward shift of the foreign supply curve of a product and an upward shift of the domestic supply curve will have the same effects on domestic output and employment (down); imports (up); and profitability of the domestic industry (down). Price on the domestic market, however, will tend to fall if the foreign supply curve falls; but to rise if the domestic supply curve rises. Price on the domestic market is therefore a crucial variable in distinguishing one hypothesis from the other.

The Commission is often perfunctory in its examination of the possibility that injury is self-inflicted. In some cases, that might be justified -- self-injury is sometimes easy to identify. Changes in the price of inputs affecting the CI – including wages – ought, for example, to be easy to observe. But it may be quite difficult to detect the effects of product design or quality or associated services that fall behind those offered by exporters.

## 3.2 PRICE UNDERCUTTING

Price undercutting implies that identical products are sold for different prices in the same market. Yet how can that be? How are high-price sellers able to make any sales? Some explanation is needed.

### *3.2.1 Explaining price difference: hypotheses and implications*

Possible explanations are that:

a. The allegedly identical products are, in fact, different. Differences might be of two types. Products might differ in:

   i. physical characteristics (different levels of impurity in a chemical, for example); or

   ii. in the relationships that sellers have with buyers: high-price suppliers, for example, might offer more and/or better services than low-price suppliers.

b. Information is imperfect – some buyers do not know that an identical product is available at lower prices.

c. Alternatively, existing contracts may prevent buyers from switching their purchases to low-price suppliers.

d. Buyers know that lower prices are available but do not think it worthwhile to switch to the low-cost sources – the market is subject to inertia.

In case (a) price differences are to be expected and are consistent with equilibrium in a com-

petitive market. That an inferior product sells for less than a better one, however, should not be interpreted as "price-undercutting". Price undercutting in this case would occur if the difference in price *overcompensated* for the inferiority of the low-price product: that, however, will be difficult to convincingly establish.

Case (a) is a problem for the Commission. It provides a simple and plausible explanation of the existence of price differences, but it does not permit the Commission to legitimately deduce from the fact of "price undercutting" the conclusions it wants to arrive at. The Commission is sometimes peremptory about cutting this Gordian knot. "The products are the same", it says, without further ado.

Yet if the Commission alleges that imported and domestic products are identical and that foreigners are undercutting domestic prices, it is still claiming that the prices for the identical products are different. It is then legitimate to suspect that it has simply failed to identify what it is that differentiates the products. To avoid this, it must provide some other explanation of the difference: that is, it must argue that one or more of cases (b), (c) or (d) hold true.

If the Commission relies on case (b) or case (c), however, it ought to be able to demonstrate that they apply. Rather than questionable assertions that the prices of domestic and imported products differ even though their economic properties do not, the Commission should provide a plausible empirical basis for whatever hypothesis it believes to explain the difference in price. This is not unduly demanding: existing contracts are in principle knowable; and imperfect information would be difficult to sustain as an explanation of price differences if it were shown, for example, that all domestic buyers had recent dealings with the alleged dumpers.

Cases (b) and (c) provide coherent explanations of price differences which do not jeopardise the thrust of an antidumping investigation[1]. Case (d) – inertia – is different. It explains price differences, but, if it is true, anti-dumping action loses much of its already slim justification.

Inertia protects incumbent suppliers. The protection, though, is unlikely to be absolute – at some price, the formerly inert buyer will switch to the cheaper source of supply. Inertia will then protect the new supplier.

A new supplier with lower costs than the incumbent, therefore, will be prepared to spend money (invest) in order to replace the incumbent, and he is likely to do this by cutting his prices – to less than marginal cost if necessary. In this case, price undercutting is likely to be the only means by which a new entrant (whether domestic or foreign) can win the business of buyers subject to inertia. Dumping and price undercutting are then consistent with economically virtuous behaviour; and to act against them raises a barrier to the entry of newcomers into a market characterised by inertia – in economic terms, a foolish thing to do.

Only two explanations of price differences leave intact the Commission's methodology – contractual rigidities or imperfect information. If the Commission relies on price undercutting in arriving at the conclusion that dumping has caused injury, it should be required to demonstrate that one or the other explanation has some basis in fact.

## 4. THE METHODOLOGY IN PRACTICE

The best way to convey how the Commission goes about fulfilling the requirement that it shows that dumping has caused injury, is to examine actual cases.

In such an examination, what are we looking for? Typically, as noted, the Commission will have

what it regards as proof of dumping, and the industry competing with the dumped imports will display symptoms of injury. At that superficial level, the evidence is consistent with the hypothesis that the dumping has caused the injury.

But, as noted, consistency is a very weak standard. To show more than mere consistency – to show that the evidence approaches something that might be regarded as proof – it is necessary to look for alternative hypotheses and to show that they are *in*consistent with the data.

The principal function of an honest enquiry into the causes of injury should be not to tediously show the consistency of injury findings with dumping findings, which in most cases can be taken for granted. It is, rather, to seek out alternative hypotheses about the cause of the injury, and to show that they do not hold water.

Broadly speaking, there are two sources of alternative hypotheses. The first consists of different notions as to why the foreign supply curve might shift downwards – for example, technological advance, improved efficiency in production; new and cheaper sources of supply of inputs, and dumping. Examination of these matters might usefully be part of the analysis of dumping.

The second source provides different reasons as to why the costs of production of the domestic industry might rise – for example, undue increases in wages or the prices of other inputs, losses in productive efficiency; or why its product might become less attractive to buyers – for example, design shortcomings, relative to foreign competing products. The Commission examines the state of the CI in some detail, but its focus is not the one suggested here.

## 4.1 THE SAMPLE

HM Revenue and Customs provides a convenient internet listing of recent EC antidumping regulations.[2] At 3 October 2008, 23 of these regulations imposed definitive duties.

I examine the ten most recent of these (as of 3 October 2008) in the Annex to this paper. I rely entirely on the information provided in the regulation. It is possible that other sources of information would reveal more cases to be problematic.

In each case, the question asked is whether the Commission does in fact "… demonstrate that the dumped imports are, through the effects of dumping … causing injury."

## 4.2 RESULTS

The outcome of this analysis is presented in Table 1. Of the ten cases, five of the analyses of cause of injury are consistent with the basic findings of dumping and injury, but add little or nothing to them (Coke of coal from China; EMD from South Africa; DCD from China; perosulphates from the US, China and Taiwan; and saddles from China). Two more suggest alternative hypotheses which have not, however, been properly explored by the Commission (Compressors from the PRC and Ferro-silicon from the PRC, Egypt, Kazakhstan, Macedonia and Russia). Two more are unconvincing to an extent that casts doubt on the idea that dumping caused the injury (Sweetcorn kernels from Thailand and Ironing Boards from China and Ukraine); and one (Dihydromyrcenol from India) is riddled with errors and offers arguments that are weak or non-existent: it raises in the mind of an attentive reader serious doubt that the injury reported was caused by the dumping the Commission claims to have discovered.

Five out of ten is not an impressive score, especially when the passing mark of "consistent" can be

achieved with little or no effort. The evidence suggests that the Commission is perfunctory and ritualistic in its approach to determining the cause of injury in antidumping investigations. Its performance can clearly be improved.

