

Recent EC Safeguards' Policy:

“Kill Them All and Let God Sort Them Out”?

The quote above is attributed to Arnaud-Arnaury, the Abbot of Citeaux, and "spiritual advisor" to the Albigensian Crusade. Pope Innocent III ordered the Albigensian Crusade, to purge southern France of the Cathari heretics. It began in the summer of 1209, with their first target - the town of Beziers. The Catholic faithful in Beziers refused to give up the Catharis among themselves. The crusaders invaded. When Arnaud-Arnaury was asked whom to kill he replied "Kill them all. God will know his own." They did. The crusaders slaughtered nearly everyone in town, over 20,000, either burned or clubbed to death. Thus they achieved their goal of killing the estimated 200 heretics who were hiding in the town among the Catholic faithful.¹

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1. Introduction

The European Community has traditionally been reluctant to impose safeguard measures on third country exports of industrial products. Safeguard measures at first sight seem less attractive in terms of relief than anti-dumping duties and countervailing duties: quotas do not directly affect the prices charged for imported products (but raise domestic prices), which may continue to hurt the EC industry, and there are stricter time limits. In addition, under the WTO rules, the EC must offer compensation to the main WTO suppliers affected by the protective measures.⁴ Last, in contrast to anti-dumping and anti-subsidy measures, safeguards target fair trade and therefore amount to an admission by domestic industries that they cannot compete with fairly traded imports. Thus, safeguards tended to be viewed as an instrument for 'wimps.' For these reasons, safeguard actions were not popular with EC Member States and industries and few cases were brought in the past. And, indeed, from this moral high ground the EC, since 1995, has gone on the offensive in challenging safeguard measures imposed by other WTO Members, including Korea, Argentina and, repeatedly, the United States, in the WTO.

During the past two years, however, the EC has initiated relatively many safeguard proceedings itself and has arguably moved as aggressively as some of its trading partners. Experience thus far shows that the safeguard instrument is a very blunt

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1. http://www.manbottle.com/triva/Kill_them_all...htm_answer.htm, visited on 2 August 2004.
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 4. Either immediately or after three years if the measure is the result of an absolute increase in imports and is in conformity with the WTO rules.

instrument that may quickly lead to imposition of protective measures on a broad spectrum of products.

On 27 March 2002, conveniently in response to similar measures taken by the United States, the Commission initiated⁵ 21 safeguard investigations against *Certain steel products* and imposed provisional safeguard measures on 15 products the very same day.⁶ Definitive measures on seven products were imposed on 27 September 2002.⁷ The measures lasted until 7 December 2003 when they were repealed following the repeal of the American measures by President Bush.⁸

On 11 July 2003, the Commission initiated simultaneous safeguard proceedings against China and *erga omnes*⁹ on *Canned mandarins*. These led to imposition of provisional safeguard measures on 7 November 2003¹⁰ and definitive measures on 7 April 2004.¹¹

On 6 March 2004, the Commission initiated a safeguard proceeding against *Farmed salmon*,¹² with provisional measures imposed (effectively against Norway and Faroe Islands) on 13 August 2004.¹³

Furthermore, there are rumours about impending safeguard complaints with respect to footwear and apparel.

In the following, we will give an overview of the EC's industrial goods'¹⁴ safeguard law and emerging practice. We will focus on the basic Regulation 3285/94, but will

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5. Notice of initiation of a safeguard investigation concerning imports of certain steel products, [2002] O.J. C77/39.
 6. Commission Regulation (EC) No 560/2002 of 27 March 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] O.J. L85/11.
 7. Commission Regulation (EC) No 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] O.J. L261/1.
 8. Commission Regulation (EC) No 2142/2003 of 5 December 2003 terminating the definitive safeguard measures in relation to certain steel products imposed by Commission Regulation (EC) No 1694/2002, [2003] O.J. L321/11.
 9. Notice of initiation of (i) a safeguard investigation under Council Regulations (EC) Nos 427/2003 and 2201/96 concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China and (ii) a safeguard investigation under Council Regulations (EC) Nos 3285/94, 519/94 and 2201/96 concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] O.J. C162/2.
 10. Commission Regulation (EC) No 1964/2003 of 7 November 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] O.J. L 290/3.
 11. Commission Regulation (EC) No 658/2004 of 7 April 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] O.J. L104/1, as amended [2004] O.J. L105/52.
 12. Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 3285/94 and 519/94 concerning imports of farmed salmon, [2004] O.J. C58/7.
 13. Commission Regulation (EC) No 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of Farmed Salmon, [2004] O.J. L267/3.
 14. We will therefore not discuss the various EC safeguard regimes with respect to agricultural products.

also briefly discuss various special safeguard regimes that the EC has in place. In addition, we will provide a critical analysis of the approach taken by the Commission, particularly with respect to the determination of serious injury, of the three cases mentioned above.

2. Essential conditions

Following the entry into force of the World Trade Organization, the European Community adopted Regulation 3285/94¹⁵ [hereinafter: the basic Regulation], which implemented the WTO Agreement on Safeguards into European Union legislation. This Regulation enables the EC authorities to take safeguard measures against imports from third countries, except for:

– products originating in certain third countries listed in Regulation (EC) No 519/94¹⁶ on common rules for imports from certain third countries. This Regulation applies to certain non-WTO members; and

– textile products covered by Regulation (EC) No 517/94¹⁷ (“autonomous regime”) other than the products listed in Annex II in so far as those products originate in a country which is a member of the WTO.

In addition, the Community has adopted legislation to enable it to impose discriminatory safeguard measures against China, on the basis of China’s Protocol of Accession to the WTO.¹⁸ One of the *Canned mandarins* cases was initially initiated pursuant to this Regulation, but the measures that were later imposed, were imposed on the basis of the general safeguard Regulations.

15. Council Regulation (EC) No 3285/94 of 22 December 1994 on common rules for imports, [1994] O.J. L349/53, repealing Regulation (EC) No 518/94, as last amended by Council Regulation (EC) No 2474/2000, of 9 November 2000 establishing, pursuant to Article 1(7) of Regulation 3030/93, the list of textiles and clothing products to be integrated into GATT 1994 and amending Annex X to Regulation (EC) No 3030/93 and Annex II to Regulation (EC) No 3285/94.

16. Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) No 1765/82, (EEC) No 1766/82 and (EEC) No 3420/83, [1994] O.J. L67/89, as last amended by Council Regulation (EC) No. 427/2003 of 3 March 2003, [2003] O.J. L65/1.

17. Council Regulation (EC) No 517/94 of 7 March 1994 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific rules, [1994] O.J. L67/1, last amended by Commission Regulation (EC) No 2309/2003 of 29 December 2003 amending Annexes III B, IV and VI, [2003] O.J. L342/21.

18. Council Regulation (EC) No. 427/2003 of 3 March 2003 on a transitional product-specific safeguard mechanism for imports originating in the People’s Republic of China and amending Regulation (EC) No. 519/94 on common rules for imports from certain third countries, [2003] O.J. L65/1 amended by Council Regulation (EC) No 1985/2003 of 10 November 2003, [2003] O.J. L295/43. See also Bronckers, Goyette, *The EU’s Special Safeguard Clause in Respect of China: (How) Will it Work?*, 30:2 *Legal Issues of European Integration*, 123-132 (2003).

Titles IV and V of the basic Regulation discuss respectively *surveillance* and *safeguard* measures which may be imposed on imports from third countries. Safeguard measures may be preceded by surveillance measures.¹⁹

On the basis of Article 17 of the basic Regulation, the Council, acting by a qualified majority on a proposal from the Commission, may adopt safeguard measures to prevent a product being imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to Community producers of like or directly competing products, where the interests of the Community so require.

Thus, in a safeguards investigation, the first step is to identify the domestic “like product” or the domestic “directly competitive product”. Then, the domestic industry (*i.e.* the producers of the like or directly competitive product) needs to be defined and it is necessary to conduct a determination of “serious” injury. The next step is to identify “unforeseen developments” *ex Art. XIX 1. (a) GATT 1994* and to examine whether imports are taking place in “such increased quantities” and “under such conditions” as to cause serious injury or threat thereof to the relevant domestic industry. Once “all relevant factors” having a bearing upon the condition of the domestic industry have been examined, the causal relationship between increased imports and serious injury has to be demonstrated. In addition, any known “sources” of injury other than increased imports have to be examined in order not to attribute the injury resulting from these sources to the increased imports (non-attribution requirement). Last, at least under WTO jurisprudence, a measure has to be formulated which takes care of the portion of the serious injury caused by the increased imports.

The investigation period

In order to perform the analysis above, an investigation period will need to be selected first. The selection of the investigation period may well be of crucial importance for the outcome of the case. It is important to note therefore that it is the Commission which makes the selection and that exporters are not consulted on the selection of the period. Rather, they will be presented with a ‘fait accompli’.

In *Certain Steel products* the IP covered five years and the investigation was initiated three months after the end of the IP. The Commission took into account recent trends in its Definitive Regulation.

In *Canned mandarins*, the IP covered again five years and the investigation was initiated six months after the end of the IP. Again, when imposing definitive measures, the Commission took into account the most recently available data, *i.e.*

19. With respect to surveillance, Article 11(1) of the basic Regulation provides that where the trends in imports on the market in respect of a product originating in a third country threaten to cause injury to Community producers of like or directly competing products and where the interests of the Community so require, importation of that product may be subject to retrospective Community surveillance or prior Community surveillance.

data corresponding to the period for which provisional measures were already in force.

