II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 December 1984

relating to a proceeding under Article 85 of the EEC Treaty

(IV/26.870 – Aluminium imports from eastern Europe)

(Only the Dutch, English, French, German and Italian texts are authentic)

(85/206/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Greece, and in particular Articles 3 and 5 thereof,

Having regard to the notification of 1970 pursuant to Article 4 of Regulation No 17,

Having regard to the Commission Decision of 16 August 1978 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and to Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

After consultation within the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) OJ No 127, 20. 8. 1963, p. 2268/63.

I. THE FACTS

1. The agreements

1.1. *Introduction*

The arrangements concerned in these proceedings confined the sales of primary and eventually other aluminium by the foreign trade organization of the USSR, Poland, Hungary, Czechoslovakia and the German Democratic Republic to a group of western primary aluminium producers. In return for the purchase by the western parties of primary aluminium ingot, the foreign trade organizations undertook, with a few limited exceptions, not to sell aluminium (whether ingot, scrap, secondary or semi-manufactures) to other prospective purchasers in the western world, from 1963 to 1976. The operation of the agreements involved the entire primary aluminium industry of the EEC and most of that of western Europe, and involved the policing of exports to the EEC, the EFTA countries, the United States of America and South America and the diversion of certain tonnages of ingot from the EEC to Turkey and Japan.

From 1963, first an English company, Brandeis Goldschmidt and Co. Ltd, and later its Swiss subsidiary, Brandeis Goldschmidt and Co. AG (3), entered into a series of purchasing agreements with

(3) Unless separate reference is needed, these two companies are hereinafter referred to without distinction as 'Brandeis Goldschmidt'.

the foreign trade organizations Raznoimport (1), Impexmetal (2), Metalimpex (3), Kerametal (4), and Intrac (5). Eisen und Metall Aktiengesellschaft, a West German company, also entered into a purchasing agreement with Intrac. A corresponding series of sales agreements was concluded with the Brandeis companies and Eisen und Metall on the one side and certain primary aluminium producers on the other, providing for the resale of all the quantities delivered under the purchasing agreements. Ancillary to these were certain agreements and concerted practices.

1.2. *The parties*

1.2.1. The western parties to the arrangements, whether directly through purchases from the Brandeis companies or Eisen und Metall, or indirectly through receipt of deliveries of eastern metal without a contract with the nominal buyers, are set out for convenience in Annex 1. All are producers of primary aluminium, most being integrated vertically to a greater or lesser extent (5.1).

1.2.2. The two Brandeis companies are traders in non-ferrous metals and Brandeis Goldschmidt Ltd is a full member of the London Metal Exchange (LME).

1.2.3. The eastern European parties are those foreign trade organizations charged with the export of aluminium. Each has a legal personality separate from the State in which it is domiciled (6).

1.2.4. The European Primary Aluminium Association (EPAA) has legal personality under the laws of the Federal Republic of Germany. The EPAA was founded in 1969 for the purpose, according to its constitution, of furthering the common interests of the primary aluminium industry. The EPAA has as its registered office the Aluminium Zentrale in Düsseldorf. At the time the association was founded, all its members, listed as founder members in Annex 1, were purchasers of aluminium under the Brandeis agreements. The only western producers party to the Brandeis agreements which were not also members of the EPAA were Nippon Light Metals (NLM) and Alugasa. NLM was not a European company and did not produce primary aluminium in Europe, and Alugasa was a subsidiary of an existing member (Pechiney-Ugine-Kuhlmann (PUK)). Both were ineligible for membership under Article 5.1 of the constitution of EPAA.

1.3. *The negotiations and agreements for total quantities*

1.3.1. Between November 1962 and February 1963 it was agreed in principle between BACO, Swiss Aluminium, Montecatini, VAW and PUK that it was desirable to ascertain the likely terms on which Raznoimport would be prepared to sell its export quota of virgin aluminium exclusively to the western European aluminium producers (7). The meeting at which Brandeis Goldschmidt was authorized to approach Raznoimport was summarized in a note by Brandeis Goldschmidt. A meeting between Brandeis Goldschmidt and Raznoimport took place on 6 February 1963; Raznoimport was interested in principle and further negotiations led to the conclusion of an agreement in May 1963 in Moscow between Brandeis Goldschmidt as buyer and Raznoimport as seller.

1.3.2. Although only BACO, Swiss Aluminium and PUK were present at the exploratory meetings with Brandeis Goldschmidt, the latter 'understood that these companies also represented most other substantial western producers' (8). In its submission to the UK Registrar of Restrictive Trade Practices in 1968, BACO indicated that Brandeis Goldschmidt had been employed to sound out the Russians by BACO, Swiss Aluminium, Montecatini, VAW and PUK and identified other big western producers which had

(1) Vsesojuznoje Importno-Exportnoje Objedinenije 'Raznoimport' (USSR).

(2) Centrala Importowo-Eksportowa 'Impexmetal', Przedsiebiorstwo Panstwowe (Poland).

(3) Metalimpex Hungarian Trading Company for Steel and Metals (Hungary).

(4) Kerametal Foreign Trade Co. Ltd (Czechoslovakia).

(5) Intrac Handelsgesellschaft mbH (DDR).

(6) Raznoimport's separate identity is confirmed in its constitution. Section 13 of the Principles of Civil Legislation (Law of the USSR No 525 of 8 December 1961) provides that the State is not liable on the obligations of State bodies which have legal personality.

Impexmetal is a public corporation (przedsiebiorstwo panstwowe) having under Polish law a separate personality from the Polish State.

Metalimpex as a foreign trade company has a legal personality separate from the State and is liable on its obligations to the extent of its assets (Article 31 (1), (2) and (3) of the Hungarian Civil Code).