**TABLE 1: SUMMARY OF CASES AND CONCLUSIONS**
**FULL DETAILS OF THESE CASES ARE IN THE ANNEX**

| | |
|---|---|
| 1. "Compressors originating in the PRC" | In the light of the price increases of the domestic industry, the Commission's comment that "… these dumped imports exerted a downward pressure on the prices, preventing the Community industry from increasing its sales prices to a level that would have been necessary to realise a profit" is unconvincing. The prima facie evidence of self-inflicted injury is greater than the Commission acknowledges. Indeed, it does not even refer to the possibility in its discussion of other factors that might have caused injury.<br><br>The hypothesis of self-inflicted injury deserved more energetic exploration. At the very least, the Commission should have provided figures to support its explanation of the increase in prices by the CI.<br><br>Verdict: Fail |
| 2. "Coke of coal from China" | This case is driven entirely by the dumping finding. The finding of injury is weak. The discussion of the cause of injury does not strengthen it.<br><br>Verdict: Pass |
| 3. "Electrolytic Manganese Oxides (EMDs) from South Africa | The Commission describes a situation in which the world price of an output is depressed, so that selling price is everywhere likely to be less than average total cost. When this situation displays itself in the pricing of exports, antidumping law allows it to be interpreted as dumping.<br><br>Verdict: Pass |
| 4. "Ferro-Silicon from the PRC, Egypt, Kazakhstan, FYR Macedonia and Russia" | The Commission's analysis may be correct but badly presented; but it certainly does not leave the sense that this case is cut and dried. On the contrary, it seems possible that with more information about the industry, a completely different story might be told about the causes of the injury to the CI.<br><br>Verdict: Fail |
| 5. "Dihydromyrcenol from India" | This is a slovenly report. Words are inconsistent with tables, and what purport to be logical inferences have no basis. The evidence the Commission presents suggests that competition from India is a problem for the CI. It does not demonstrate that unfair competition is a major component in the creation of that difficulty, or in the injury suffered by the CI.<br><br>Verdict: Bad fail |
| 6. "Dicyandiamide (DCD) from China" | The cause-of-injury analysis adds nothing to the finding of "dumping" and the description of the wounds of the CI. It is, indeed, a monument to negativity – "No, we can't". No we can't quantify quality differences. No we can't compare the CI cost structure with the Chinese cost structure, even though evidence suggests that the CI may be relatively high-cost.<br><br>Verdict: Pass |
| 7. "Perosulphates from the US, China and Taiwan" | The CI displays some symptoms of injury, and the Commission is able to produce evidence of dumping. The cause-of-injury analysis adds little to these facts.<br><br>It is difficult to avoid the conjecture that this case was deliberately structured to catch US producers of KPMS in the antidumping net.<br><br>Verdict: Pass |

| | |
|---|---|
| 8. "Saddles from China" | The analysis of causation adds nothing to the basic finings of dumping and injury. There is a clear possibility that the CI is at risk in the production of low-tech saddles but profitable in the production of high-tech ones. Anti-dumping duties may maintain a temporary EC presence in the production of low-tech saddles. It is not self-evident, however, that this outcome is to be applauded.<br><br>Verdict: Pass |
| 9. "Prepared or Preserved Sweetcorn Kernels from Thailand" | The evidence on price undercutting – only two of the four sampled firms found to undercut, and then by small and possibly exaggerated margins -- does not seem to support strong statements. The Commission nevertheless says that: "Given the volume and the level of price undercutting of the imports concerned, these imports were certainly a factor affecting prices" (emphasis added).<br><br>But the level of price undercutting is trivial compared to the difference between Thai and EC prices, and, indeed, is so small as to be suspect. That prices in the EC would have risen had the Thai producers withdrawn from the EC market is a reasonable proposition. But it has nothing to do with price undercutting. It is difficult to avoid the conclusion that the Commission is trying to buttress a weak case with strong words.<br><br>The evidence of injury also seems slight. The return on investment of the CI did indeed fall by 58 per cent: from 59.8 per cent to 25.1 per cent. But the starting point is high; and the end point a long way from ruin.<br><br>The evidence of injury and the evidence that the injury was caused by the dumping of Thai products is unconvincing. On the contrary, the evidence suggests that the EC would have been better off had this EC industry been left to cope with competition by itself.<br><br>Verdict: Fail |
| **10.** "Ironing boards from China and the Ukraine" | It is far from evident on that the injuries of the CI – which are themselves open to question – were caused by the dumping or price undercutting that the Commission alleges. Certainly the Commission's presentation of its evidence is far from making either case.<br><br>An alternative hypothesis, based on the Commission's own evidence, is that this was a lucrative but sleepy EU industry. It offered more energetic companies in China and the Ukraine the prospect of profitable entry, which they took.<br><br>Verdict: Fail |

## 5. CONCLUDING COMMENTS

How can improvement be obtained?

The Commission's present analysis of COI is dominated by the incorrect notion that mere consistency between dumping and injury proves that the dumping has caused the injury. Alternative hypotheses are "examined" at the end of its investigations, true, but this exercise is perfunctory -- ticking the boxes of a standard list. As is clear from the detailed examination of the cases in the Annex, the Commission does not go out of its way to generate alternative hypotheses about causation, fails to notice hypotheses that stare it in the face, and ignores suggestions made to it.

Yet the Commission's duty to show that dumping has caused injury means that alternative hypotheses about the cause of injury are at the centre of its task, not a mere after-thought, needed to meet a legal formality. If the Commission takes seriously the job of showing that dumping has caused injury, alternative hypotheses about the cause of injury should be at the heart of its investigations.

An increase in the price of the output of the domestic industry in excess of the price of imports suggests the possibility of self-injury. It is an indicator that should be treated seriously by the Commission.

In practice, the Commission frequently dismisses this indicator on the basis that the increase in the average price of the domestic product is due to a shift in the product mix of the CI towards higher-quality and higher-price products. It rarely gives evidence for this proposition, however. Yet the indicator is important enough that if the Commission wants to dismiss it on such grounds, it should provide supporting numerical evidence, not merely unsupported assertion.

Finally, the Commission relies heavily on the idea of price undercutting in its injury and cause-of-injury analyses. This is perfectly consistent with the ADA, but that does not mean that the Commission can be careless in its use of price undercutting. More careful analysis of price undercutting, including specification of what allows prices to differ, is needed to remove the problematic features of the Commission's current usage.

It may, of course, be difficult for the Commission to put this short list into effect. Everything suggested here would make it more difficult to pursue antidumping complaints to antidumping duties; and that may run so strongly counter to the antidumper culture that it cannot be achieved with existing institutions.

If so, that makes a strong case for a new body, independent of the antidumping authority, to examine injury and provide cause-of-injury analyses.

## ANNEX

## ANALYSIS OF INJURY AND CAUSE OF INJURY IN TEN RECENT ANTIDUMPING INVESTIGATIONS

### AD1555

### CERTAIN COMPRESSORS ORIGINATING IN THE PRC
### NO PROVISIONAL REGULATION.
### DEFINITIVE: OJ L81/2008

**Product:** Reciprocating compressors giving a flow of not more than 2 cubic metres per minute (R16).

**Industry Structure:** The Commission identifies three European producers, all Italian (R13). There is "an apparent high number of exporting producers in the PRC" (R7). Fourteen companies or groups of companies based in the PRC made themselves known to the Commission (R22).

**Investigation Period:** 1 October 2005 to 30 September 2006. Trends were observed from 1 January 2003 to the end of the IP (R15).

**Dumping calculation:** The Commission selected a sample of six companies or groups of companies from the PRC. Market economy treatment (MET) was granted to two of these, and individual treatment (IT) to all but one of the rest (R38).[3] The analogue country was Brazil, and dumping margins of 51.6 per cent to 76.6 per cent were discovered for the Chinese companies denied MET, and lower ones -- 10.6 per cent and 13.7 per cent -- for the two who received MET (R25-55). Dumping duties were imposed at these levels.

**Price undercutting:** The Commission says (R74) that: "A comparison for comparable models of the product concerned was made between the sampled exporting producers' and the Community industry's average selling prices in the Community". The Commission's comparison showed that during the IP the product concerned sold in the Community undercut the Community industry's prices by between 22% and 43%, depending on the exporter concerned.