Finally, in the *Salmon* case, the IP covered four years and the investigation was initiated two months after the end of the IP. The Commission also took into account that the investigation was initiated two months before the EU enlargement and indicated that it would include available data relating to the new Member States. In this case, forecasts for 2004 and 2005 were requested in order to check whether they confirm the trends shown during the IP.

Like or directly competitive products

In *Certain steel products*, the Commission stated that although technical differences in product characteristics and qualities were alleged, the imported product and the Community product were like or directly competitive. More problematically, however, the investigation was effectively against 21 products, without the Commission considering whether these products were in fact competing with each other.

In *Canned mandarins*, the Commission took into account that both products were classified under the same HS code level (at six digit level) and that they shared the same or similar physical characteristics (the differences in quality were considered negligible from the perspective of the consumers and, in fact, some imported products did not specify their origin, making it difficult for the consumers to make a distinction between the EC and the Chinese product). Regarding end uses, the EC considered that both products had “*the same or similar end-uses, they were, therefore, alternative or substitute products and were easily interchangeable.*” As a result, the EC concluded that the imported and the EC products were like products.

In *Farmed salmon*, the EC concluded in the provisional determination that the imported product and the Community product were ‘like or directly competitive’. It rejected the argument that frozen salmon is a different product to fresh salmon although it admitted that the fresh product is marketed as a premium quality product and enjoys a price premium at the retail level.

WTO case law²⁰ provides some guidance on using an “effects” test when comparing “directly competitive” products. This effects test could include an analysis of the elasticity of substitution across products or cross-price elasticity between products. In addition, a co-integration analysis²¹ could be done to show that over long periods

20. Japan - Taxes on Alcoholic Beverages - Report of the Panel, U 96-2651, WT/DS8/R,WT/DS10/R,WT/DS11/R, 11 July, 1996.

21. See Greene, *Econometric Analysis*, 789-96, (2000) (4th Edition, New Jersey: Prentice Hall) for details on co-integration analysis. Briefly, the implication of the analysis would be that the two or more series, if related, drift together at roughly the same rate and the partial difference between them might be stable around a fixed mean. There are two basic approaches for testing co-integration: The Engle and Granger (1987) method (see Engle, Granger, "Co-Integration, Error Correction: Representation, Estimation and Testing", *Econometrica* 55, 1251-1276 (1987)) and the Johansen (1988) (see Johansen, "Statistical

of time, the goods in question (fresh salmon and frozen salmon for instance) are positively correlated. However, in the *Farmed salmon* case, the Commission implicitly rejected the use of economic analysis and relied rather on a qualitative assessment to determine “likeness”.

Definition of the domestic industry

In *Certain Steel products*, the complainants were all members of the European Confederation of the Iron and Steel Industry (Eurofer), and represented around 91.4 % of the total EC production of the products concerned.

In *Canned mandarins*, the EC highlighted that virtually all production of the product concerned in the EC was carried out in Spain and that in 2002-03, the Spanish producers accounted for over 85% of the total Community production.

In *Farmed salmon*, the Commission noted that the Community producers represented 47% of the total Community production for 2003 and, therefore, a major proportion. Claims by non-complaining EC producers that they opposed the initiation were rejected on the ground that the requirement of ‘standing’ did not apply to safeguards’ proceedings.

Unforeseen developments

In *Certain steel products*, the EC concluded that the unforeseen developments consisted of the increased use of trade defence instruments by the United States and the decrease in imports to the US.

In *Canned mandarins*, the EC concluded that the unforeseen developments consisted of the unprecedented increase in Chinese production capacity leading to high pressure to export; the possibility that United States retaliatory measures in the hormones dispute would exclude the EU product from the United States, encouraging an increase in PRC's capacity and consequently production; a change in consumer preferences from 2001 onwards and the exchange rate policy of the Chinese government coupled with the unexpected fall of the United States dollar since October 2000.

In *Farmed salmon*, the EC provisionally concluded that the unforeseen developments that caused the increase in imports was significant over-production in Norway, aggravated by the unexpected effects of the termination of trade defence measures against Norway and the fact that its industry did not achieve its forecast of increasing its exports to non-EU countries, in addition to the rise in the value of the Euro and the Danish Krone vs. the Norwegian kroner.

Analysis of Cointegration Vectors," *Journal of Economic Dynamics and Control*, 12, 231 –254 (1988)) and Stock and Watson (1988) approach (see Stock, Watson, "Testing for Common Trends," *Journal of the American Statistical Association*, 83, 1097 –1107 (1988)).

It may be noted that, as Alan Sykes has pointed out, unforeseen developments were originally considered to be “*development[s] that caused the increase in imports following a trade concession under original GATT to be greater than reasonably expected*”.²² Thus, the import surge would not have happened if the original concession had not been given. The scope of the condition has clearly been widened, probably not only in the EC, but also in other countries. In the three EC cases that we examined, there has been no reference to or analysis of previously granted tariff concessions with respect to the products concerned.

Serious injury and causation

Article 10 (1) of the basic Regulation requires analysis of the following *injury factors*:

- (a) the volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;
- (b) the price of the imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community;
- (c) The consequent impact on the Community producers of similar or directly competitive products as indicated by trends in certain economic factors such as:
 - production,
 - utilization of capacity,
 - stocks,
 - sales,
 - market share,
 - prices (i.e. depression of prices or prevention of price increases which would normally have occurred),
 - profits,
 - return on capital employed,
 - cash flow;
 - employment.

Furthermore, where a threat of serious injury is alleged, the Commission must also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as (a) the rate of increase of the exports to the Community and (b) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community.

It may further be noted that WTO panels, supported by the Appellate Body, have consistently taken the position that *all* injury factors as well as other factors brought to the attention of the authorities by interested parties *must* be analyzed by the

22. Sykes, *The Persistent Puzzle of Safeguards: Lessons from the Steel Dispute*, Working Paper No. 212, (2004) (Chicago: University of Chicago).

authorities before protective measures are imposed and that such analysis must be reflected in the public record.

In *Certain steel products*, the EC concluded that the EC industry had suffered serious injury as a result of the increased imports in the form of lost market share and decreases in capacity utilization, productivity and employment. The EC also took into account that the Community producers were already suffering serious injury and that due to the US steel safeguard measure that was taken on 5 May 2002, the EC producers' situation was likely to worsen because of expected further increases in imports.

In *Canned mandarins*, the EC noted that in 2001/02, imports more than doubled, the EC producers' sales volume in the Community was low and their profitability decreased. Moreover, in 2002/03, consumption fell but not the level of imports and the EC producers' sales fell by 22% while their prices fell by 6%. The effect of this was a reduction in the EC producers' sales revenue and in the profitability of the EC. Thus, the EC concluded that the producers had suffered serious injury. The EC also took into account the negative development for capacity utilisation, production, employment, productivity, cash flow, return on capital employed (ROCE), sales, market share, prices and profitability when reaching the conclusion that the Community producers suffered serious injury.

In *Farmed salmon*, the Commission concluded that there had been a recent, sudden, sharp and significant increase in imports (absolute and relative). The Commission also examined the conditions under which those imports were made and stated that prices of imports were slightly below their average in 2003 and that the latest information available showed that prices were following a downward trend (although wholly reliable data was not available at that time). The Commission noted that during the last year of the IP, the position of the Community industry worsened considerably, as witnessed by a fall in profitability and a negative development in ROCE and cash flow. The Commission added that stocks of fish in the water and sales fell and that EC producers had lost market share. Furthermore, the EC took into account the forecast for 2004 that indicated that capacity, production, capacity utilisation, employment, sales volume, market share and live fish stocks would decline. All these factors, added to the fact that five Community producers went to bankruptcy or receivership, two were taken over by feed companies and seven more closed down or were preparing the closing down their operations, led the EC to conclude that provisional measures were necessary.

Empirical studies confirm that increased imports raise the probability of protection.²³ Yet, in order to determine whether the import surge resulted in or contributed to the

23. See Moore, Rules or Politics? An Empirical Analysis of ITC Anti-dumping Decision, *Economic Inquiry* 30, 449-66 (1992); Baldwin, Steagall, An Analysis of ITC Decisions in Antidumping, Countervailing Duty and Safeguard Cases, *Weltwirtschaftliches Archiv* 130, 290-308 (1994); and Hansen, Prusa, Cumulation and ITC Decision Making: The Sum of the Parts is Greater than the Whole, *Economic Inquiry* 34, 746-69 (1996) for results from anti-dumping measures' usage.

serious injury suffered by the domestic producers, it is useful to set up a simple framework for analyzing injury attribution, particularly because of the emphasis that the WTO Appellate Body has put on the non-attribution requirement and the requirement to link the relief to the portion of the injury caused by the increased imports.

Domestic producers of a like product may be injured not only by an import supply shock (increased imports), but also by domestic supply and demand shocks. A shock to supply could include decreasing production, capacity constraints, bankruptcy, etc. A shock to demand could include a fall in consumption caused by various factors, product substitution, a fall in income, etc. In fact, a combination of factors is usually the cause of the decline of domestic producers of like products.