Kerametal is regarded under Czechoslovak law as an entity separate from the State and, by section 11 of Law No 119 of 1948, is liable on its obligations to the extent of its assets and the State will not be liable on Kerametal's obligations.

Intrac has, as its full name implies, limited liability.

(7) The genesis of the arrangements was first revealed to the Commission in January 1979. The text is taken almost verbatim from particulars supplied by BACO in 1968 to the UK Registrar of Restrictive Trade Practices. The BACO response was put on the special (non-public) section of the UK register.

(8) Letter to the Commission dated 7 January 1980.

'indicated their willingness to participate in the arrangement'. These were said to be Alcan UK, VMW, Endasa, Elkem, Gränges and ASV. Certainly, as will be seen below, all these companies bought eastern metal from Brandeis Goldschmidt in 1963.

1.3.3. The agreement with Raznoimport was renewed in 1964, to the end of 1965, in 1966 to the end of 1967 and in 1968 to the end of that year. Gradually other foreign trade organizations appeared as sellers and were accommodated in the same way by Brandeis Goldschmidt. The agreements were also extended to products other than ingot over a period. The period of each new seller's contract was made to conform to the date of termination laid down in the then current Raznoimport contract. By 1967 there were four foreign trade organizations which were sellers and one more which was a potential seller, and the tonnages of metal they hoped to sell in 1968 and beyond had increased. It became the practice from 1967 onwards to precede the conclusion of the individual 'Brandeis contracts' with negotiations upon total quantities and prices at what came to be called (by the big western parties) 'eastern metal conferences'. The texts of the Brandeis agreements had by then become reasonably standardized and what was at issue was total tonnage, price and price variation, and derogations from existing contracts.

1.3.4. Table 1 shows the total tonnages contracted for, until 1968, by adding the individual tonnages from the 'Brandeis agreements', and from 1968 to 1976 those from the 'eastern metal conferences'. The surplus available from the foreign trade organizations tended to lessen with time and there were difficulties in the western market place, so that the eastern metal conferences after the first were all concerned with tonnage or price adjustments.

1.3.5. At the eastern metal conferences the chairmanship was shared by Raznoimport and Swiss Aluminium. The first (Budapest) conference was attended on the western side by Swiss Aluminium, PUK, Alcan, BACO and Brandeis Goldschmidt. But other undertakings [1] took eastern metal from Brandeis Goldschmidt in 1968, which indicates that they accepted the results of that first conference.

1.3.6. After the EPAA was formed in 1969 it was used as a forum for discussing the operation of the Brandeis agreements and for resolving issues from time to time arising under those agreements. On several occasions the general meeting of the EPAA was asked to give full powers to the negotiators at the next eastern metal conference; despite this the agreements reached at those conferences were reported to the EPAA membership and their ratification of the agreements was sought. Swiss Aluminium, having been appointed in 1963 as coordinator and 'spokesman' of the western producers, became the first chairman of the EPAA. The negotiating team for the eastern metal conference after the first appears to have consisted of the EPAA executive committee for the time being.

1.3.7. The negotiations with the foreign trade organizations were throughout the joint wish of the western European producers, as is shown by the active participation of some and by those others who supported the negotiation by taking up eastern metal and (later) by taking up membership of the EPAA.

1.4. *Analysis of the operational agreements*

The Brandeis agreements

1.4.1. For various reasons the tonnages originally contracted for were reduced; final deliveries are shown in table 1. Price is dealt with in section 4.

1.4.2. The essence of all the agreements was to prevent supplies of aluminium from coming on to the western markets, and particularly western European markets, except through the Brandeis agreements. The record of the first meeting, made by Brandeis Goldschmidt, stated:

> 'The Russians would have to guarantee that only this (contractual) quantity would be exported to the western world from Russia or from any other eastern country . . . The period of commencement should be as soon as possible after the present Russian commitments on barter deals, etc., have been fulfilled . . . with the understanding that the Russians should conclude no further deals at the moment.'

Brandeis Goldschmidt confirmed this to Raznoimport at the meeting on 6 February 1963:

> 'We (Brandeis Goldschmidt) explained to you that we were in principle interested in buying the entire production of aluminium produced by you and the Socialist Republics for export to western markets provided that you would guarantee that no quantities other than those bought by us would be sold direct or under barter deals to those markets.'

[1] ASV, Endasa, Elkem, Giulini, Holland Aluminium, VAW, VMW, NLM, Gränges and Montedison.

In 1974, as a result of the Eastern Metal Conference in Venice, the quantity of ingot to be taken up by Brandeis Goldschmidt was reduced (which suited the western producers because there was a glut at the time) but the price per tonne for the remainder was increased. The foreign trade organizations were forbidden to sell their resulting surplus in the prohibited countries even though they promised to sell at the Brandeis price.

The agreements made from 1967 with Impexmetal contain a provision permitting the export of 1 524 tonnes of primary aluminium for processing into semi-manufactured products by 'members of the Buyer's Group' (i.e. the western producers).

1.4.3. From the beginning the parties adopted the drafting device whereby the eastern European seller undertook 'not to sell to other countries' and to list excepted countries. The exceptions were limited.

Other products than primary aluminium were soon added to the list of those that could not be sold 'in other countries'. The first agreement expressly permitted the sale of semi-manufactures by Raznoimport but, in its 1964 agreement, Raznoimport agreed to restrain exports to the United Kingdom of aluminium sheets. Table 2 shows schematically the product limitations introduced, including restrictions upon barter deals, which had been mentioned from the beginning but were not contractual until 1968.