**COI analysis:** the core of the Commission's analysis of injury and causation is given in recital 102:

"The significant increase in the volume of the dumped imports by 182% between 2003 and the IP, and of its corresponding share of the Community market, i.e. by 35 percentage points [from 17.6 per cent in 2003 to 52.9 per cent in 2006] as well as the undercutting found (between 22% and 43% during the IP) generally coincided with the deterioration of the economic situation of the Community industry, as explained in recital 99. In addition, dumped prices were, on average, considerably below those of the Community industry throughout the period considered. It is considered that these dumped imports exerted a downward pressure on prices, preventing the Community industry from increasing its sales prices to a level that would have been necessary to realise a profit and that the dumped imports had a significant negative impact on the situation of the Community industry. Moreover, it appears that the Community industry lost a significant part of its market share to the increased volume of dumped imports. The decreased sales volumes led to a relative increase of the fixed costs of the CI, which had a negative impact on the financial situation as well. Therefore, there is a clear causal link between imports from the PRC and the material injury suffered by the Community industry".

**Comments:** The Commission notes (R105) that "one interested party" claimed that the injuries of the CI were self-inflicted. The Commission dismisses the claim: "It is noted that that party was not specific about the causes which would point to self-inflicted injury".

The issue, however, is more difficult than the Commission acknowledges. One might not guess from the passage from R102 quoted above that average unit prices for CI output increased by 20 per cent between 2003 and 2006, while the average price of imports from the PRC rose by 6 per cent. This evolution of prices is the one that would classically follow an increase in prices initiated by the domestic industry.

The Commission claims (R88) that: "The increase in the average unit prices [of the CI] is a reflection of the CI's gradual partial shift of the production towards upper segment of the market ...". And in R73 (at some risk of inconsistency unless the entire market shifted in that direction), it offers the same explanation of the rise in PRC prices. No evidence is offered in support of either proposition.

The statements do, however, confirm that there are substantial differences in quality and prices. They therefore raise the question of whether these differences have adequately been taken into account in the Commission's calculations of price undercutting. The Commission provides no insight on this matter.[4]

**Conclusion**: In the light of the price increases of the domestic industry, the Commission's comment that "... these dumped imports exerted a downward pressure on the prices, preventing the Community industry from increasing its sales prices to a level that would have been necessary to realise a profit" is unconvincing. The *prima facie* evidence of self-inflicted injury is greater than the Commission acknowledges. Indeed, it does not even refer to the possibility in its discussion of other factors that might have caused injury.

The hypothesis of self-inflicted injury should have been explored more energetically. At the very least, the Commission should have provided figures to support its explanation of the increase in prices by the CI.

## AD 1552

## COKE OF COAL FROM CHINA
## PROVISIONAL: OJ L244/2007
## DEFINITIVE: OJ L75/2008

*All references are to the provisional regulation unless otherwise noted*

**Product:** Coke of coal with a diameter of more than 80mm (Coke 80+). Imports from the PRC were subject to an anti-dumping duty from 2000-2004 (R3).

**Industry structure:** Seven producers are known to operate in the EC (R34). The Commission notes (R5) that there is "... an apparent large number of exporting producers and importers involved in the investigation. The U.S. is reported (R20) to have five producers.

**Investigation Period:** The IP was 1 October 2005 to 30 September 2006. Trends were observed from 1 January 2003 to the end of the IP.

**Dumping Calculation:** Only one exporter from the PRC responded to the Commission's questionnaire, and did not receive MET. The analogue country is the United States. A dumping margin of 61.8% was discovered (Def R15). An anti-dumping duty of 25.8% was imposed (Def R74).

**Price Undercutting:** The undercutting margin was determined to be 10.2 per cent (R44).

Injury and Cause of Injury Analysis: The CI made healthy profits in 2003-05, but negative profits in the IP, despite charging a price 19 per cent higher than in 2003 and selling 25 per cent more than in that year. The price of coking coal rose by 64 per cent over that period, however; and since it accounts for 50-60 per cent of production cost (R75 and Def R41), the CI was forced into losses. The Commission argues that coke from the PRC prevented the CI from adjusting its price to cover the increased input costs (R76).

**Comment:** A loss in the IP seems a slim basis on which to declare injury; especially in a period when the price of coking coal, the principal input into the production of coke, is changing rapidly, and adjustment to that change is likely to be incomplete.

It was contended (Def R42) that producers in the PRC were able to buy coking coal at lower prices than producers elsewhere. The Commission's refusal to explore this possibility is not convincing -- it declares that because of the low level of cooperation of the Chinese producers, it cannot obtain information on the prices paid by Chinese producers of coking coal. Since it has been willing to use other information from its Chinese respondent, however, there seems no reason why it should not have used the information provided by it on this point also. Of course, once the dumping margin has been declared, any actual production advantages of the Chinese industry are legally irrelevant; though they might in fact explain much of what the Commission cites as injury.

**Conclusion**: This case is driven entirely by the dumping finding. The finding of injury is weak. The discussion of the cause of injury does not strengthen it.

## AD1551

## ELECTROLYTIC MANGANESE OXIDES (EMDS) FROM SOUTH AFRICA
PROVISIONAL: OJ L243/2007
DEFINITIVE: OJ L69/2008
*All references to the provisional regulation unless otherwise stated.*

**Product:** EMD is used in the production of dry-cell consumer batteries. There are two main types: carbon-zinc grade EMD and alkaline grade EMD. Both are produced through an electrolytic process, which can be adapted to produce either type.

**Industry Structure**: The CI consists of one company, which "represented more than 50% of the EMD produced in the Community" (R38). A second Company producing in the EC did not cooperate with the investigation (R36). A third, "representing one third of Community production" closed in 2003 (R40). There is one South African producer (R7). China also exports EMD.

**Investigation Period**: The IP was 1 October 2005 to 30 September 2006. Trends were observed from 1 January 2002 to the end of the IP (R8).

**Dumping Calculation**: Normal value was constructed for all types (R19) "since no product type identical or directly comparable and sold on the domestic market in representative quantities", though it is not clear whether this is because sales on the domestic market were made at a loss (in the Commission's view) or because there were simply not enough domestic sales. The weighted average dumping margin was calculated by the Commission to be 17.1% (Def R15). Antidumping duties of 17.1% were imposed (Def R65).

**Price Undercutting**: price undercutting was "in the range of 11 to 14%" (R46).

**Injury and Cause of Injury Analysis**: The South African producer's share of the Community market rose from roughly one third in 2002 to two thirds in 2005 and the IP (R42).

Manganese, the principal input into EMD, doubled in price in 2005, increasing the "CI's unit cost of production by 19%". (R88). The Commission argues, however (R90) that "... the cost increase was not *per se* the factor causing injury but the fact that the Community industry was not able to pass on the cost increases to its customers due to the downward price pressure exerted by the dumped imports from South Africa, which did not reflect the rise in prices of raw materials".

**Comments**: The Commission remarks almost in passing (R91) that a "... global oversupply of EMD caused by the increased production capacity in China has depressed EMD prices"; but rejects this as a cause of the difficulties of the CI on the basis that sales from China to the EC are small.

In the Definitive Regulation (Def R24&25), this picture changes somewhat. The Commission says: "It should be noted that the investigation also showed ... that EMD imports from the PRC are currently not an alternative for users, especially in the small cell battery sector. Indeed, switching from one EMD source to another is time- and finance-intensive. This prevents users from being flexible in their choice of EMD source. It should be noted that this conclusion is confirmed by the low level of EMD imports from the PRC, which shows that this source of imports, despite prices much below the average import prices, has not been considered by users as an alternative during the IP and could not have contributed to the injury suffered by the Community industry".

This last comment, however, is a *non sequitur*. That users did not purchase from the PRC cannot show that they did not consider such purchases. Indeed, it is very likely that they did consider them: at some price of Chinese EMD relative to South African EMD, users will find it worthwhile to undergo the costs of sourcing in the PRC (and the observation that global oversupply is caused by increased production facilities in China indicates that some, somewhere in the world, already have). The South African producer will be aware of this, and that awareness is likely to be reflected in its pricing.

**Conclusion**: The Commission describes a situation in which the world price of an output is depressed, so that selling price is likely everywhere to be less than average total cost. Antidumping law allows this to be interpreted as dumping.