In order to meet the requirements of the Safeguards Agreement, the Commission must decompose injury into the possible underlying causes and statutorily defined factors (employment, capacity usage, production volumes, etc.). However, the Commission effectively starts with the assumption that imports are causing the decline in domestic production, and then, by conducting a trends' analysis on the other factors, determines whether these factors are significant. As Blonigen and Prusa (2004)²⁴ suggest, this trends analysis consists of "*eyeballing charts and tables and confirming profits and employment are down. If imports have also increased, the causality connection is assumed.*"²⁵ Tharakan and Waelbroeck²⁶ suggest that the EC uses even less sophisticated methods than the USITC in determining injury – for instance, the use of the Boltuck model.²⁷ The authors state that many of the indicators used by the Commission in its determination – the 'margin of price undercutting' for instance – have no economic foundation. Formal economic analysis²⁸ is rarely done leading many to conclude that there appears to be no

24. This refers to analysis done by the USITC in AD cases. However, the same can be said of the approach taken by the EC in both AD and safeguard cases.

25. Blonigen, Prusa, Antidumping, Handbook of International Economics, 18 (2004) (Basil Blackwell, forthcoming).

26. Tharakan, Waelbroeck, Antidumping and countervailing duty decisions in the E.C. and in the U.S.: An Experiment in Comparative Political Economy, *European Economic* 38, 171- 193 (1996).

27. Boltuck, Assessing the effects on the Domestic Industry of Price-dumping, (1991), Policy implications of AD-measures, (P.K.M.THARAKAN (ed), North Holland).

28. Economic analyses undertaken test the economic factors that determine injury mainly in anti-dumping cases. With the exception of Irwin, Causing Problems? The WTO Review of Causation and Injury Attribution in U.S. Section 201 Cases, NBER Working Paper 9815 (2003); Sykes (2002) – see footnote 22; and Durling, A Decent Respect for the Opinions of Mankind: U.S. Steel Safeguard measures and the Need to Improve the Deterrent Effect of WTO Decisions, 19 (2002) (Conference presentation, unpublished), most empirical papers on safeguards look at the trade diverting or trade deflecting nature of the measure (See Bown, How Different are Safeguards from Antidumping? Evidence from US Trade Policies Toward Steel, (2004) (<http://ssrn.com/abstract=564362>); Bown, Crowley Trade Deflection and Trade Depression, Federal Reserve Bank of Chicago, No WP-03-26 (2004); and Bown, McCulloch, Nondiscrimination and the WTO Agreement on Safeguards, *World Trade Review* 2(3), 327-348 (2003)). Those papers that do, and given that the decision-making process is nearly the same for AD as it is for safeguards, are Hansen, Prusa (1997) see footnote 23; Grossman Imports as a Cause of Injury: The Case of the US Steel Industry, *Journal of International Economics* 20, 201-23 (1986); Kaplan, Injury and Causation in USITC

serious attempt to isolate the injurious effects of imports from those of other sources.²⁹ In addition, as Sykes has pointed out, increased quantities of imports should not be treated as a causal or exogenous variable given that supply and demand, as well as prices, will determine these quantities. Sykes argues that the exogenous factors are the determinants of domestic supply and demand and the world price, and that the quantity of imports is the result of the interaction of these forces and not the cause of them. Irwin puts forth the same argument; however, based on his empirical results, he finds that, in some cases, an increase in import supply may be the leading cause of the decline in domestic production.

The following section will set out a possible framework for analyzing the effects of import supply, domestic supply, and domestic demand shocks similar to the approach taken by Irwin. Assuming that markets start out in equilibrium and that the shocks disturb that equilibrium, we can make inferences on the effect on prices, imports, domestic production, and domestic consumption. The purpose of the section is not to demonstrate that factors other than increased imports were the *actual* cause of the injury (since this would require an economic method which provides a breakdown of the importance of these relative shocks³⁰) but rather that the economic rationale for determining injury is weak. This conclusion is supported by the anti-dumping literature for both the determinations made by the ITC and by the Commission, and by other analyses of injury attribution in safeguard cases in the U.S.

Appendix 1 demonstrates the effects on prices, and supply and demand of both domestic and imported products. Figure 1 isolates the effect of an import supply shift for the domestic market. The market equilibrium between total supply to the market (domestic supply $S + M$ imports) and domestic demand (D) and supply (S) occurs at price P and quantity Q_d and Q_s . The difference between Q_s and Q_d is the amount imported. An increase in imports shifts the import supply curve outwards ($S + M'$) – but not the domestic supply curve S – which creates a new equilibrium at P' and quantities Q'_d and Q'_s . When imports increase and domestic supply remains unchanged, the quantity demand increases while the quantity supplied by the market decreases. Price falls in order to clear the market. If an examination of the circumstances surrounding domestic injury were to demonstrate these effects, it could be an indication that imports were indeed the cause of injury (but again,

Antidumping Determinations: Five Recent Approaches, Policy Implications of Antidumping Measures, 143-173 (1991) (P.K.M. Tharakan (ed.), Amsterdam, Oxford, Tokyo: North Holland); Pindyck, Rotemberg Are Imports to Blame? Attribution of Injury under the 1974 Trade Act, *Journal of Law and Economics* 30, 101-22 (1987); Rousssang, Import Injury in U.S. Trade Law: An Economic View, *International Review of Law and Economics* 8, 177-182 (1987); and Tharakan, Waelbroeck (1994) see footnote 26; to name a few.

29. Blonigen, Prusa (2004). See footnote 25.

30. See Irwin (2003) for a discussion of the alternative methods which exist: the econometric approaches of Grossman (1986) and Pindyck, Rotemberg (1987) – see footnote 28, and the simulation approach of Kelly, The Analysis of Causality in Escape Clause Cases, *Journal of Industrial Economics* 37, 187-207 (1988). Irwin supports the Kelly model and indeed finds that, with regards to various U.S. safeguards cases, the injury to domestic industry was caused by factors other than increased imports.

without further economic study, this cannot be said conclusively). Figure 2a examines the effect of a negative domestic supply shock (contraction). If the total supply curve shifts inwards (S'), domestic production contracts (Q'_s) and imports will increase to prevent a fall in the domestic price (difference between Q_d and Q'_s). If imports also fall, as in Figure 2b, and the import supply curve shifts inwards ($S' + M'$), demand will also contract (Q''_d). The quantity supplied (Q''_s) will increase but it is ambiguous whether it will increase as much as Q_s . This would depend on the elasticity of the $S' + M'$ curve. Figure 3 illustrates the effect of an increase in domestic demand (D to D'). Both domestic price and production increase as a result and imports are drawn in.

The effects of the import supply shift and the domestic supply and domestic demand shifts are clearly different. While an outwards shift of the import supply curve may clearly be a cause of injury, the other two shocks may not. In fact, an increase in imports is the result rather than the cause of injury to the domestic market.

Appendix 2 presents the figures for imports, domestic production, consumption, import market share, and unit value (domestic and imports) for two steel products (hot rolled coils and cold rolled sheets), mandarins, and salmon. This data is taken directly from their respective Commission investigations.

Do these products demonstrate the effects of an import supply shift? If so, then the Commission may be right to consider protecting its domestic industry.

In *Certain steel products*, and in particular hot-rolled steel, domestic production had been constant to decreasing over the past few years. Consumption had also been stable to decreasing. During the period 1997-2001, both the unit value of domestic and imported steel had increased slightly but due mainly to a large increase in price and import volume in 2000 (following a drop in 1999). This could be due to the AD and CVD investigations initiated in 1999.³¹ Empirical and econometric work³² on AD has shown that the harassment or anticipation effect of the initiation of the investigation (initiated in January 1999) can have a greater impact on trade flows than the duties themselves. In the steel case, imports and prices all fell in 1999 but recovered by 2000 when both the AD and CVD duties were imposed. The Commission determined, on the basis of such factors (and on other, less-related issues), that increased imports were the leading if not the sole cause of the decline in the steel industry. Given that no economic analysis was undertaken, it could be just as likely that the increased imports were the result and not the cause of a negative domestic supply shock.

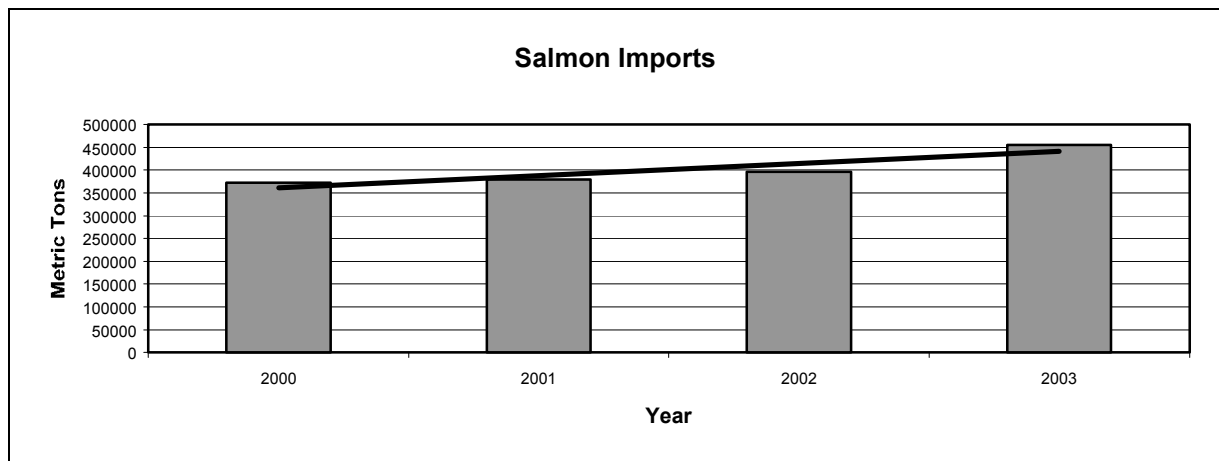
31. 283/2000/ECSC and 284/2000/ECSC respectively

32. See Prusa, On the Spread and Impact of Antidumping, NBER Working Paper No. 7404 (1999); Krupp, Pollard, Market Responses to Antidumping Laws: Some Evidence from the US Chemical Industry, *Canadian Journal of Economics* 29, 199-227 (1996); and Blonigen, Ohno, Endogenous Protection, Foreign Direct Investment, and Protection-building Trade, *Journal of International Economics* 46, 205-27 (1998).