Where countries were included in the territories open to sales by the foreign trade organizations, but which might be thought to be of central interest to the western producers, there were often contractual limitations designed to protect the western producers (see table 3).

1.4.4. In 1964, in the second contract with Raznoimport, the clause which came to be known as 'the spirit of the agreement' clause was introduced:

> 'Should it become apparent during the period 1 July 1964 to 30 June 1965 that exports of aluminium from other sources become of such importance that they interfere with the spirit of the agreement, the sellers and the buyers have the right to renegotiate terms . . .'

The 'spirit of the agreement' was never defined, but it was never intended to cover what would normally be considered as grounds of frustration of contract because this was already dealt with in the first (1963) contract. (The 'frustration' clause, which explicitly included 'prohibition of import or export', was relied upon in 1973 by Impexmetal and by Intrac when their governments forbade exports.) In the 1964 Raznoimport contract, quoted above, the contingency which would 'interfere with the spirit of the agreement' appears to have been the export of tonnages by some other foreign trade organizations; in connection with the 1968 agreement with Raznoimport a supplementary letter from Brandeis Goldschmidt confirmed an agreement whereby Bulgarian exports would be deducted from the tonnages due to be bought from Russia. The 'spirit of the agreement' formula was also used either to stop or to restrict sales of aluminium (other than ingot), or to ensure that such quantities as were permitted contractually to be exported were sold at prices which would not endanger the aluminium market and the agreement. From 1968 onwards the formula was used to cover the contingency that aluminium might be sold on the LME and that the quota on aluminium cable might be exceeded.

The Eisen und Metall agreements

1.4.5. Brandeis Goldschmidt had had an agreement with the East German foreign trade organization Intrac since 1965. On 20 March 1971 Eisen und Metall made an agreement with Intrac for the import of aluminium from the German Democratic Republic; the agreement was stated to be within the framework of the agreement which had been made by Brandeis Goldschmidt with Intrac (contract No EG 7000) and the contractual quantity was increased to 75 000 tonnes, with yearly quotas from 1971 to 1975 being increased correspondingly. It was agreed that deliveries would take place within the framework of the Berlin agreement on trade between the Federal Republic of Germany and the German Democratic Republic; by clause 7 Intrac undertook not to export primary aluminium nor semi-manufactures to the Federal Republic of Germany apart from the contractual quantities. The agreement with Intrac lapsed at the end of 1973 through *force majeure*.

1.5. *Negotiations for the fourth series*

1.5.1. It had been the intention of all the parties that a fresh agreement should be negotiated to run from 1 January 1976 to 31 December 1980, but the

Copenhagen conference succeeded only in extending the existing contract for six months in order to buy negotiating time. The foreign trade organizations wished to be free to sell to the United States and Japan and to send aluminium into western Europe for processing without asking the permission of the western producers first. They also wished to send aluminium into the formerly forbidden territories if this were part of barter deals.

1.5.2. These proposals were described by BACO as 'ridiculous changes' and, in another telex, BACO stated that 'the USA must be covered by the agreement because of ease of switching by merchants back into the European market'. Alcan UK and ASV both suggested that the USA should not be a 'free country' and that exports of semi-manufactures should be limited to 10 000 tonnes. BACO and ASV felt that even this quantity of semi-manufactures should be taken by the western producers only.

1.5.3. The differences between the western producers and the foreign trade organizations could not be resolved and the negotiations came to an end in July or August 1976.

1.6. *Brandeis / western producers*

1.6.1. Brandeis Goldschmidt made corresponding sales contracts with western producers, using serial numbers in which the letter prefixes represented the country of origin. A summary of those agreements is set out in Annex 2. Originally, the text of these agreements reproduced all the material terms of the agreements made by Brandeis Goldschmidt with the foreign trade organizations, and in particular set out in full the restrictions imposed on the supply by the foreign trade organizations of primary and secondary aluminium, scrap and semi-manufactures. Later certain amendments were made, the history of which is set out in 7.2.

1.6.2. Until 1968 the agreements were made with Brandeis Goldschmidt and Co. Ltd. The 1968 series of agreements, and those made in 1971, were concluded with Brandeis Goldschmidt and Co. AG, a wholly owned Swiss subsidiary of Brandeis Goldschmidt and Co. Ltd. By a letter to the Commission dated 7 January 1980, Brandeis Goldschmidt and Co. Ltd explained that 'the agreements were made by Brandeis Goldschmidt and Co. AG instead of Brandeis Goldschmidt and Co. Ltd, from 1968 onwards, to eliminate the necessity of registering the agreements with the Registrar of Restrictive Trade Practices'.

(The registrar had called for details of the agreements because they had not been registered with him.)

2. The operation of the agreements

2.1. *EPAA membership*

At the time the EPAA was founded, all its founder members were purchasers of aluminium under the Brandeis agreements. When new members joined the EPAA they were invited by Swiss Aluminium to take up a quota of the aluminium purchased under the Brandeis contracts. The invitation was expressed in terms which made it clear that participation in the Brandeis arrangement was a duty owed by a member of the EPAA to the other members.

2.2. *Allotment to western producers*

2.2.1. The aluminium purchased under the Brandeis agreements was distributed among the participants in a ratio corresponding to each participant's share of sales in western Europe. The ratio was calculated by Swiss Aluminium on the basis of information on sales of aluminium which each participant was required to disclose to that company. Included in sales were sales of primary aluminium to third parties, deliveries of primary aluminium to subsidiary companies and deliveries in Europe to US producers by way of swap transactions. The sales information requested related to the last calendar year before the request and quotas were assigned for the following year (the quota for 1971 was, for example, established by reference to sales figures for 1969, disclosed after a request was sent in September 1970).