## AD1550

## FERRO-SILICON FROM THE PRC, EGYPT, KAZAKHSTAN, FYR MACEDONIA AND RUSSIA
PROVISIONAL: OJ L223/2007
DEFINITIVE: OJ L55/2008
*All references to the provisional regulation unless otherwise stated*

**Product:** FeSi is a ferro-alloy produced in electric-arc furnaces. It is used as a deoxidiser and alloying component in the iron and steel industry (R13)

**Industry Structure**: There are six producers in the EC (R8). The Commission received replies to its questionnaires from three exporters in the PRC; two in Egypt; one in Kazakhstan; one in Macedonia; and two in Russia (R9).

**Investigation Period:** The investigation of dumping and injury covered the period from 1 October 2005 to 30 September 2006 (IP). The examination of trends relevant for the assessment of injury covered the period from January 2003 to the end of the IP (R12).

**Dumping Calculation**: One Chinese exporter was granted MET; one IT; and one neither. The companies are not identified by name. The Kazakh exporter was granted neither MET nor IT. The analogue country for exporters not given MET was Norway. Costs were constructed for some exports from Egypt (R50); for all exports from Macedonia (R52); for some exports from Russia (R53). An adjustment was made to the costs of one Russian exporter on the basis that its electricity prices were too low (R54).

Definitive dumping margins ranged from 5.4 per cent for the Macedonian exporter to 29 per cent for one of the Chinese exporters (Def R53-R62).

**Price Undercutting**: According to R89, exports: '… undercut the CI's prices between 4 % and 11 %, depending on the exporting producer concerned, with the exception of a Russian, an Egyptian and the exporting producer in the formerYugoslav Republic of Macedonia, for which no undercutting was found. However, on a type-by-type basis it was found that in several instances the prices of the exporting producers concerned were significantly lower than the above average undercutting margins or in the case of exporting producers where no overall undercutting was found, undercutting margins were established for certain product types. Moreover, in view of the significant losses suffered by the CI, the undercutting margins do not show the full effect of dumped imports on prices as there was considerable price depression. Finally, the amount of undercutting found should not be considered insignificant taking into account the nature of the product which is a commodity sensitive even to minor price variations".

It hardly needs noting that if some observations are significantly lower than an average, then other observations must be above that average.

The defensive tone of this passage should be noted. We shall return to it.

**Injury and Cause of Injury Analysis:** The market share in the EC of imports from the named countries rose from 15.4 per cent to 51.2 per cent between 2003 and 2006 (R85). Production of the CI fell by 40 per cent (R91), and its rate of return on investment, though positive in 2003 and 2004, became negative in 2005 and 2006 (R100). The average unit price of the CI rose by 10 per cent (R96); that of imports rose by 3 per cent (R85).

R113 offers the core of the Commission's analysis of causation of injury:

> "The substantial increase in volume of the imports from the countries concerned at low and dumped prices and their gain in market share over the period considered coincided with the deterioration of the situation of the Community industry during the same period, in particular in terms of profitability, sales volumes, market share, production, capacity utilisation, cash flow, return on investments and employment. Moreover, the CI was not able to increase its sales prices up to the necessary level to cover its full costs, as its sales prices were undercut during the IP by the dumped imports".

**Comments:** On the Commission's telling, this seems an open-and-shut case. The CI has sustained injury as imports – deemed dumped by the Commission – have taken over a major share of the EC market.

Still, there are problems. Data is inconsistent with text; tables are inconsistent with one another; relevant information is not provided; and, perhaps most important, the Commission refuses to

examine the performance of individual members of the CI.

***Consistency of data with text***

The Commission says (R89) that "… the nature of the product which is a commodity sensitive to even minor price variations". On the basis of the text, this is far from obvious.

The primary argument of the Commission is that the increase in the volume of dumped imports was driven by relatively small differences between the prices of the dumpers and those of the CI. In recital 112, for example, it says that: "Between 2003 and the IP, the volumes of dumped imports increased significantly by 237% … during the IP, the average price of the dumped imports undercut the prices of the CI by 3.7% to 11% …". Moreover, we know from R86 and R96 that CI prices rose relative to imports after 2003, which suggests that the undercutting margin for the CI is greater than that for earlier periods.

The Commission, therefore, must argue that FeSi is very price sensitive. This is not on its face implausible.

A variety of statements in the regulation, however, suggest otherwise. For example in R119: "The third most important country among third countries not concerned by this investigation in terms of quantities during the IP was Brazil. Imports from Brazil decreased by 11% in terms of quantity … [but] … [d]uring the whole period under consideration the average import price from Brazil was significantly above that of the CI" – while "dumped imports" were selling at a price significantly below that of the CI. And R125 notes that with respect to "the CI's sales made outside the Community, the investigation showed that there was an overall increase of 69% in terms of volume during the period considered. During the same period, the unit selling price was on average 22% higher than on the Community market".[5]

***Inconsistency between different sets of data***

According to R91, production of the CI fell by 2 per cent between 2003/04, but, according to R102, employment fell by 27 per cent. R91 says that production then fell by 40 per cent over the next two years. R102, however, says that employment remains essentially constant.

There may be a legitimate explanation for the apparent inconsistency of these figures. If so, it should have been provided. That an inconsistency so glaring is allowed to pass without comment casts doubt on the rest of the document.

***Failure to provide relevant information***

R118 says: "Imports from Iceland increased by 16 % and the market share of these imports increased by 1.2 percentage points over the period considered (IP = 9.3 %). This development can be explained to a certain extend by the fact that *one major Norwegian producer transferred part of its production to Iceland where the conditions for the production of FeSi were more favourable*. While the average import price from Iceland was below that of the CI during the IP, it was well above the average import price of the countries concerned (12 % higher). (emphasis added).

Some elaboration of *why* conditions in Iceland are more favourable is called for. If Iceland is a better location for an electricity-intensive product than Norway, what does that say about costs of production in the EC?

***Refusal to examine individual performance***

Confronted by the suggestion (R79) that the performance of individual members of the CI dif-

fered markedly, the Commission responds (R80) that: "… pursuant to Article 4 of the basic Regulation the term 'Community industry' refers to the Community producers whose collective output represents a major proportion of the total Community production. The same Article provides for the circumstances in which certain Community producers may be excluded from the definition of CI. These circumstances do not include the performance of Community producers. Moreover, the exclusion of producers based on performance goes against the very principle of making an objective assessment of the situation of the CI. On the basis of the above, the claim was rejected".

This position, however, is doctrinaire, liable to lead to error, and open to abuse. Consider, for example, a CI that consists of two producers of similar size. Suppose that one of them suffers a major strike, which shuts it down for a year. Community output therefore falls sharply; its price rises; and imports increase. It is the strike that has initiated this sequence, not the increase in imports. But, under the doctrine noted above, will the Commission feel obliged to report this or take account of it?

The issue is especially important because although what has happened to individual members of the CI may be important to the defence, the defence may have no easy way of obtaining the information. The CI may know it, and the Commission may know it, but if both remain silent, the defence is deprived of weapons to properly do its job. In the interests of honesty and openness, the Commission should facilitate the production by the defence of hypotheses that compete with those of the injured producers or of the Commission itself.

In the specific case of FeSi, the cost of electricity is, as the Commission notes (R132), "a major portion" of the cost of producing FeSi. It rejects, however, the thought that electricity prices may have had something to do with the state of the CI and with the differences in performance of different firms within it: "… the investigation also revealed that energy prices all over the world, including in the countries concerned, increased, in some instances to a much higher degree than in Europe". This dismissal is evasive. It might be read to say, but does not in fact say, that electricity prices in the countries concerned increased relative to those in Europe. Actual figures should have been provided.

Moreover, there is no Community common market in electricity: electricity prices are likely to differ markedly between member states. In this circumstance, what is the economic sense of the notion of a CI? If the price of a major input differs between member states, and can change by different amounts in different member states, this clearly might contribute to or cause the difficulties of the "CI". The Commission surely should not be permitted to remove a set of possible alternative hypotheses as to how the injury came about on merely doctrinaire grounds.