In *Canned Mandarins*, the EC again argued that an import supply shift caused injury to domestic producers. Again, without any formal economic analysis, the Commission determined that the overall and year-to-year increase of imports into the Community, led to a steady decrease of both production and domestic unit value. A trends analysis, in this case, seems to support this conclusion since, with the exception of 2000/2001, consumption was in decline.

In *Farmed Salmon*, arguments by the Commission that increased imports were causing distress to domestic industries do not seem to hold. During this time, domestic production and consumption increased while both domestic and imports unit value decreased. This could be, as Sabry³³ coins it, filing for protection during “good times”. Sabry found that, in the case of AD cases filed with the USITC, the number of cases filed during periods of increasing demand were just as many as those filed when demand was in decline.

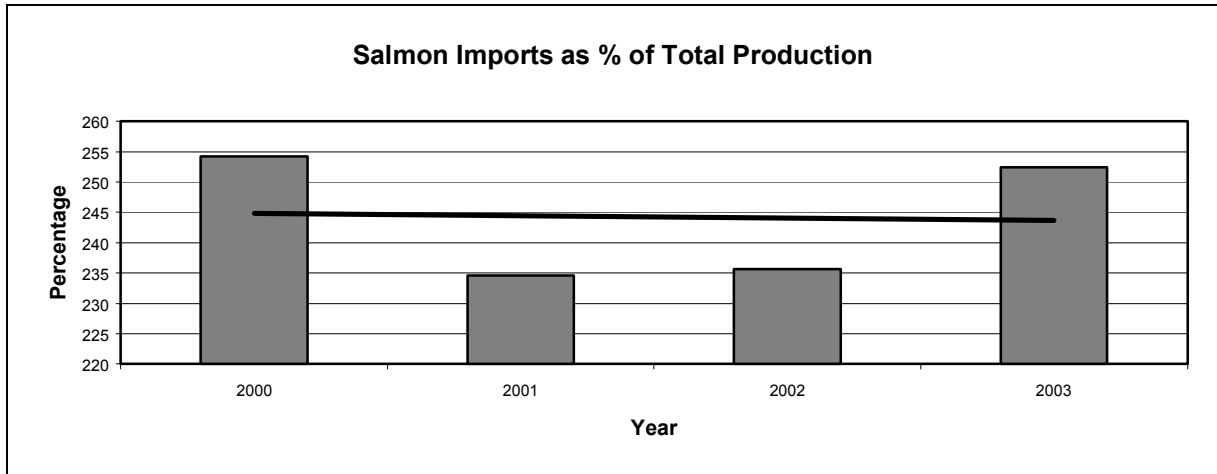
The following graph exhibits the absolute increase in imports of Salmon into the EC between 2000-2003:



Source: Commission Regulation (EC) No 1447/2004 of 13 August 2004

However, if one looks at the volume of imports as a percentage of total production, this figure has decreased over time and in fact experienced a severe drop in 2001 and 2002. The following graph illustrates this trend:

33 Sabry, An Analysis of the Decision to File, the Dumping Estimates, and the Outcome of Antidumping Petitions, *The International Trade Journal*, Volume XIV, No. 2, (2000).



Source: Commission Regulation (EC) No 1447/2004 of 13 August 2004

The trend line, which includes all years under investigation, shows a downward trend. In fact, import levels in 2003 returned to their 2000 level. Despite this, the EC found that there had been a sudden and significant increase in imports relative to domestic production. While the absolute increase is clear, the Commission's claim that there was an increase relative to domestic production seems misguided. The magnitude of the increase in 2003 (but still under 2000 levels) would suggest that this increase reflected the overall growth in the market, confirmed by the relatively stable import market share ratio.

Given the Euro appreciation against the Norwegian kroner during this period, it is also possible (though the Commission discounts it), that this led to increased filings. This would be consistent with empirical evidence from Knetter and Prusa³⁴ on AD filings for the U.S., Canada, EU, and Australia from 1980 through 1998. The authors find overwhelming evidence that dollar appreciations lead to increased AD activity.

In sum, the Commission's approach to the determination of serious injury lacks a clear economic foundation. In fact, when reading an investigation report, it seems the intent is rather to confound the reader with numbers, percentages, and ratios since there is much of this, but little analysis of how these figures all fit together.

Non-attribution

In *Certain steel products*, other factors causing injury were the effect of restructuring and declines in consumption, captive use and exports. However, none of these were considered to play a significant role, compared to the impact of the increased imports. The Commission did consider, however, that there was a likelihood that the serious injury suffered already by the EC producers might significantly worsen as a result of the imposition of safeguard measures by the United States, first of all through trade diversion and, second, through a reduction of EC exports to the US.

34. Knetter, Prusa, Macroeconomic Factors and Anti-dumping Filings: Evidence from Four Countries, NBER Working Paper No. 8010, (2000).

In *Canned mandarins*, the Commission considered the effects of changes in consumption, changes in export performance, excess capacity, lack of supply of raw material and demand for fresh small citrus fruits by the processing industry, but concluded that these either did not or only marginally contribute(d) to the injury suffered by the EC producers.

In *Farmed salmon*, the Commission noted that, at the provisional determination stage, there were no other factors contributing to the injury apart from the increase in low-priced imports. The Commission discussed a number of other factors, raised by interested parties, such as an alleged fall in consumption in the UK, the effect of changes in export performance, the effect of excess EC capacity, the effects of competition among EC producers, the effect of increased mortality and disease outbreaks in Ireland and the UK, the effect of higher production costs in the EC, and alleged higher transportation costs in Ireland, but lackadaisically rejected them all.

As mentioned in the previous section, the Commission must decompose the alleged injury and analyse the effects of all the possible determinants of this injury. The approach is similar to that taken in the serious injury determination: a trends analysis is undertaken for each possible determinant, other than increased imports, which could account for the injurious effects. In all three cases, the Commission argued that the serious injury suffered by the domestic industry was accompanied by an increase in imports.

In *Certain Steel Products*, the real problems for the EC producers began in 1999. When imports began to rise in 1997 and 1998, the domestic industry was still doing well. However, the sharp drop in imports in 1999 (e.g. -28.6% for Cold Rolled Sheets, -20.1% for Hot rolled coils) coincided with a fall in consumption (-6.4% and -1.5% respectively), and a fall in both domestic and imported unit prices (-17.6% and -11.7% respectively). Domestic production however stayed relatively the same. As Durling finds in the USITC's determination of injury caused by increased imports in the US Steel case, "*it was only when imports began to decline...that the domestic industry's performance weakened.*"³⁵ Even though the Commission fulfilled its formal legal obligation to examine other determinants, its substantive analysis and reasons for dismissing some of these determinants, is not satisfactory.

In *Canned Mandarins*, all factors seem to point towards a shift in import supply as the economic event. If one believes that imports can be an exogenous factor, then the domestic producers seem to have a strong case. A trends analysis seems consistent with this conclusion though it is impossible to discount other factors without testing these either econometrically or using other models (Kelly model for instance).

In *Farmed Salmon*, the Commission is far too quick to dismiss the euro appreciation and to emphasize the hypothetical 'price undercutting'. Other determinants, if

35. See footnote 28.

tested, would surely prove more significant than increased imports as the cause of serious injury.

As many have pointed out, correlation does not imply causation. The EC, however, does not even attempt to show correlation given that no economic analysis of this relationship is undertaken.

3. Procedure and decision-making structure

A safeguard or surveillance investigation may be initiated by the Commission at its own initiative or at the request of one or more Member States. In the three recent cases, the investigation concerning *Certain steel products* was initiated at the request of 'Several Member States', the investigation concerning *Canned mandarins* was initiated at the request of Spain and the investigation concerning *Farmed salmon* was initiated at the request of the UK and Ireland.

Prior to initiation, the Commission must consult the Member States. The 'Safeguards Advisory Committee' used for this purpose tends to be staffed by the same government officials that also staff the Anti-Dumping and Anti-Subsidy Advisory Committees.

If, after consultations, the Commission considers that it has sufficient evidence, it will initiate an investigation. The opening of the investigation is published in the C series of the Official Journal.

Contrary to the practice under Regulation 288/82, the Commission now sends out *questionnaires* for producers and for exporters which will need to be completed by all interested parties.³⁶ The Commission will also carry out *verifications* of selected questionnaire responses. Compared to AD/AS questionnaires and verifications, the SG equivalents are relatively simple and straightforward.

The procedures for requesting a hearing by the Commission are contained in Article 6 (4) of the Regulation. Thus, the Commission may hear the interested parties, but such parties *must* be heard where they have applied in writing within the period laid down in the notice of initiation showing that they are actually likely to be affected by the outcome of the investigations and that there are special reasons for them to be heard orally.

Interested parties which made themselves known in time also have access to the non-confidential version of the information made available to the Commission by the complainants (Article 6 (2)).