2.2.2. From this information a quota was established for each participant. New members of the EPAA which had not previously produced primary aluminium were to estimate their production for the following year. This procedure was adopted in 1970 for Anglesey Aluminium, Kaiser-Preussag and Metallgesellschaft and in 1973 for Alsar.

2.2.3. This procedure was operated throughout the life of the agreements. Swiss Aluminium informed each company of its prescribed quota by circular letter (up to 1970) or (after 1970) by circulation of 'eastern metal distribution' lists.

2.2.4. Since the lists fixing the quotas were circulated to all EPAA members, each member was made aware of the amounts of eastern metal purchased by the others. In the event that any EPAA member disputed the amount of its quota, or that of any other member, Swiss Aluminium would investigate and ask for explanation of other EPAA members.

2.2.5. The tonnages of metal bought since 1971 from Brandeis Goldschmidt are shown on a contract and annual basis in table 4.

2.2.6. While the basic framework of the whole arrangement from 1963 to 1976 was one of agreements made between Brandeis Goldschmidt and the foreign trade organizations with corresponding agreements between Brandeis Goldschmidt and the western producers, some western producers, notably VAW, RTZ and BICC, took part without signing a standard-form Brandeis agreement. Primary aluminium sold under the Brandeis agreement was also swapped between participants. A quota reserved for Japan under the agreement made by Brandeis Goldschmidt with the foreign trade organizations was purchased by NLM under agreement No RU 1. This quota amounted to around 7 % of the total purchased under the Brandeis agreements.

2.2.7. When the Eisen und Metall agreement superseded the Brandeis agreement with Intrac, VAW agreed to take up the entire quota of 75 000 tonnes from Eisen und Metall, and VAW made a further agreement with Alusuisse Deutschland GmbH, Kaiser Preussag Aluminium GmbH, Metallgesellschaft AG and Gebrüder Giulini GmbH, by which the aluminium purchased from Intrac was distributed among the five West German aluminium producers. For the second half of 1973 Alusuisse agreed to take up the shares of the supplementary quota attributed to Giulini, Kaiser-Preussag and Metallgesellschaft. Intrac withdrew from the agreement in 1973 because exports of primary aluminium had been prohibited by the Government of the German Democratic Republic.

2.3. *Restrictions on resale of eastern metal*

2.3.1. The aluminium ingot sold under the Brandeis Goldschmidt and Eisen und Metall agreements carried the cast mark of the relevant producer. Third parties would therefore be able to recognize its origin unless the aluminium were remelted. There was therefore an understanding among the western producers that eastern metal should not be sold to third parties unless it had been remelted and its origin could no longer be recognized.

2.3.2. Alcan contended during the hearing that it would have been uneconomic to remelt the ingot for sale as primary unalloyed remelt ingot, while the replies of Swiss Aluminium, VAW and VMW indicated that remelting would have resulted in an increase in cost of around 4 %. This refers to remelting specifically for the purpose of changing one set of marks of origin for another. Evidence was given at the oral hearing before the Commission that, if added to a pot of virgin aluminium as it left the production cells, the eastern metal could be melted at no additional cost because on leaving the furnace the temperature of the aluminium is about 970 °C, while aluminium melts at about 630 °C.

2.3.3. Most of the western producers deny that this restriction was in any way an 'obligation'. Alcan, however, does admit that 'during the currency of the agreements Alcan certainly thought that there was an understanding of this kind'. Swiss Aluminium referred to it in a letter at the time as a 'gentlemen's agreement' or an 'understanding':

> '. . . we would like to point out also that it is the understanding among the EPAA members that eastern metal should not be sold to third parties unless it has been remelted and its origin can no longer be recognized.'

When, in a telex to Swiss Aluminium on 9 November 1973 under contract No RU 18, Alsar specified Rotterdam as the port of discharge, an employee of Swiss Aluminium put a manuscript note on the copy received:

> 'Does Alsar know that eastern metal cannot simply be resold, but must be remelted in their own works?'

This remark was no doubt prompted by the notoriety of Rotterdam as a centre for the free market in aluminium. Swiss Aluminium, in the course of its reply to Alsar, said:

> 'This metal should not be sold to third parties unless it has been remelted before. You would of course be free to sell it directly to another western producer, should you wish that.'

These and other documents show, and the Commission finds as fact, that there was an understanding, the purpose of which was to prevent its resale to outsiders in its original form.

2.3.4. The parties allege that remelting was a technical necessity since many customers did not have remelt facilities of their own. However not all potential

customers were in this position: users of scrap, outside the ranks of the integrated producers, use ingot of 99,5 % purity as a sweetener and there would be no necessity for traders, in particular, to remelt. With many EPAA members it was never likely that they would sell eastern metal in its original condition. The understanding not to resell to third parties without remelting was in general respected.

It was accepted that onward sales could be made to other EPAA members of their subsidiaries without remelting and only VMW and VAW appear to have sold small quantities in 1973 and 1974 to third parties without remelting. In 1976 VMW asked if its quota of aluminium from Russia could be supplied without marks, in a so-called 'neutral' form, but received a negative answer from Raznoimport.

At the hearing VMW was asked why it had made this request and replied that, as eastern metal bought by VMW was generally sold to third countries outside the common market, it would have been easier for VMW if remelting had not been necessary.

This shows that for some, at least, there was no technical necessity to remelt. Had there been such a necessity there would have been no need for any understanding nor of any policing of that understanding.