**Conclusion**: The Commission's analysis may be correct but badly presented; but it certainly does not leave the sense that this case is cut and dried. On the contrary, it seems possible that with more information about the industry, a completely different story might be told about the causes of the injury to the CI.

AD 1547

DIHYDROMYRCENOL FROM INDIA
PROVISIONAL: OJ L196/07
DEFINITIVE: OJ L23/2008

*All references to the provisional regulation unless otherwise stated*

**Product**: Dihydromyrcenol is a chemical with a citrus scent, used in the production of detergents, soap fragrances and in citrus and lime-type perfumes.

**Industry Structure:** There are five producers in the EC, but only three, all located in Spain, in the Community Industry (CI) defined for this case.[6] According to R4, there is an "… apparent high number of Indian exporting producers and importers into the Community" — though, in the event, only two of them responded to the Commission's questionnaire.

**Investigation Period**: The IP 1 October 2005 to 30 September 2006. The examination of trends relevant for the assessment of injury covered the period from 1 January 2003 to the end of the IP (R8).

Dumping Calculation: "… normal value, by product type, was calculated as the weighted average of all domestic sales prices of the type in question, irrespective of whether these sales were profitable or not" (R16). Dumping margins of 3.1 per cent by one firm and 7.5 per cent by the other were discovered.

**Price Undercutting:** 5.8 per cent by one firm and 7.5 per cent by the other (R42).

**Injury and Cause of Injury Analysis:** The share of the EC market of the CI fell by 1% between 2003 and 2006 though its sales volume increased by 22% (R47). Its average selling price, however, declined by 31% over the period, and it made losses in every year except 2003 (R49).

The Commission's conclusions on the injury suffered by the CI (sustained in the Definitive Regulation) are that:

> "(54) During the period considered the presence of low-priced dumped imports from India increased dramatically. In terms of volume, dumped imports of the product concerned increased by almost 3000% between 2003 and the IP. In terms of market share, they held more than 17% of the Community market of dihydromyrcenol in the IP compared to only 0.7% in 2003.
>
> "(55) Despite Community consumption of dihydromyrcenol increasing by 23% during the period considered, the Community industry, in the IP, *only managed to attain the same share on the Community market as in 2003*, in particular thanks to an increase in sales of its production in 2005 and in the IP. However, as the above analysis of the economic indicators of the Community industry revealed, this could only be achieved at the price of severe losses, a fall in return on investment and cash outflow. In fact, the injury materialised in particular in terms of a significant drop in prices of the Community industry, which had a direct and significant negative impact on the financial situation of these companies. Specifically, the Community industry's prices fell from EUR 4.55 in 2003 to EUR 3.15 in the IP. This fall was not accompanied by any corresponding decrease in production cost. Therefore, the Community industry turned loss-making in 2004 and its losses from sales of dihydromyrcenol on the Community market further increased in 2005 and in the IP, when the sales revenues were hardly covering the Community industry's fixed cost. Such a situation is

clearly not sustainable in the long run" (emphasis added).

The proposition in the last sentence of this quotation is correct. But neither it nor any of the rest of commentary demonstrates that dumping from India caused the problem.

Recall that price undercutting by importers is not *per se* illegal. Nor is it *per se* illegal for importers to increase their sales in the Community. They can without transgression even to gain market share in the EC.

The Commission's problem is that it must argue that a large decline in CI sales prices (31 per cent) has been caused by the relatively low dumping margins (3.1 per cent and 7.5 per cent). That is difficult.

Moreover, the story the Commission tells in words is different from the story its tables tell. It says (R39) that import prices were significantly below CI prices in the IP, which would add some plausibility to the notion that Indian prices are dragging down CI prices. But that is not what its figures say. R39 gives an average import price of 3.81 EUR/kg in the IP and R47 gives a CI average price in the IP of 3.15 EUR/kg.

According to the figures, Indian prices were also higher than CI prices also in 2005 (3.45 EUR/kg versus 3.09 EUR/kg). Import prices were, however, lower than CI prices in 2003 and 2004.

The figures in the tables may be due to error (though error on such a matter in this context would be egregious). If correct, however, they make it very difficult indeed to conclude that imports from India were responsible for the decline in the prices charged by the CI.[7]

**Comment:** The Commission says about causation (R59) that: "The dumped imports undercut the prices of the Community industry by substantial margins, so it can be reasonably concluded that they were responsible for the price suppression which led to the deterioration of the financial situation of the Community industry". This is nonsense. The word "substantial" is not precise, but price-undercutting margins of 5.8 per cent and 7.5 per cent are not substantial in antidumping terms. Moreover, the Commission's conclusion *can*not reasonably be drawn from the evidence provided. There is no showing here that dumping has caused the injury suffered by the CI – there is nothing more than energetic arm waving.

**Conclusion**: This is a slovenly report. Words are inconsistent with tables, and what purport to be logical inferences have no basis. The evidence the Commission presents suggests that competition from India is a problem for the CI. It does not demonstrate that *unfair* competition is a major component in the creation of that difficulty, or in the injury suffered by the CI.

## AD 1534

## DICYANDIAMIDE (DCD) FROM CHINA
## NO PROVISIONAL REGULATION
## DEFINITIVE REGULATION: OJ L296/2007

**Product:** 1-cyanoguanidine (dicyandiamide or DCD) is a crystalline powder made from quick lime and carbon black. It is used in the production of a broad range of other chemicals, including pharmaceuticals.

**Industry Structure**: There is one producer of DCD in the EC (R47). A Norwegian producer, ODDA, formerly held 25% of the Community market, but abandoned production in 2002 (R57).

The Commission says (R7) that there is an "... apparently high number of exporting producers in the PRC", but only three replied to its questionnaire. Worldwide, DCD appears to be produced only in the EC and the PRC.

**Investigation Period**: 1 July 2005 to 30 June 2006. Trends were observed from 1 January 2002 to the end of the IP.

**Dumping Calculation:** None of the three Chinese producers were given either MET or IT by the Commission.

That decision, however, presents a problem. Having refused MET for the Chinese producers, the Commission needs an analogue country, but DCD is produced in only one other jurisdiction, the EC. The EC, therefore, is the only candidate for the role of analogue country. Bravely, the Commission grasps the nettle and uses the production costs of the EC producer as normal value, arriving by this means at a dumping margin of 91.8% (R44).

An anti-dumping duty of 49.1% was imposed on all Chinese exports of DCD to the EC (R137).

**Price Undercutting**: During the IP, the Commission claims (R54) to have found that the "weighted average undercutting margin expressed as a percentage of the CI's average ex-works sales price, was between 25 % and 35% for the cooperating Chinese producers".

The Commission accepts that DCD produced in the EC is of higher quality than DCD produced in China (R16). It claims, however, (R17) that these differences cannot be quantified; and therefore ignores them. The failure to take account of quality differences, however, means that actual price undercutting is less than stated by the Commission.

**Injury and Cause of Injury Analysis**: The CI made losses in all four years observed. Between 2002 and the IP, exports of DCD to the EC from the PRC rose by 141%, and the Chinese share in Community consumption increased from 15-25% to 40-50%; in effect, taking over the market share of ODDA (R50).

The Commission does not hesitate to turn this fact into a statement about *motivation* (R84): "... the Chinese exporting producers decreased their prices by 7% in 2003, *in their effort to take over the market share held by ODDA*. Having obtained the majority of it, they increased their prices by 25% in 2004, decreased them by 27% in 2005 and then increased them again by 4% in the IP" (emphasis added). In these comments, the Commission seems to imply co-ordination of pricing by the PRC exporters. To be taken seriously, the Commission's view on the coordination of pricing by the PRC producers needs substantiation, but the Commission provides none.