36. These questionnaires request company-specific information, typically for the past four to five years, on sales (to the EU, on the domestic market and to third country markets), production, capacity, capacity utilization, profitability, and employment. Companies will also be requested to provide projections for future (two years) developments.

Contrary to anti-dumping and anti-subsidy cases, a completed preliminary investigation is not a mandatory requirement for imposing a restrictive measure. Article 8 (1) of the Regulation provides that a surveillance measure may be taken at any time and, in the case of a critical situation, a provisional safeguard measure may be imposed forthwith. Subsequently, an *ex post facto* investigation will be carried out by the Commission. This happened in *Certain steel products*, where the Commission initiated the investigation and imposed provisional measures on the same day. The United States originally challenged this practice of the EC in the WTO,³⁷ but later decided not to pursue its WTO challenge.

The basic Regulation provides that the investigation should not exceed nine months. Exceptionally this time limit may be extended by two months.

A Commission proposal to impose definitive safeguard measures must be adopted by the Council, acting by qualified majority. The following table indicate the votes each country has in the EU-25 (and the EU-27).

Country	EU-25 (until 31/10/04)	EU-25 (from 01/11/04 until 31/10/09)	EU-27 (from accession Bulgaria and Romania)
Germany	10	29	29
UK	10	29	29
France	10	29	29
Italy	10	29	29
Spain	8	27	27
Poland	8	27	27
Romania	-	-	14
Netherlands	5	13	13
Greece	5	12	12
Czech R.	5	12	12
Belgium	5	12	12
Portugal	5	12	12
Hungary	5	12	12
Austria	4	10	10
Sweden	4	10	10
Bulgaria	-	-	10
Denmark	3	7	7
Ireland	3	7	7
Finland	3	7	7
Slovakia	3	7	7
Lithuania	3	7	7
Latvia	3	4	4
Slovenia	3	4	4
Estonia	3	4	4
Luxembourg	2	4	4
Cyprus	2	4	4
Malta	2	3	3
TOTAL	124	321	345

37. European Communities - Provisional Safeguard Measures on imports of Certain Steel Products, Request for Consultations by the United States, WT/DS260/1 G/L/554 G/SG/D28/1, 5 June 2002.

From 1 May to 31 October 2004, the current Member States will maintain their number of votes and a qualified majority will require 88 votes out of 124. From 1 November 2004 a qualified majority needs 232 votes out of 321. Any Member State might request that verification is carried out to confirm that the Member States constituting a qualified majority represent at least 62% of the EU population. In the EU-27 (date to be determined), a qualified majority is expected to need 255 votes out of 345.³⁸

4. Remedies

As to the relief which the Community may adopt once the conditions are met, the language of the old Regulation was sufficiently broad to cover a variety of safeguard measures, including quantitative restrictions and tariff quotas. In practice, however, the Community imposed quotas or negotiated voluntary restraint agreements. Where quotas were imposed, the quota levels were typically determined on the basis of the preceding three years' import data. Quotas were either global or country-specific and, in a number of cases, contained carry-over/carry-forward provisions.

In *Certain steel products*, provisional measures were imposed on 15 of the 21 products under investigation on the same day that the EC initiated the investigation. These took the form of global tariff quotas, with the additional duty rate to be applied once the quotas were reached varying between 14.9% and 26%.

Definitive measures were imposed by the EC on seven steel products. For six of the seven products, these consisted of global tariff quotas with country-specific quotas for substantial suppliers.³⁹ However, because of the large number of supplying countries having a substantial interest in supplying Hot-rolled coils, a single global quota was applied for this product because otherwise not enough would have been left for the other countries. These quotas were administered on a first-come, first-served basis.

38. On 18 June 2004, the EU leaders adopted the Constitutional Treaty. The text should be signed on 29 October 2004 and, after its signature, Member States will have two years to ratify it. Provisions regarding qualified majority would apply from 1 November 2009. As far as the definition of qualified majority voting is concerned, it was agreed to define a qualified majority as at least 55% of the members of the Council (72% if not acting on a proposal from the Commission or from the Union Minister of Foreign Affairs), comprising at least 15 of them and representing Member States comprising at least 65% of the EU's population. A blocking minority shall include at least four Member States. Finally, if members of the Council representing at least $\frac{3}{4}$ of the population or $\frac{3}{4}$ of the number of Member States necessary to constitute a blocking minority indicate their opposition to the Council adopting an act by qualified majority, the Council shall discuss the issue. This rule shall remain in force at least until 2014. Thereafter the Council may adopt a European decision repealing it.

39. For Non Alloy Hot Rolled Sheets and Plates: Slovakia, Poland, Hungary and Bulgaria; Non Alloy Hot Rolled Narrow Strip: Bulgaria, Slovakia, Switzerland, Czech Republic and Turkey; Alloy Hot Rolled Flat Products: Yugoslavia and Romania; Cold Rolled Sheets: Turkey, Slovakia, South Korea, Bulgaria, Yugoslavia, Argentina, Hungary, and South Africa; Fittings: Slovakia, Thailand, Vietnam, Russia, Malaysia, Taiwan, Romania, Czech Republic, Poland, South Korea and Switzerland; Flanges: China, Poland, Romania, and Czech Republic.

Measures were originally imposed for 3 years (including the period of provisional measures), to expire on 28 March 2005, and were to be liberalized progressively during this period. Global quotas were based on the average volume of imports of the previous 3 years plus 10%. That amount was increased by 5% for each following year. The additional duties (once the quotas were reached) were fixed at 26%. The rate of duty was decreased by 10% for each following year. In fact, during the duration of the SG measures, the quotas for six of the seven products were never filled so that the duties never entered into force.

In addition to these tariff quotas, Commission Regulation 1695/2002 established a system of retrospective surveillance regarding 14 additional steel products. This system was terminated on February 2004.⁴⁰

Developing countries having less than 3% of imports were excluded from the measure. For each of the 7 products concerned, the Regulation specified the excluded developing countries.

In *Canned mandarins*, tariff quotas were also imposed. The tariff quotas were fixed according to the average volume imported in the most recent 3-year period for which statistics were available and to be progressively liberalized as follows:⁴¹

Period	Quota — PRC (tonnes)	Quota — all other countries (tonnes)
11.4.2004 to 10.4.2005	30,843	2,314
11.4.2005 to 10.4.2006	32,385	2,314
11.4.2006 to 10.4.2007	34,004	2,551
11.4.2007 to 8.11.2007	20,738	1,556

The Commission stated in its definitive determination that the additional duty fixed under the provisional measure had been inadequate as imports of the product concerned continued to increase. Therefore, the Commission imposed a higher definitive duty of EUR 301 per tonne.⁴²

As far as developing countries were concerned, the Commission this time decided not to apply the safeguard measure to developing countries with less than 3% of imports as long as that share did not exceed 3%. The only developing country which did not meet the requirements to benefit from this derogation was China. It should be noted that the derogation seems open-ended in the sense that developing

40. Commission Regulation (EC) No 184/2004 of 2 February 2004 terminating the system of retrospective surveillance in relation to certain steel products established by Regulation (EC) No 1695/2002, [2003] O.J. L29/3.

41. Commission Regulation (EC) No 658/2004 of 7 April 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] O.J. L104/1, at Annex I.

42. Corrigendum to Commission Regulation (EC) No 658/2004 of 7 April 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc), [2004] O.J. L105/52.

countries exceeding the 3% in the future might then be included within the scope of the measure.

The Commission again decided that the quota should be administered on a first-come, first-served basis, provided, however, that traditional importers would have the opportunity to apply for a licence to import a quantity free of additional duty based on their traditional imports from China.

As far as the *Farmed salmon* case is concerned, provisional measures took the form of specific tariff quotas for Norway (186.338 t) and the Faroes (25.261 t) and one quota for all other countries (22.850 t), on a first-come, first-served basis, with an additional duty of 17.8%, equivalent to €522/tonne for gutted and €722/tonne for fillets. Quotas are to be increased by 5% yearly. Furthermore, a system of retrospective surveillance was implemented to provide information regarding the imports' developments.

Regarding the territorial scope of the measure, the EC noted that there was a developing country (Chile) whose imports in the most recent period available were below 3%. Therefore and as long as its share did not exceed 3%, provisional measures would not apply to it.

4.1 Prohibition of grey area measures

The Safeguards Agreement negotiated during the Uruguay Round broke new ground in establishing a prohibition against so-called 'grey area' measures. It provides that Members shall not seek, take or maintain any voluntary export restraints, orderly marketing agreement or any other similar measures on the export or the import side.

Since 1995, the EC has not imposed VRAs against WTO members.

5. Special safeguard mechanisms

5.1 Imports from state-trading countries and China

Council Regulation 519/94⁴³ established a new set of common rules for 'state-trading' countries and repealed Regulations 1765/82, 1766/82 and 3420/83. Generally speaking, while imports from these countries are still subject to this specific Regulation, the treatment and content do not dramatically differ from the one used for market economies. At present, this Regulation, as amended, applies to: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

43. Council Regulation 519/94 on common rules for imports from certain third countries [1994] O.J. L67 last amended by Council Regulation No 427/2003.