2.3.5. Most of the aluminium ingot sold under the Brandeis arrangements was, at the buyers' request, of 99,5 % purity. The western parties maintain that this was in general too low to be marketable and the Commission accepts that the market is limited. For this reason the western producers had an interest to remelt, for in this way it could be upgraded by being added to metal of a higher purity by making use of the difference between the melting temperature of aluminium and the higher exit temperature from the cells. Only to this extent could it be said that there was any technical necessity to remelt.

2.3.6. The parties stated that the remelting arrangement was of use in the enforcement of the Brandeis arrangements, since it ensured that no branded eastern metal appeared in western markets. By this means the adherence of the foreign trade organizations to their obligations not to export to western countries could be verified.

2.4. *Sales between EPAA members*

2.4.1. In some instances the quotas allotted to certain western producers included amounts to be taken up by other western producers under arrangements between the producers concerned. Arrangements of this nature were made between Alcan and VAW and between Swiss Aluminium, RTZ and BICC.

2.4.2. Although VAW was one of the companies which had agreed in 1963 that Brandeis Goldschmidt should negotiate with Raznoimport, the first recorded agreement made by VAW with Brandeis Goldschmidt was concluded in 1967 for the purchase of aluminium from Impexmetal. In its reply to the statement of objections, VAW stated that 'it first participated in the concerted purchases of eastern aluminium in June 1968'. In reply to a question at the hearing, the representative of VAW declared that, 'with respect to the participation of VAW, it is correct and unequivocal that we only joined the concerted action after the decisive discussion in 1968 and not before. We did not enter into any obligations before and made no agreement'. Neither of these statements was a wholly accurate account of the participation of VAW in the Brandeis agreements. The evidence shows that VAW, having been one of those companies appointing Brandeis Goldschmidt to negotiate the first agreement with Raznoimport in 1963, was a participant in those agreements from their inception. The precise method by which VAW participated in the Brandeis agreements from 1963 to 1968 was first disclosed to the Commission by Alcan in a letter of 23 January 1980. This makes it clear that Alcan accepted VAW's allocation of eastern metal under the arrangements with Raznoimport in 1963 and 1964, with Metalimpex in 1964 and 1966 and with Intrac in 1965 and 1966. In return for Alcan's agreement to accept an allocation of eastern metal on its behalf, VAW usually agreed to purchase from Alcan corresponding tonnages of aluminium products. In practice, however, such purchases were not always called for by Alcan, or the matter was dealt with in some other way by VAW. According to Alcan's reply VAW was unable to participate directly in the Brandeis contracts because imports of eastern aluminium into the Federal Republic of Germany were at that time prohibited or very strictly limited.

2.4.3. The quota assigned to Swiss Aluminium from 1971 onwards included amounts to be purchased by RTZ and BICC. The quotas for the ultimate purchasers corresponded to their respective shares of, initially the estimated production, and subsequently the sales of Anglesey Aluminium Ltd, calculated by reference to the percentage of

the share capital in Anglesey Aluminium held by RTZ and BICC (1).

2.4.4. The participation of RTZ and BICC appears to have been arranged in this manner in order to avoid the provisions of the UK Restrictive Trade Practices Act. Anglesey Aluminium Ltd had agreed in December 1970 to accept an obligation to take up aluminium under the Brandeis agreements, as a result of becoming a member of the EPAA but, in January 1971, RTZ indicated that there were 'legal and technical problems' relating to its participation, that it had consulted BACO at length and 'we are attempting find formula that will not offend the UK Trade Practices Court' and asked whether Swiss Aluminium would be prepared to make the agreement with RTZ and assume its commitment in the 'master agreement'. This was done.

2.4.5. The eastern metal distribution list for 1974 shows that the quota assigned to Alcan Canada included a third-party share. The amount of eastern metal taken up by Alcan included not only the amount proportionate to the sales of Alcan companies in Europe but also an amount proportionate to the share of Kaiser Aluminium and Chemical Corporation in the sales of Alcan Booth Industries Ltd (in which at all material times Kaiser held a 25 % shareholding).

2.4.6. In 1968 Mosal A/S, the jointly owned subsidiary of Elkem and the Aluminium Company of America (Alcoa), signed a purchasing agreement with Brandeis Goldschmidt. In 1971 a similar agreement was made by Elkem, but the quota allotted under this agreement was calculated by reference not only to Mosal's 'sales in western Europe' but also to sales in western Europe made by Alcoa. While it was Elkem which signed the Brandeis agreement in 1971, over 60 % of the quota allotted was related to sales made by Alcoa, either directly or through Mosal.

2.4.7. The above long-term arrangements involving Alcan, VAW, Swiss Aluminium, RTZ, Kaiser, BICC, Elkem and Alcoa were not the only instances in which eastern metal passed through the hands of one western metal producer to another. In addition, *ad hoc* sales and swaps of eastern metal were made from time to time between EPAA members in the course of their daily trading.

(1) Anglesey Aluminium was originally held as to 43 % by RTZ and as to 27 % by BICC. By 1975 these had become 33 % RTZ and 19 % BICC. BICC ceased to be a shareholder in December 1975. The remaining shareholder was Kaiser Aluminium and Chemical Corporation, which became the majority shareholder at the end of 1975 with 66,6 % of the share capital.

3. The enforcement of the agreements

3.1. *Introduction*

The object and effect of the series of agreements made betwen Brandeis Goldschmidt, the western aluminium producers and the foreign trade organizations can be seen from the manner in which they were implemented and enforced and acts which were regarded as infringements.

3.2. Throughout the duration of the whole Brandeis arrangements, steps were taken by the western producers to enforce the terms of the restrictions that the foreign trade organizations had entered into.