The Commission concedes that the CI faces disadvantages that have nothing to do with imports from China (R95): "... the CI is suffering from some cost disadvantages, such as three different production sites, no proximity to coal mines and expensive production process, even though it is not possible to compare the CI's cost structure with that of any other DCD producer, since none of the Chinese exporting producers obtained MET".

It brushes these deficiencies of the CI aside, however, as insignificant when compared to the effects of Chinese dumping (R97).

**Conclusion:** The cause-of-injury analysis adds nothing to the finding of "dumping" and the description of the wounds of the CI. It is, indeed, a monument to negativity – "No, we can't". No we can't quantify quality differences. No we can't compare the CI cost structure with the Chinese

cost structure, even though evidence suggests that the CI may be relatively high-cost.

## Further Comments

The DCD case has two unusual features, both of which deserve further comment. They are, first, the use of the EC itself as the analogue country and, second, the role of micro-DCD in the investigation.

### *Using the EU as an analogue country*

The use of analogue countries in cases involving non-market economies (NMEs) has no economic rationale and is used because there is no obviously better way of conducting an anti-dumping investigation of producers in a NME. The alternatives would be to abandon anti-dumping in dealing with NMEs, and to control trade either by the use of safeguards or by import duties imposed by administrative fiat. As against either of these, anti-dumping has the advantage that it is a defined process, not, at least on the surface, open to political interference; and therefore avoiding potential controversy and awkwardness for administrators and politicians – controversy is directed towards the process rather than its outcome in individual cases.

Seen in this light, there is no reason not to use the CI as an analogue. The Chinese industry is making sales at the expense of the CI (that is why the complaint has been made), so one can be confident that imputing the costs of production of the CI to the Chinese industry will lead to the discovery of dumping. The same is true, though, when an industry that does not export to the EC or whose exports are stable or declining is used as the analogue.

It is, perhaps, a sense of decorum that leads to uneasiness at the use of the CI as the analogue. The sale of exports at prices lower than are charged by domestic producers is not dumping, despite the wishes of some domestic producers. Using the EC as the analogue country in an EC investigation, however, is equivalent to that false proposition.

Antidumping as used against producers in NMEs casts a veil over an inane proceeding. To use the CI as analogue throws away the veil. It is, somehow, impolite.

## Micro-DCD

Micro-DCD is a type of DCD produced only in the EC (and in which, therefore, the single EC producer has a world monopoly). Sales of micro-DCD are, the Commission says, "very profitable" (R61). Nevertheless, the Commission lumps micro-DCD together with all other kinds. It comments, however, (R82) that micro-DCD was excluded for the purpose of calculating the degree of price undercutting. That is clearly appropriate. Yet when it gives a series of prices of DCD for the CI (R65), micro-DCD is included. A consequence is that movements of the prices of other types of DCD – which is the subject of the investigation -- are obscured. One wonders why.

Despite its lagging performance in the EC, exports of the CI increased by 58 per cent between 2002 and the IP (R92). The Commission comments that: "This shows that … there is a strong demand for DCD produced by the CI, even at prices well above those of the Chinese exporters, although, as explained above, the higher average price can be explained by the higher prices obtained for micro-DCD".

This sentence is confused. If the higher average price *is in fact* explained by the higher price of micro-DCD (which the Commission does not say) the self-congratulatory tone of the comment on DCD produced by the CI is misplaced. If it is not in fact explained by the higher price of micro-DVD, as is suggested by the evasive phrase "*can* be explained", then the issue of quality difference

again appears – and challenges the correctness of the Commission's conclusions on, for example, price undercutting.

Micro-DCD appears once more in the Commission's argument, when in R95, quoted above, it discusses factors that increase the production costs of the CI. It continues, however: "Nevertheless, the fact that the CI made a small profit in 2001 and also that it is profitable on the product type (micro DCD) not exported by the Chinese producers clearly shows that in normal conditions of competition, the CI might be in a much better shape, and therefore that the amount of losses is not purely structural". This is a silly comment. That the CI is profitable in micro-DCD, of which it is the world's only producer, says nothing about what might happen in "normal conditions of competition"; and a small profit in 2001 is hardly strong evidence that its losses are not structural.

## AD 1526

## PEROSULPHATES FROM THE US, CHINA AND TAIWAN
## PROVISIONAL: OJ L97/2007
## DEFINITIVE: OJ L265/2007

*All references to the provisional regulation unless otherwise noted.*

**Product:** Perosulphates are used in the production, inter alia, of polymers; printed circuit boards; hair cosmetics; paper; denture cleansers; and disinfectants. There are four principal types, which may have different prices[8].

This is a product with previous experience of antidumping protection. The EC imposed antidumping duties on exports from the PRC between 1995 and 2002 (R134).

In the definitive regulation, there is a lengthy discussion (Def R9-R25) about whether one of these types – KPMS – should be included in the definition of the product. The Commission is at pains to argue that it should be included, and seems at times to be over-enthusiastic in its rejection of arguments to the contrary (confronted with the assertion that KPMS is largely used to clean swimming pools whereas other perosulphates cannot be used for that purpose because they are skin irritants, for example, the Commission responds that other perosulphates are "indeed used in cleaning and disinfection applications" (R15), which does not meet the point. And in answer to the contention that the consistently high price of KPMS suggest that it is a different product, the Commission says that the high price is due to "the limited number of producers of KPMS worldwide" (R18), which, again, fails to meet the point: an oligopoly only has the ability to set the price of its output – which is presumably what the Commission is suggesting – if the elasticity of substitution between that product and others is far from infinite.

An outcome of the inclusion in the product definition of KPMS is that KPMS can be subjected to dumping action even though an action against KPMS alone might fail. Whether this is the Commission's *intent*, of course, is a different issue. The Commission notes (Def R70) that, "exports from the USA consist to a large extent of KPMS"

**Industry Structure:** The Commission mentions (R10) two producers in the EC, both in Germany; two in the US; and one in Taiwan. It says (R6) that there is "an apparent high number of exporting producers in the PRC": six of them responded to its questionnaire. Turkey has one producer, used in this investigation as the analogue country for the PRC (R11).

**Investigation Period:** The IP was 1 July 2005-30 June 2006. Trends were observed from 1 January 2003 to the end of the IP.

**Dumping Calculation**: The Commission claims to have found (R95-R105) dumping margins of 28.3% and 84.1% for the US producers; *de minimis* for two of the PRC exporters granted market economy treatment and 14.49% for the other; 102.7% for the three PRC exporters not granted MET; and 22.6% for the Taiwanese exporter.

Antidumping duties of 10.6% and 39% were imposed on the US exporters; 0-24.5% on the Chinese (with a residual duty of 71.8%); and 22.6% on the Taiwanese exporter.

**Price Undercutting:** The Commission says (R119) that "During the IP, the weighted average price undercutting margins, expressed as a percentage of the Community industry's sales prices, was 30.2 % for the Taiwanese exporter, 30.3 % for the PRC, and 7.4 % for the USA. The total weighted average undercutting margin for all countries concerned was 22.7 % during the IP".

**Injury and Cost of Injury Analysis:** Output of the CI fell by 14 per cent over the period (R120). Its average unit price fell by 8 per cent (R123). The rate of return on investment of the CI fell throughout the period of the investigation, but remained positive (R130).

R142 says that: "In the analysis of the effect of the dumped imports, it was found that price is an important element of competition because quality issues do not play a significant role. It should be noted that the prices of dumped imports were considerably below those of the Community industry as well as those of other third country exporters".

This is a confusing sentence. Average unit prices for different exporters are very different from one another, so presumably the Commission means that for each of the four types, there is little leeway for charging a price that is different than that charged by other sellers; but, if so, the proposition sits uneasily with its findings on price undercutting. Despite the substantial undercutting reported by the Commission, the sales in the EC of the CI fell by only 5 per cent between 2004 and 2005 (R 123).