As far as China is concerned and as part of the Chinese accession protocol to the WTO, the EU has been given the right to maintain a number of quotas on imports of Chinese footwear, tableware and ceramics. By way of example, quotas for the second tranche of 2004 have been allocated as follows:

Allocation of the 2004 quotas - second tranche (May-December)⁴⁴

Product description	HS/CN code	Portion reserved for traditional importers (75%)	Portion reserved for other importers (25%)
Footwear falling within HS/CN codes	ex 6402 99 ⁽¹⁾	43,904,228 pairs	14,634,742 pairs
	6403 51 6403 59	2,387,593 pairs	795,864 pairs
	ex 6403 91 ⁽¹⁾ ex 6403 99 ⁽¹⁾	10,494,678 pairs	3,498,226 pairs
	ex 6404 11 ⁽²⁾	14,176,498 pairs	4,725,500 pairs
	6404 19 10	25,126,810 pairs	8,375,603 pairs
Tableware, kitchenware of porcelain or china falling within HS/CN code	6911 10	50,929 tonnes	16,976 tonnes
Ceramic tableware, kitchenware, other house-hold articles and toilet articles, other than of porcelain or china falling within HS/CN code	6912 00	43,593 tonnes	14,531 tonnes

(1) Excluding footwear involving special technology: shoes which have a cif price per pair of not less than ECU 9 for use in sporting activities, with a single- or multi-layer moulded sole, not injected, manufactured from synthetic materials specially designed to absorb the impact of vertical or lateral movements and with technical features such as hermetic pads containing gas or fluid, mechanical components which absorb or neutralise impact or materials such as low-density polymers.

(2) Excluding:

(a) footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, springs, stops, clips, bars or the like, with a non-injected sole;

(b) footwear involving special technology: shoes which have a cif price per pair of not less than ECU 9 for use in sporting activities, with a single- or multi-layer moulded sole, not injected, manufactured from synthetic materials specially designed to absorb the impact of vertical or lateral movements and with technical features such as hermetic pads containing gas or fluid, mechanical components which absorb or neutralise impact or materials such as low-density polymers.

These quotas are administered by the Commission according to the procedure for administering quantitative quotas under Regulation (EC) No 520/94.⁴⁵ Quantities

44. Commission Regulation (EC) No 2044/2003 of 20 November 2003 establishing administrative procedures for the second tranche of the 2004 quantitative quotas for certain products originating in the People's Republic of China, [2003] O.J. L303/3.

45. Council Regulation (EC) No 520/94 of 7 March 1994 establishing a Community procedure for administering quantitative quotas, [1994] O.J. L66, last amended by Council Regulation (EC) No 806/2003 of 14 April 2003, [2003] O.J. L122/1.

that are not allocated, assigned or used shall be redistributed in time to allow them to be used before the end of the period covered by the quota.

China's accession to the WTO required changes to the safeguard regime. The relevant changes were introduced through "Council Regulation (EC) No. 427/2003 on a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China and amending Council Regulation (EC) No 519/94 on common rules for imports from certain third countries."⁴⁶ This mechanism will expire 12 years after the entry into force of the Protocol, i.e. at the latest on 11 December 2013.

Regulation 427/2003 contains important differences from the Basic Safeguards Regulation and the EC Regulation on imports from certain non-market economies.

Most importantly, it authorizes *discriminatory* safeguard measures against China only and does not contain a compensation requirement. Furthermore, the extent of injury required to impose measures is less. So-called 'market disruption' shall exist "*whenever imports of a product, like or directly competitive with a product produced by the Community industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the Community industry*";⁴⁷ (as opposed to the 'serious injury' in Regulations 3285/94 and 519/94, defined as "*a significant overall impairment in the position of Community producers*").⁴⁸ Third, there are no rules concerning the maximum duration of definitive measures⁴⁹ (as opposed to 4 plus 4 years under Regulation 3285/94⁵⁰). Last, specific provisions exist to counter *trade diversion*⁵¹ (in case of increased imports from China as a consequence of product-specific safeguards measures taken by other WTO Members).

Regulation 427/2003 also removed surveillance measures on certain Chinese products.⁵² Regulation 519/94 laid out in its Annex III a list of products which were subject to surveillance measures, and which therefore could be put into free circulation only on production of a surveillance document issued by the competent authorities of the Member States. The list included, among others, toys, bicycles, gloves, puzzles, playing cards and fireworks. As from 9 March 2003, the surveillance measures were no longer necessary, and this Annex was repealed.

The progressive removal of the remaining quotas by the year 2005 has been bilaterally agreed between the EC and China.⁵³ Commission Regulation 427/2003

46. [2003] O.J. L 65/1

47. Regulation 427/2003 at Article 2.1.

48. Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94, [1994] O.J. L349/53, at Article 5.

49. Regulation 427/2003 at Articles 9 to 12.

50. Regulation 3285/94 at Article 20.5.

51. Regulation 427/2003 at Article 13.

52. *Idem* at Article 22.1.

53. Respecting the rules, Trade Policy Instruments, Safeguards, European Commission at http://europa.eu.int/comm/trade/issues/respectrules/safeguard/index_en.htm

and Commission Regulation 428/2003⁵⁴ implement this phasing-out plan. Furthermore, Council Regulation 1985/2003 provides that, in view of the enlargement of the EU on 1 May 2004 it is appropriate to increase the quotas in accordance with the relevant international trade rules. As a result, the Annex set out in Regulation 427/2003 has been replaced by the following:

Phasing out timetable of industrial (non-textile) quotas on imports originating in China

Product description	HS/CN code	January to December 2003	January to April 2004	May to December 2004	2005
Footwear	ex 640299 ⁽¹⁾	47,480,959	18,201,035	58,538,970	Removal
	6403 51 6403 59	3,712,459	1,423,109	3,183,457	Removal
	ex 640391 ⁽¹⁾ ex 640399 ⁽¹⁾	14,698,530	5,634,436	13,992,904	Removal
	ex 640411 ⁽²⁾	22,106,953	22,106,953	8,474,332	Removal
	6404 19 10	38,683,955	14,828,849	33,502,413	Removal
Tableware, kitchenware of porcelain or china	6911 10	73,139	28,036	67,905	Removal
Ceramic tableware, kitchenware other than of porcelain or china	6912 00	55,334	21,212	58,124	Removal

(1) Excluding footwear involving special technology: shoes which have a cif price per pair of not less than EUR 9 for use in sporting activities, with a single- or multi-layer moulded sole, not injected, manufactured from synthetic materials specially designed to absorb the impact of vertical or lateral movements and with technical features such as hermetic pads containing gas or fluid, mechanical components which absorb or neutralize impact or materials such as low-density polymers.

(2) Excluding:

(a) footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, springs, stops, clips bats of the like, with non-injected sole;

(b) footwear involving special technology: shoes which have a cif price per pair of not less than EUR 9 for use in sporting activities, with a single- or multilayer moulded sole, not injected, manufactured from synthetic materials specially designed to absorb the impact of vertical or lateral movements and with technical features such as hermetic pads containing gas or fluid, mechanical components which absorb or neutralise impact or materials such as low-density polymers.

5.2 Steel

The principle is that steel products from all countries come into the EU freely, without facing quantitative restrictions or similar barriers. However, some specific ECSC Treaty commercial policy measures continue to exist in the form of bilateral steel agreements⁵⁵ – really VRAs -- with Russia⁵⁶, Kazakhstan⁵⁷ and Ukraine⁵⁸. As

54. Commission Regulation (EC) No 428/2003 of 12 February 2003 establishing the allocation method for the additional quantities resulting from the quota increase brought in by Council Regulation (EC) No 427/2003 to the 2002 and 2003 Community quantitative quotas on certain products originating in the People's Republic of China, [2003] O.J. L65/12.

55. The Steel Sector, last updated December 2003, downloaded from http://europa.eu.int/comm/trade/issues/sectoral/industry/steel/index_en.htm, 13 August 2004.

56. Agreement between the European Community and the Government of the Russian Federation amending the Agreement between the European Coal and Steel Community and

far as Russia is concerned, the new agreement was initialled on June 2004 and quotas were increased⁵⁹ to take into account traditional trade between Russia and the new Member States. Regarding Ukraine, the EU also considered it necessary to increase the existing quotas to take into account traditional trade flows between the candidate countries and Ukraine.⁶⁰ According to the Commission, the increase is based on the average of the imports of the relevant steel products by the new Member States over the years 2000, 2001 and 2002 adjusted *pro rata temporis*. Finally, as far as the agreement with Kazakhstan is concerned, it establishes a double-checking system without quantitative limits until 31 December 2004, unless both Parties agree to terminate it earlier.⁶¹

As far as Slovakia,⁶² Poland,⁶³ and Czech Republic⁶⁴ are concerned, the double-checking system applying to certain steel products expired on the date of accession of these countries to the EU. Regarding Romania, Regulations (EC) No 1499/2002 and 1445/2003⁶⁵ expired on 1 May 2004.