3.3. *Enforcement of the 1963/64 and 1964/65 agreements*

3.3.1. The agreement made in 1963 between Raznoimport and Brandeis Goldschmidt expressly permitted the supply by Raznoimport of aluminium semi-manufactures. In 1964 a UK independent dealer, Non-Ferrous Stockholders, made a contract for the import of up to 10 000 tonnes of aluminium sheet. The UK Government had recently placed aluminium sheet on the 'open general licence' list as a result of a trade agreement between the UK Government and the Government of the USSR, and Non-Ferrous Stockholders sought to avail itself of the opportunity for trade thereby presented. However, on learning of the Non-Ferrous Stockholder's contract, Alcan UK, BACO and Swiss Aluminium jointly prevented the performance of it by obliging Raznoimport to undertake not to export aluminium sheet to the United Kingdom.

An Alcan UK telex message dated 1 May 1964 to Alcan International Ltd explained that:

> 'Re: (Alcan SA's) telex of 30 April. (BACO) now takes view that we must use present position arising from metal negotiations to insist on complete cancellation of sheet contract between Russians and Non-Ferrous Metals. His opinion, with which we agree, is that even 2 000 tonnes a year of Russian sheet would have serious influence on stability of UK and Continental markets and that every possible step must be taken to prevent this . . . (BACO) will refuse (BACO's) signature to metal contract unless Russians undertake in writing to refrain from any, repeat any, exports of semis to western Europe . . . Request your advise of line to be taken at meeting in Zurich

Monday when understand Alcan SA and Alcan UK represent group . . .'

By letter dated 18 May 1964 Raznoimport undertook not to export more than 3 000 tonnes of aluminium sheet to the United Kingdom during the period May 1964 to December 1965.

3.3.2. By the 'spirit of the agreement' clause, which first appeared in 1964, Metalimpex undertook to 'handle . . . sales of semi-manufactured aluminium products in the spirit of this agreement'. By this the parties meant that sales of semi-manufactures were to be held at their pre-existing levels. A BACO memorandum dated 15 September 1965 records that:

'A condition of the contract required the Russians to limit their export of aluminium semis to the United Kingdom to 3 000 tonnes during the period of the contract. This 3 000 tonnes would be additional to the 2 000 tonnes already ordered but not delivered. The Hungarians effectively agreed to limit their semi sales in the United Kingdom to the then prevailing level (about 660 tonnes per annum).'

3.4. *Enforcement of the 1968 to 1970 agreements*

3.4.1. A letter dated 22 July 1970 from Swiss Aluminium to Brandeis Goldschmidt shows that infringements of the 1968 to 1970 series did take place, and that steps were taken by the EPAA members to remedy such infringements. The letter sets out the infringements in tabular form, a copy of which is reproduced in table 5. This letter also shows that the main remedy used by EPAA members to deny any advantage to the foreign trade organizations for deliveries in excess of the agreed quotas was to deduct any such excess from the quota for the following year.

3.4.2. Throughout the running of the Brandeis agreements there were recurrent shortages of aluminium scrap in the EEC and other countries of western Europe. It was never the policy of any of the western European countries concerned to restrict the importation of aluminium scrap. During 1968 and 1969 the UK secondary smelters made repeated representations to the UK Board of Trade to alleviate a shortage of scrap, in the course of which the Association of Light Alloy Refiners and Smelters pointed out that in 1965, when Russia had been a major supplier of scrap to the UK market, imports from Russia had amounted to 15 000 tonnes. This source had 'completely dried up'.

On each occasion the primary smelters in the United Kingdom maintained that there were adequate supplies of primary aluminium to replace scrap. Primary aluminium was more costly than scrap for the secondary smelters.

3.4.3. The complaints about breaches of the eastern metal agreements and action taken in 1970 to enforce the agreements are summarized in table 6, which partly overlaps table 5.

The action taken in 1970 to enforce, in respect of deliveries to the EEC, the restrictions contained in each of the agreements between Brandeis Goldschmidt and the foreign trade organizations may be set out in more detail.

Raznoimport

3.4.4. A complaint was made by Brandeis Goldschmidt on 12 August 1970 at the delivery of 1 000 tonnes of primary ingot to Rotterdam for the account of a metal dealer Messrs Panchaud Frères SA. When Raznoimport indicated that it had received no reply to a letter on this matter to Panchaud Frères, Brandeis Goldschmidt replied:

'We . . . have noted that you have not yet received a reply from Messrs Panchaud Frères SA regarding the 1 000 tonnes of Russian aluminium shipped to Rotterdam outside the Basle agreement.

However, as we have supplied conclusive evidence that this material was virgin aluminium ingots of Russian origin shipped from Russia, we shall deduct this tonnage from the fourth-quarter allocation.'

3.4.5. Complaints were also made by Endasa concerning the supply to a Spanish cable maker, Echevarria Hermanos SA, of 152 tonnes of aluminium ingot of USSR origin. The complaint, contained in a letter dated 13 November 1970, was addressed to the EPAA in Düsseldorf, and stated:

'We confirm (our) telex about the importation of aluminium ingot from USSR.

The Spanish import licence No 7.155.023 has been issued to the Spanish cable manufacturer 'Echevarria Hermanos SA' covering 152 234 kg of aluminium ingot at a cif Spanish port price equivalent to US $ 0,21 per lb (1) and country of origin of the said metal is shown to be the USSR.'

Swiss Aluminium replied by telex dated 20 November 1970:

(1) This price was noticeably lower than the price then ruling under the Brandeis agreements (US $ 566 per tonne).

'(Your letter) 13 November 1970 to EPAA. Please address all letters re eastern metal to Zürich.'

and called on Endasa to provide further details. It was eventually established by Swiss Aluminium that the consignment in question had been originally destined for the United Kingdom under the Brandeis agreements, but had been re-shipped by the western producer concerned.