In its injury determination, the Commission uses cumulation: that is, it adds together the exports to the EC of the three countries in assessing the injury caused by dumping. Most of the increase in the market share of imports from the three countries, however, comes from the PRC. The market share of the three together rose from 25.3% to 36.1%. However, the share of imports from China rose from 11% to 20.9%; of those from the US from 9.0% to 9.3%; and of those from Taiwan from 5.3% to 5.9% (Def R57).

**Comment:** The CI displays some symptoms of injury, and the Commission is able to produce evidence of dumping. The cause-of-injury analysis adds little to these facts.

It is difficult to avoid the conjecture that this case was deliberately structured to catch US producers of KPMS in the antidumping net

## AD 1506

## SADDLES FROM CHINA
PROVISIONAL: OJ L379/2006
DEFINITIVE: OJ L160/2007
*All references to the provisional regulation unless otherwise noted*

**Product**: The saddles in this case are for bicycles and gymnastic equipment.

**Industry Structure**: There are ten EC producers (R64). The complaint refers to three groups

of Chinese producers, each containing two or more companies, and one independent producer (R11). The Commission also mentions production in Taiwan, Vietnam, India, Mexico and Brazil, one of whose producers is used as the analogue for Chinese producers not granted MET (one group and the individual producer) (R21).

**Investigation Period**: The IP is calendar year 2005 and trends are examined between the start of 2002 and the end of the IP.

**Dumping Calculation**: Dumping margins were calculated at 29.6 per cent for producers not given MET; and at 0 and 5.8 per cent for those given MET (FD R19 and R22 amending PD R60-63).

**Price Undercutting**: Price undercutting is stated as 67.3 – 70.1 per cent (R76). The definitive determination imposed dumping duties at the level of the dumping margins.

**Injury and Cause of Injury Analysis**: The Chinese share of the EC saddle market grew from 7 per cent to 26 per cent between the start of 2002 and the end of 2005 (R72). The average price of Chinese saddles fell by 21 per cent over the period (R74). The average price of CI saddles rose by 25 per cent (R89). The output of the CI fell by 17 per cent (R79).

The Commission explains (R89) the increase in the average price of CI saddles as a result of

a. an increase in raw material prices (which it says accounts for roughly half of total cost: R90); and
b. a shift of output from low tech to high tech products.

No evidence is provided in support of these statements, nor any figures that would allow comparison of the size and relative importance of the two effects.

The Commission comments that:

> "This price development in opposite directions can only partly be explained by a different product mix of saddles produced in the Community and the PRC. Moreover, the Community producers have submitted evidence that the access to and the prices of most raw materials are similar in the Community and the PRC. They have also shown that the raw material cost of saddles in the Community increased over the period considered. Indeed, some exporting producers in the PRC sell their products to the Community below cost of the raw material and this clearly shows that this is not a situation where prices are low because of a comparative advantage of the producers in the PRC, but because of the existence of dumping practices."

Or one in which the Commission got the facts wrong. No evidence is provided for the assertion that Chinese producers sell saddles in the EC for less than the cost of the raw materials they contain, and no reason is suggested why they might choose pursue such an expensive policy.

In R113, moreover, the Commission notes that the average unit price of saddles from India sell is roughly one half that of saddles from China (though the EC market share of Indian saddles remains at roughly one per cent through the period of observation); and that Vietnam exports saddles at roughly the same unit price as China, but also failed to push its EC market share above 1 per cent.

The Commission concludes (R108) that:

> "The effect of this unfair pricing behaviour of the dumped imports from the PRC was that the Community industry's prices were suppressed and could not even cover the increase of cost of raw materials. This was further confirmed by the significant reduction in profitability by the Community industry".

In fact, the return on investment of the CI was positive throughout, and in double figures every year except for the IP, when it fell to 1 per cent (R94).

**Comments**: The average unit price of CI output rose by 25 per cent between 2002 and 2005. That is compatible with price suppression, but does not sit easily with it. The Commission should have provided figures that would support its contention about the causes of the increase in CI prices and that allow comparison of performance in the production and sale of different types of saddle.

**Conclusion**: The analysis of causation adds nothing to the basic findings of dumping and injury. There is a clear possibility that the CI is at risk in the production of low-tech saddles but profitable in the production of high-tech ones. Anti-dumping duties may maintain a temporary EC presence in low-tech saddles; but it is not self-evident that this is an outcome to be applauded.

## AD1504

## PREPARED OR PRESERVED SWEETCORN KERNELS FROM THAILAND
PROVISIONAL: OJ L364/2006
DEFINITIVE: OJ L159/2007
*All references are to the provisional regulation unless otherwise stated*

**Product**: Sweetcorn kernels, prepared or preserved by vinegar or acetic acid or other preservatives, not frozen.

**Industry Structure**: There are 18 producers of preserved sweetcorn kernels in the EC (R41), and at least 19 in Thailand (R16). The Commission selected 4 of the Thai companies for sampling, representing about 52 per cent of Thai exports to the EC (R18).

**Investigation Period**: The IP is calendar year 2005. Trends were observed from 1 January 2002 to the end of the IP (R12).

**Dumping calculation**: It seems clear (R22-R32) that normal value was frequently obtained by constructing costs of production, on the basis that the producer had insufficient profitable sales on the Thai market to use them in determining normal value. Dumping margins calculated on this basis ranged from 3.1 per cent to 17.5 per cent (Def R24, adjusting R38).

**Price Undercutting**: Price undercutting is claimed to be in the range 2 – 8 per cent. However, two of the four Thai producers were found not to undercut (R48). The language of R48 is not clear: it seems, however, that the other two undercut by 2 - 8 per cent, not that this was an average over the four.

**Injury and Cause of Injury Analysis**: Imports into the EC from Thailand rose by 87 per cent between 2002 and the IP, taking the Thai share of the EC market from 6.8 per cent to 12.7 per cent (R45). The price of imports fell by 13 per cent over the period.

The average unit price received by the CI fell by 8 per cent (R63). Its market share fell from 58.5 per cent to 55.9 per cent (R63).

Thai average unit prices (R45) maintained a fairly constant relation to CI prices (R63). The ratio of Thai to CI prices (R63) was 0.69 in 2002; 0.64 in 2003; and 0.65 in 2004 and 2005.

The Commission makes no comment on the difference in CI and Thai prices. It does speak (e.g. R22-29) of different "product types"; which opens the possibility that the difference in average unit price might be due to a concentration of Thai production in low-price types, while EC production is concentrated on high-price types. This is not demonstrated, however, and it is also possible that what the Commission interprets as "price undercutting" is due to within-type quality differences.

**Conclusion**: The evidence on price undercutting – only two of the four sampled firms found to undercut, and then by small and probably exaggerated margins -- does not seem to support strong statements. The Commission nevertheless says (R65) that: "Given the volume and the level of price undercutting of the imports concerned, these imports were *certainly* a factor affecting prices" (emphasis added).

But the level of price undercutting is trivial compared to the difference between Thai and EC prices, and, indeed, is so small as to be suspect. That prices in the EC would have risen had the Thai producers withdrawn from the EC market is a reasonable proposition. But it has nothing to do with price undercutting. It is difficult to avoid the conclusion that the Commission is trying to buttress a weak case with strong words.

The evidence of injury also seems slight. The return on investment of the CI did indeed fall by 58 per cent: from 59.8 per cent to 25.1 per cent. But the starting point is high; and the end point a long way from ruin.

The evidence of injury and the evidence that the injury was caused by the dumping of Thai products is unconvincing. The evidence strongly suggests that the EC would have been better off had this EC industry been left to cope with competition by itself.

## AD1501

## IRONING BOARDS FROM CHINA AND THE UKRAINE
## PROVISIONAL: L300/2006
## DEFINITIVE: L109/2007

*References are to the provisional regulation unless otherwise stated*

**Industry Structure**: This is an industry containing many producers. The Commission identifies thirty producers in the EC (R72); eight in the PRC (R9, but in R4 suggests that there are many more); one in the Ukraine; at least nine in Turkey (R38); at least five in the US; three in Thailand; and five in India (R38).