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- the Government of the Russian Federation on trade in certain steel products of 9 July 2002, [2004] O.J. L255/33.
57. Council Decision of 29 April 2004 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the Republic of Kazakhstan establishing a double-checking system without quantitative limits in respect of the export of certain steel products from the Republic of Kazakhstan to the European Community [2004] O.J. L261/48 and Agreement in the form of an Exchange of Letters between the European Community and the Republic of Kazakhstan establishing a double-checking system without quantitative limits in respect of the export of certain steel products from the Republic of Kazakhstan to the European Community [2004] O.J. L261/49.
 58. Council Decision of 15 December 2003 on trade in certain steel products between the European Community and Ukraine, [2003] O.J. L333/84. Previous steel agreement expired.
 59. Council Regulation (EC) No 1386/2004 of 26 July 2004 amending Commission Decision 2002/602/ECSC on administering certain restrictions on imports of certain steel products from the Russian Federation, [2004] O.J. L255/1.
 60. Council Decision of 21 June 2004 amending Decision 2003/893/EC on trade in certain steel products between the European Community and Ukraine, [2004] O.J. L227/35.
 61. Council Regulation (EC) No 1385/2004 of 29 April 2004 on administering the double-checking system without quantitative limits in respect of the export of certain steel products from Kazakhstan to the European Community, [2004] O.J. L261/1.
 62. Council Regulation (EC) No 1129/2003 of 21 January 2003 concerning the export of certain steel products from the Slovak Republic to the Community for the period from the date of entry into force of this Regulation to the date of accession by the Slovak Republic to the European Union (extension of the double-checking system), [2003] O.J. L160/3.
 63. Council Regulation (EC) No 952/2003 of 21 January 2003 concerning the export of certain steel products from Poland to the Community for the period from the date of entry into force of this Regulation to the date of accession by Poland to the European Union (extension of the double-checking system), [2003] O.J. L135/1.
 64. Council Regulation (EC) No 542/2003 of 21 January 2003 concerning the export of certain steel products from the Czech Republic to the Community for the period from the date of entry into force of this Regulation to the date of accession by the Czech Republic to the European Union (extension of the double-checking system), [2003] O.J. L81/1.
 65. Council Regulation (EC) No 1499/2002 of 20 June 2002 concerning the export of certain steel products from Romania to the Community for the period from 1 July to 31 December 2002 (double-checking system) [2002] O.J. L227/1 and Council Regulation (EC) No 1445/2003 of 21 January 2003 concerning the export of certain steel products from Romania to the Community for the period from the date of entry into force of this Regulation to the date of accession by Romania to the European Union (extension of the double-checking system) [2003] O.J. 206/1.

As far as the Former Yugoslav Republic of Macedonia (FYROM) is concerned, the Stabilisation and Association Agreement between the EC and the FYROM states in its *Protocol 2 on steel products*⁶⁶ that imports into the Community of products listed in Appendix I to Annex I of the Protocol⁶⁷ originating in the FYROM are subject to a double-checking system.

As far as the Republic of Moldova is concerned, there is a pending Proposal for a Council Decision regarding the conclusion of an Agreement between the EU and the Republic of Moldova establishing a double-checking system without quantitative limits in respect of the export of certain steel products from the Republic of Moldova to the European Community, to be applied until December 2006.⁶⁸

Regulation 76/2002⁶⁹ introduced prior Community surveillance of imports of certain iron and steel products originating in certain third countries other than EFTA, EEA and Turkey and those subject to a double-checking agreement which shall be subject to the conditions established by this agreement. Regulation 2385/2002⁷⁰ extended the application of the above Regulation until 31 March 2005.

5.3 Textiles

On 1 January 1995, the Multifiber Arrangement was replaced by the WTO Agreement on Textiles and Clothing (ATC), which established a gradual process for the ultimate removal of the remaining textile quotas by 2005. The ATC is a transitional instrument providing for staged increases in, then elimination of, quotas so that the affected textile and clothing products are integrated into GATT/WTO rules. Quotas will be eliminated either when the products concerned are integrated into GATT/WTO at one of the stages or at the end of the transition period on 1 January 2005.

The EC's trade in textiles with WTO members is covered mainly by EU Council Regulation (EC) 3030/93.⁷¹ Its annexes, as amended, contain a list of the countries

66. Protocol 2 on steel products, [2004] O.J. L84/86

67. Idem at Annex I, Appendix I: Complete CN headings 7208, 7209, 7210, 7211 and 7212.

68. Proposal for a Council Decision concerning the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the Republic of Moldova establishing a double-checking system without quantitative limits in respect of the export of certain steel products from the Republic of Moldova to the European Community, 2004/0149 (ACC), Brussels, 15 July 2004.

69. Commission Regulation (EC) No 76/2002 of 17 January 2002 introducing prior Community surveillance of imports of certain iron and steel products covered by the ECSC and EC Treaties originating in certain third countries, [2002] O.J. L16/3.

70. Commission Regulation (EC) No 2385/2002 of 30 December 2002 continuing and amending prior Community surveillance of imports of certain iron and steel products originating in certain third countries, [2002] O.J. L358/125.

71. Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries, [1993] O.J. L275/6, as last amended by Commission Regulation (EC) No 487/04, [2004] O.J. L79/1.

affected, the quotas and the mechanics of administering these quotas. The latest amendment adjusts these quotas to also cover imports into the new Member States.

The Basic SG Regulation applies to textiles, except for textile products which are covered by Regulation (EC) No 517/94⁷² (“autonomous regime”) other than the products listed in Annex II in so far as those products originate in a country which is a member of the WTO. Specific provisions for these products concerning surveillance and safeguard measures are contained in Title III “Surveillance and safeguard measures.”

The regulations relating to the import licence and the distribution of quotas are Commission Regulation 3168/94⁷³ and Commission Regulation 2308/2003⁷⁴ respectively.

As far as China is concerned, a safeguard instrument for Chinese-origin textiles was published on January 2003.⁷⁵ This Regulation sets out a specific safeguard clause applicable until 31 December 2008 concerning imports of textiles and apparel products, covered by the ATC, of Chinese origin. Under this Regulation, the Commission may open consultations with China in case imports into the Community of ATC products “*threaten to impede, owing to market disruption, the orderly development of trade in those products*” and shall provide China with the reasons and justifications for this request. If a solution is not reached within the consultation period (90 days), the Commission may impose a quota. The term of this quantitative limit shall be effective for a period ending on 31 December of the year in which consultations were requested, or, where three months or less remained in the year at the time of the request for consultations, for a period ending 12 months after the request for consultations. Consultations with China shall continue during the term of the quantitative limit set up under this provision.

6. Conclusions

The EC seems at a turning point regarding the use of the safeguard instrument. After a long period of inaction, the EC in the past two years has imposed three

72. Council Regulation (EC) No 517/94 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific rules, [1994] O.J. L67, last amended by Commission Regulation (EC) No 2309/2003 of 29 December 2003 amending Annexes III B, IV and VI, [2003] O.J. L342/21.

73. Commission Regulation (EC) No 3168/94, of 21 December 1994 establishing in the field of application of Council Regulation (EC) No 517/94 on common rules for imports of textile products from third countries not covered by bilateral agreements, protocols or other arrangements or by other specific Community import license, [1994] O.J. L335/23, as amended by Commission Regulation (EC) No 1627/95 of 5 July 1995, [1995] O.J. L155/8.

74. Commission Regulation (EC) No 2308/2003 of 29 December 2003 laying down rules for the management and distribution of textile quotas established for the year 2004 under Council Regulation (EC) No 517/94, [2003] O.J. L342/13.

75. Council Regulation (EC) No 138/2003 of 21 January 2003 amending Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries, [2003] O.J. L23/1.

safeguard measures – conservatively counting the seven definitive steel safeguard measures as one - with more cases likely to follow in the near future.

During these two years, the EC has arguably been ‘flexing its muscle’, trying to see how far it can go while maintaining a façade of economic liberalism notably through adopting relatively liberal remedies. For the time being, this position has perhaps resulted in measures that do not ‘bite’ too deeply, thereby decreasing the chances of its measures being challenged in the WTO or the EC courts.⁷⁶ However, there are indications that the EC is becoming more strict, for example on the exclusion of developing countries on the basis of the 3% rule: While in *Certain steel products*, developing countries with less than 3% were excluded ‘tout court’, language in the subsequent *Canned mandarins* and *Farmed salmon* cases would appear to indicate that the Commission now takes the position that such exclusion is not a one-time decision, but an issue which may be re-visited throughout the course of the proceeding if the situation were to change. It is not at all clear whether such an evolutionary interpretation of the exclusion concept is in conformity with the WTO rules.

Furthermore, this supposedly liberal façade masks poor procedures and an aggressive and not always sound economic and legal analysis of the specifics of the cases.

The lack of detailed procedures presumably results from a similar absence of detailed procedural rules in the WTO Safeguards’ Agreement, which the EC has essentially copied. This makes it to some extent understandable, but not necessarily good policy. The EC’s TDI practice is often followed by other countries, as witnessed, for example, by what happened in the aftermath of the EC steel safeguard measures: in rapid succession, countries such as Poland, Hungary and China adopted safeguard measures which were remarkably similar to those adopted by the EC. Indeed, such domino effects are more likely to occur following the imposition of *safeguards* measures because of their visibility,⁷⁷ their wide coverage and the perfect⁷⁸ excuse of ‘unforeseen developments’ that imposition of measures by one WTO member gives to all other WTO members. Again, the steel safeguards’ cases offer a good example of this. Thus, it seems in the interest of all WTO Members, not least of all the EC, that the procedural framework for safeguard proceedings be improved.

Our analysis of recent EC safeguards’ experience indicates that the safeguards’ instrument is an extraordinarily blunt instrument capable of very rapid deployment against imports covering broad product categories. Continued aggressive use of

76. The EC is probably more concerned about having any of its safeguard measures challenged in the WTO than in the EC courts, because the EC courts would most likely afford the EC institutions considerable discretion in applying the safeguards’ instrument.

77. The (English) WTO notifications of safeguard measures by WTO Members are published on the WTO website, which is extremely helpful.