Impexmetal

3.4.6. An offer made to Swiss Aluminium for 1 000 tonnes of Polish aluminium prompted a letter dated 9 July 1970 from Swiss Aluminium to Brandeis Goldschmidt in the following terms:

'This offer constitutes a violation of our agreement. In order not to disrupt the market, Swiss Aluminium have decided to purchase this metal rather than letting it be offered to independent aluminium users.

This quantity which is exactly 1 000 tonnes will be deducted from the 1970 quota, to be supplied by Impexmetal to the group. To allow you to prove the case to Impexmetal, Warsaw, we are sending you herewith the original certificates of analysis issued by Huta Aluminium "Konin".

. . . In consequence of the above, the total quantity to be taken from Impexmetal this current year is to be reduced to 15 085 long tons. Kindly advise Impexmetal accordingly.'

3.4.7. Swiss Aluminium also complained of the activities of a British metal trader in selling Polish aluminium to Argentina. A telex message dated 2 December 1970 to Brandeis Goldschmidt stated:

'Have reliable information that British Metals Corporation offered, in Argentina, Polish metal at US $ 523 per tonne, deliverable in 180 days. This is against clause 2 (price not lower (1)). Request withdrawal of offer – if sale is made we will deduct.'

3.4.8. On 4 December 1970 Swiss Aluminium made a further complaint to Brandeis Goldschmidt:

'Hungarian or Polish metal – Our subsidiary Satral, Belgium, received offer from Landa Metals for 200 tonnes at £ 198 per tonne. All these offers seem to become a habit and have a bad effect on the price level. Please ask suppliers to stop this nonsense now.'

(1) The Brandeis price at the time was US $ 566 per tonne, cash against documents.

The message was conveyed to both Impexmetal and Metalimpex.

Metalimpex

3.4.9. By letter dated 20 May 1970 to Brandeis Goldschmidt, Swiss Aluminium sought the withdrawal of a quotation for Hungarian aluminium to Alfa Romeo SpA. The letter was in these terms.

'We have been informed that the Hungarians, presumably Metalimpex, have offered to supply to Alfa Romeo, in 1971, 4 000 tonnes of aluminium alloy (Al Si 9), and that moreover they already supplied 200 tonnes in 1969.

Both actions constitute a violation of the present contract since the deadline for a new contract is 31 October 1970, and before that date no quotations for next year can be allowed.

Please be good enough to protest against this and ask for a withdrawing of the quotation. The 200 tonnes supplied last year will be deducted next year . . .'

3.4.10. Apart from the 200 tonnes supplied in 1969, Alfa Romeo SpA purchased no further quantities from Metalimpex or any other foreign trade organization.

Metalimex/Kerametal

3.4.11. In January 1970 a Slovakian company, Kerametal Ltd, became responsible with Metalimex for the supply of aluminium under the Brandeis agreements. It is not clear whether the new company, Kerametal, had sought to be released from the restrictions of the Brandeis agreements, but Brandeis Goldschmidt, after a meeting in July 1970, reminded Kerametal that:

'Concerning secondary aluminium, semis, alloys and the other virgin aluminium discussed, we regret that section 2 of the agreement cannot be in any way amended or deviated from.'

Intrac

3.4.12. In early 1970 Intrac disclosed to Brandeis Goldschmidt that it had contracted for the sale of 2 200 tonnes of aluminium wire, and 3 750 tonnes of primary ingot to the Federal Republic of Germany. Intrac itself proposed the deduction of the 5 950 tonnes from its total of 8 990 tonnes to be supplied under the Brandeis agreement. Brandeis Goldschmidt replied on 27 January 1970 that:

'. . . Our friends do not agree with your sale of aluminium wire and resultant deduction of aluminium ingots.

> We refer in this respect to your letter dated 26 June 1968.
>
> Our friends insist that you should cancel the contract for wire and deliver the ingots. We realize your difficulties of cancelling an existing contract although it should never have been concluded. In order to find a solution we propose that you deliver the 2 000 tonnes of ingots this year and the quantity will be deducted from an eventual contract for 1971.
>
> Please confirm, as otherwise we really think major unpleasantness will arise.'

Intrac replied that it did not understand how 'unpleasantness' could arise if Intrac deducted the amounts in question from the quotas it was to sell under the Brandeis agreement. To this argument Brandeis Goldschmidt replied:

> '. . . If you look at the contract Brandeis Goldschmidt, Basle, has with you there is no doubt that the sale of 2 000 tonnes is prohibited. You take the position that in 1968 material was sold by DIA and was later deducted by us and that this was a precedent. The sale in 1968 was an infringement, we protested and we deducted because you confirmed in your letter dated 26 June 1968 that no further sales would be made by DIA. In other words we treated this transaction as an exception but under no circumstances give you or DIA the right to make further sales and later deduct the equivalent tonnage from your contract with Basle.
>
> You must agree that should we give you these rights it would make a nonsense of the contract which you have with Basle, as it would give you an option to sell either semis or ingots, when the market is in your favour, at a price better than the agreement price, deducting the tonnage later . . . In any case please deliver the 2 000 tonnes ingots as called forward as we cannot change our programme, and we will deduct in 1971.'

Brandeis Goldschmidt supplied Swiss Aluminium with copies of the telex messages exchanged with Intrac concerning the 2 000 tonnes of aluminium and undertook to keep Swiss Aluminium informed. Brandeis Goldschmidt informed Swiss Aluminium on 6 May 1970 that:

> 'The parcel was reduced to 500 tonnes only and made into a conversion contract and not a direct sale.'