The Commission notes, however, (R73) that "the level of concentration is relatively high as can be seen by the fact that the output of the five major producers represents more than 50% of the overall estimated output in the Community".

**Investigation Period**: The IP is calendar year 2005. Trends are observed between 1.1.02 and 31.12.05 (R11).

**Dumping Calculation**: The Ukrainian producer and one Chinese producer received market economy treatment (MET). Turkey is used as the analogue country for exporters not given MET. Dumping margins for the PRC were found to be between 0 and 36.5 per cent (the zero dumping margin belonging to the producer given MET); and for the Ukrainian producer 17.3 per cent (R68).

**Price Undercutting**: Price undercutting, the Commission says, was 30.8 per cent for the Chinese producers and 6.6 per cent for the Ukrainian producer (R98). This suggests that imports from China were 24 per cent cheaper than those from the Ukraine.

**Injury and Cause of Injury Analysis**: Nevertheless, Ukrainian exports still managed to make inroads into the European market. R88 comments that "there were no imports from Ukraine in 2002. The only Ukrainian producer of ironing boards started its operation in 2003. The imports from Ukraine increased sharply in 2004, by more than 400%".

The Chinese producers are apparently also newcomers to the industry. The Commission notes in passing (R 90) that "[m]ost of the Chinese exporting producers are recent entrants to the ironing board market ....".

Moreover, at least 95 per cent of the output of the Ukrainian producer and the Chinese producer accorded MET was exported (R43-49). This strongly suggests that these two operations – and perhaps the other Chinese operations – were set up to produce for export, probably primarily for the EC (the Commission remarks (R37) that the US market is said to be highly protected).

According to R100, the net return on investment for the CI was 61.98 per cent in 2002. It rose to 68.19 per cent in 2003, then fell to 4.77 per cent in 2004, recovering to 27.02 per cent in 2005.

**Comments**: These figures do not self-evidently describe a distressed industry. The Commission explains in R102 that:

> "The return on investment, expressed in terms of net profits of the Community industry and the net book value of its investments developed in line with the investment and the profit margins. In respect of the seemingly high level of return on net assets, it should be noted that most of the companies constituting the Community industry were established 30 or more years ago and thus most of their assets have already been considerably depreciated. In fact, in 2004 when certain investments were made and when profit margins reflected the actual performance of the Community industry (rather than the artificially increased profit in the IP), the return on investment dropped by 63 percentage points. This confirms the inability of the Community producers to raise capital, in particular because of decreasing sales volume and low sales price".

This is an odd commentary. Does it follow that because the companies constituting the Community industry were established "30 or more years ago" that "*most* of their assets have already been considerably depreciated"? It does if there has been little recent investment. If that is the case, however, considerable depreciation is surely appropriate after thirty years. But the picture this suggests is of a not-very-vigorous industry making high profits on old capital equipment. And how does this "confirm the inability of the Community producers to raise capital, in particular because of decreasing sales volume and low sales price"?

The "artificially increased profit in the IP" to which the Commission refers in R102 is explained in R100:

> "Over the period considered, profitability of the Community industry deteriorated. The

profit margin in the IP was 40% lower than in 2002. The apparent improvement in the IP, as compared to 2004, was in reality achieved by cuts in remunerations of the management of some companies. Such remuneration cuts had significant impact on their profit margins. In fact, the overall gross profit continued decreasing in the IP and reached 65 % of its 2002 level. It is therefore evident that the increase of overall net pre-tax profit is artificial and not sustainable".

This analysis is unsatisfactory. A company that starts with a return on capital of 68.19 per cent, can experience a large reduction in that figure without being distressed. And why should 2004 management remuneration levels be regarded as sacrosanct? These are not, after all, self-evidently successful managers.

In fact, these figures suggest an alternative analysis. It is that this European industry has coasted for many years -- "*most* of their assets have already been considerably depreciated" -- but now is confronted by newcomers who have looked about for profitable opportunities and have found one in the European ironing-board industry.

An interesting footnote to this analysis appears in R137, where the Commission notes that members of the CI have imported Chinese ironing boards. "That was", it says, "a self defence action of the Community industry against the influx of low-priced dumped imports. In any event, these imports were resold in the Community at non-injurious prices." Buying at prices deemed injurious by the Commission and selling at non-injurious prices! A profitable business if you can get it!

**Conclusion:** It is far from evident on that the injuries of the CI – which are themselves open to question – were caused by the dumping or price undercutting that the Commission alleges. Certainly the Commission's presentation of its evidence is far from making either case.

## FOOTNOTES

1. Although the notion that buyers are bound by previous contracts raises difficulties for calculation of the degree of price undercutting. If existing contracts prevent buyers from purchasing at the lowest prices currently available, for example, which prices are to be compared – the prices at which the CI has contracted to supply with the price at which imports are offered; or prices at which exporters and domestic producers bid for off-contract business?

2. http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageImport_ShowContent&id=HMCE_PROD1_026952&propertyType=document

3. In anti-dumping cases against exports from non-market economies (NMEs), normal value is typically established by taking the costs of production of the allegedly dumped good in a country deemed to have a market economy (the analogue country). If an exporter from an NME is given "market economy treatment" (MET), however, that exporter is treated as if it came from a market economy, and its costs and dumping margins established under the same rules as apply to exporters from market economies. If an exporter is given "individual treatment" (IT), the reference price is established by the analogue country method, but a dumping margin will be calculated for it individually, on the basis of its own export prices.

   The rules for the grant of either treatment are rigorous. They may be found in any antidumping case involving an economy deemed to be an NME.

4. In an interesting analysis, the Commission says (R106) "… the investigation showed that the unit costs of production of the Community industry have increased by around 8% between 2003 and the IP. The increase could be partly attributed to the apparent rise in the price of raw materials".

   "However", it continues in R107, "the rise in the average unit cost of production has been more than compensated by the increase of the average unit selling price. … It is therefore considered that the rise in the cost of production did not contribute to the injury suffered by Community producers".

The increase in average unit selling prices clearly could have contributed to that injury. The Commission, however, chooses to regard the CI's assumed inability to raise prices further as part of the wrong done to the industry by the dumped imports.

5. Of course, what the Commission offers as a "price" is in fact an average of the prices of different types of FeSi. It may therefore be that apparent instances of price-insensitivity, such as those noted above, can be explained by different product mixes, or changes in mix, and not by actual differences or changes in prices. Until that is demonstrated to be true, however, the mere possibility does not preclude other explanations.

6. The Commission makes an interesting comment in R25, discussing the composition of the CI. It says of one of the three firms that it proposes to include in the CI: "It is noted [by an Indian exporter] that one of them had made substantial imports of dihydromyrcenol from India in the IP. However, importation was not its core business and these imports were considered to have been made in reaction to the influx of dumped imports significantly depressing prices, in particular in order to improve its financial situation and to maintain its own production of the like product viable. Therefore, it was not considered appropriate to exclude this producer from the definition of the Community industry". The Commission does not explain how these purchases might have maintained "its own production viable", which is a pity.

7. It also raises questions about the price undercutting the Commission claims to have found during the IP.

   One would hesitate to say that it is impossible that Indian price undercutting could co-exist with Indian average prices that are 21 per cent higher than those of the CI -- the weights in one calculation are different from the other. But it is not strightforward or probable that they co-exist; and if the Commission wants to say that they do co-exist, it should explain how they manage it.

8. And they appear to vary a great deal. The Def R50 gives actual import prices in EUR/tonne. The US price (which was 1131 EUR/tonne in the IP) is roughly but consistently twice Taiwanese prices and the PRC price is roughly but consistently 100 EUR/tonne more than the Taiwanese price. Comparing these prices with CI prices is difficult, since CI prices are given only in ranges (R123). CI price appear, however, to be more similar to US prices than to Taiwanese or Chinese prices. The Commission says (R142, quoted below) that quality differences are not important, which presumably must imply that the large differences in price are due to different proportions of the four types in the sales of each country.