78. It remains to be seen, however, whether WTO Panels and Appellate Body would accept the use of trade defence instruments by WTO members as valid ‘unforeseen developments’ as the use of trade defence instruments is clearly foreseen by the WTO.

the instrument by the EC authorities may well signal a return to the bad old days of managed trade.

However, as regards economic and legal analysis, the amount of detail provided in the published determinations seems aimed at masking the lack of proper analysis of causal factors. A trends' analysis is not sufficient when the stakes are high, particularly in the steel cases where the product is such a key input and the trade coverage so wide. We would note that while the EC has always found absolute increases in imports thus far, possibly reflecting a reluctance to take up cases where imports increased only in relative terms, we find the causation and non-attribution analysis cursory and sketchy and certainly not better than the analysis of the trading partners that the EC has challenged in the WTO. Thus, it seems a question of time before the EC becomes a victim of its own victories.

Appendix 1

Figure 1 - Shift in Import Supply (Expansion)

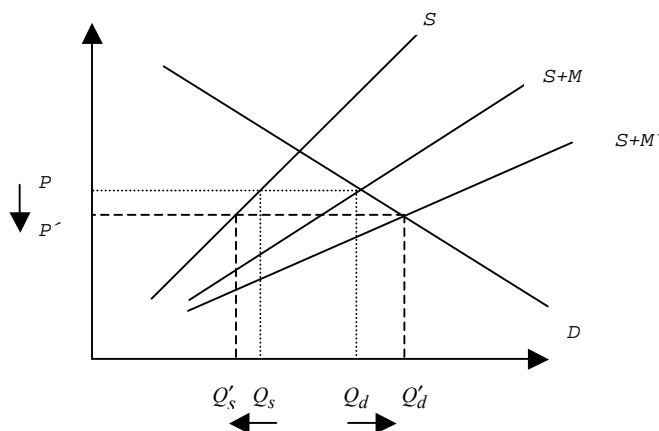
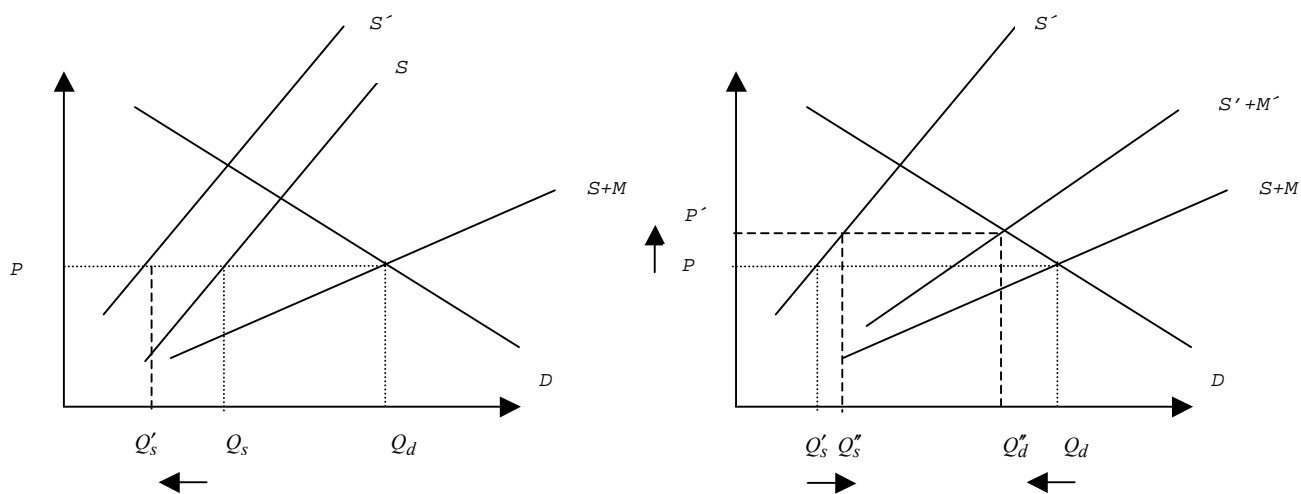


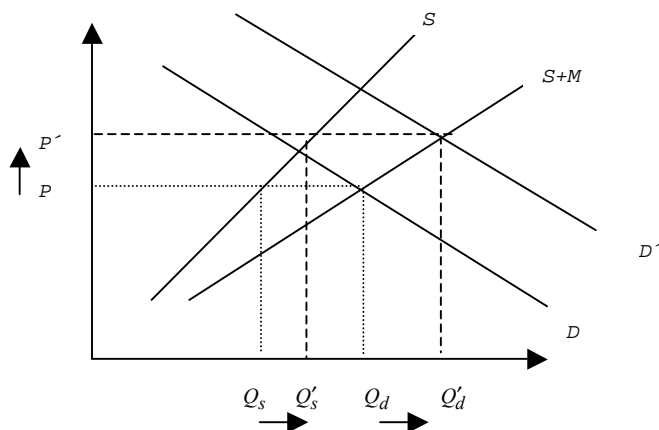
Figure 2a and 2b - Shift in Domestic Supply (Contraction)



- Imports substitute exactly for decreased supply. Demand and price stays the same

- Imports also contract. Demand contracts. Price rises. Amount supplied may be less than original Q_s but this depends on the elasticity of supply.

Figure 3 - Shift in Demand (Expansion)



Appendix 2

STEEL												
	1997	1998	1999	2000	2001	% change			% change			
						1998-97	1999-98	2000-1999	2001-00	2001-97	2001-00	2001-97
Hot rolled coils												
<i>Imports</i>	3,281,808	4,817,109	3,847,708	4,829,175	5,011,290	46.8%	-20.1%	25.5%	3.8%			52.7%
<i>Domestic Production</i>	66,892,420	65,474,371	66,184,419	67,414,844	62,361,216	-2.1%	1.1%	1.9%	-7.5%			-6.8%
<i>Consumption</i>	22,943,397	22,894,274	22,544,897	23,178,301	22,501,555	-0.2%	-1.5%	2.8%	-2.9%			-1.9%
<i>Import Market Share</i>	14.30%	21.00%	17.10%	20.80%	22.30%	46.9%	-18.6%	21.6%	7.2%			55.9%
<i>Unit Value - Domestic €</i>	273	290	235	301	277	6.2%	-19.0%	28.1%	-8.0%			1.5%
<i>Unit Value - Imports €</i>	242	221	223	290	254	-8.7%	0.9%	30.0%	-12.4%			5.0%
Cold Rolled Sheets												
<i>Imports</i>	1,228,151	1,839,053	1,312,704	2,445,101	2,460,647	49.7%	-28.6%	86.3%	0.6%			100.4%
<i>Domestic Production</i>	47,011,191	47,837,266	47,061,756	50,150,980	44,460,000	1.8%	-1.6%	6.6%	-11.3%			-5.4%
<i>Consumption</i>	15,353,318	15,233,990	14,262,302	14,712,170	13,251,241	-0.8%	-6.4%	3.2%	-9.9%			-13.7%
<i>Import Market Share</i>	8.00%	12.10%	9.20%	16.60%	18.60%	51.3%	-24.0%	80.4%	12.0%			132.5%
<i>Unit Value - Domestic €</i>	354	370	305	371	360	4.5%	-17.6%	21.6%	-3.0%			1.7%
<i>Unit Value - Imports €</i>	362	315	278	346	311	-13.0%	-11.7%	24.5%	-10.1%			-14.1%

Source: Commission Regulation (EC) No 1694/2002 of 27 September 2002

MANDARINS	1998/99	1999/2000	2000/01	2001/02	2002/03	% change 98/99-99/00	% change 99/00-00/01	% change 00/01-01/02	% change 01/02-02/03	% change 02/03-98/99
	<i>Imports</i>	16,347	17,573	20,335	44,804	44,813	7.5%	15.7%	120.3%	0.0%
<i>Domestic Production</i>	81,869	75,767	60,462	60,329	39,600	-7.5%	-20.2%	-0.2%	-34.4%	-51.6%
<i>Consumption</i>	80,065	74,056	65,676	80,960	72,843	-7.5%	-11.3%	23.3%	-10.0%	-9.0%
<i>Import Market Share</i>	20%	24%	31%	56%	62%	20.0%	29.2%	80.6%	10.7%	210.0%
<i>Unit Value - Domestic €</i>	826	790	925	827	781	-4.4%	17.1%	-10.6%	-5.6%	-5.4%
<i>Unit Value - Imports €</i>	631	670	792	691	605	6.2%	18.2%	-12.8%	-12.4%	-4.1%

Source: Commission Regulation (EC) No 658/2004 of 7 April 2004.

SALMON	2000	2001	2002	2003	% change 2001-2000	% change 2002-2001	% change 2003-2002	% change 2003-2000
	<i>Imports</i>	372,789	379,764	396,772	455,948	1.9%	4.5%	14.9%
<i>Domestic Production</i>	146,664	161,854	168,374	180,593	10.4%	4.0%	7.3%	23.1%
<i>Consumption</i>	507,705	527,970	550,943	607,728	4.0%	4.4%	10.3%	19.7%
<i>Import Market Share</i>	74%	72%	72%	75%	-2.2%	0.1%	4.2%	2.0%
<i>Unit Value - Domestic €</i>	3.5	3.23	3.02	2.79	-7.7%	-6.5%	-7.6%	-20.3%
<i>Unit Value - Imports €</i>	3.55	2.99	2.87	2.54	-15.8%	-4.0%	-11.5%	-28.5%

Source: Commission Regulation (EC) No 1447/2004 of 13 August 2004.