3.4.13. The activities of Intrac continued to be the subject of complaint. On 27 May 1970 Swiss Aluminium informed Brandeis Goldschmidt that:

> 'Have just learnt from the Federal Republic of Germany that the German Democratic Republic is offering 5 000 to 7 500 tonnes for 1971 and following years. Please protest strongly to Intrac, as everybody is bound to the agreement and no such action shall take place before 31 October 1970, provided a new agreement cannot be reached by that date.'

Brandeis Goldschmidt raised this matter with Intrac. The latter explained that the 'talks' concerned were only 'informative in case we would not come to an agreement'. It was also disclosed that Intrac had sold 3 000 tonnes to the Federal Republic of Germany and proposed to deduct this quantity from the quota for 1971:

> '. . . They (Intrac) told us that they have sold for the end of this year 3 000 tonnes to the Federal Republic of Germany, and the reason they gave us was that it concerned some involved financial transactions and they had to sell this material . . . they themselves mentioned that . . . this quantity should be deducted for 1971.'

This information produced a spirited reaction from Swiss Aluminium. By letter of 25 June 1970 Swiss Aluminium declared:

> 'We were rather alarmed on receiving your letter of 12 June 1970 and have contacted VAW in order to find out to whom this metal might have been sold.
>
> Unfortunately they have not been successful. Nevertheless we feel strongly that we should not accept the statement by Intrac and that you should demand that they withdraw from their sale.
>
> We cannot allow that running contract is broken intentionally with a simultaneous offer to deduct this quantity from a future contract, should there be one. The purpose and spirit of this contract is that eastern metal is sold to the western European producers, and not to independent aluminium users. Further, there remains the question of the price.'

In consequence of this complaint Brandeis Goldschmidt sent the following letter on 29 June 1970 to Intrac:

> 'With regard to the 3 000 tonnes which you have sold for delivery end 1970 to the Federal Republic of Germany, our friends are most perturbed by this news and demand that you withdraw this sale as this contravenes the Basle agreement and also is completely against the spirit of the agreement.'

3.4.14. While this matter was being resolved, Swiss Aluminium made a further complaint that Eisen und Metall was offering aluminium from the German Democratic Republic to purchasers in the Federal Republic. A telex message of 23 June 1970 relayed the terms of Swiss Aluminium's complaint to Intrac:

> 'Eisen und Metall Gelsenkirchen offer 99,5 % East German aluminium at DM 212 (free customer). 500 tonnes in July, 200 tonnes in September and 100 tonnes in October. This is not part of free quota as this goes through VAW. The "Interzonenabkommen" allows imports of GDR aluminium for DM 22 million. The 5 000 tonnes (3 750 tonnes through Brandeis plus 1 250 tonnes free quota) are approximately DM 11 million. GDR may, therefore, according West German regulations, export another approximate 5 000 tonnes to the Federal Republic of Germany, but this would definitely constitute a violation of present contract. Therefore please ask Intrac to withdraw offer immediately.'

Intrac subsequently denied that they had offered or supplied the tonnage in question to Eisen und Metall.

3.5. *Enforcement of the 1971 to 1976 agreements*

3.5.1. The enforcement efforts are summarized in table 7. They show the same pattern of vigilance in the market place and vigorous protest against alleged infringements of the agreements.

3.5.2. The complaints show that the western producers were prepared to resist, under the contract, activities by the foreign trade organizations which were permitted or at least not forbidden under the contracts.

3.5.3. In May 1971 Swiss Aluminium took the view that Raznoimport could not exhibit merchandise at an exhibition of export goods from the USSR to be held in Basle. In a reply dated 31 May 1971 Raznoimport undertook only to display high purity aluminium (99,9 %) and certain rolled products and stated they would not offer for sale any quantities of aluminium of any grade during the fair.

3.5.4. The export by Raznoimport and by Impexmetal of aluminium dross, containing 15 to 20 % aluminium, also drew a protest. Although Raznoimport replied that the export of aluminium dross was not prohibited by the agreement, Brandeis Goldschmidt maintained that the aluminium content of the dross should be deducted from the primary metal purchases. However, on other occasions, notably when Intrac wished to sell into the Federal Republic of Germany outside the Brandeis agreements and offered to deduct the amount involved from the following year's quota, Brandeis Goldschmidt refused.

3.5.5. During this period the western producers insisted upon prior authorization by them of conversion contracts (whereby aluminium from eastern Europe would be converted into semi-manufactures and re-exported to eastern Europe), or at least to have knowledge of the transactions in order to ensure that the Brandeis agreements were not being circumvented.

3.5.6. On occasion the western producers complained about offers of sales by eastern foreign trade organizations to the United States. This country was within the markets which were contractually out of bounds to the eastern European foreign trade organizations, and the complaints are of principal concern to the various local competition authorities. This shows the determination of the western producers to enforce the agreements, but they are also relevant to the EEC because there was always the possibility that the goods could find their way back to the EEC. This was recognized by the western producers.

3.5.7. During the abortive negotiations for an agreement in 1976, Raznoimport prepared a draft which added to the countries to be in bounds to Raznoimport, Japan, Canada, the United States and Thailand. Alcan UK stipulated that only Thailand should be 'free'; BACO went further, by stating in a telex to Swiss Aluminium (8 June 1976):

> '. . . 4. The USA must be covered by the agreement because of ease of switching by merchants back into the European market . . .'

3.5.8. Complaints were made in 1971 and 1972 concerning imports into Italy of Yugoslav aluminium, even though on one occasion the metal was clearly Yugoslav. Swiss Aluminium on that occasion wrote (letter of 17 January 1972) to Raznoimport:

> 'The metal which they sell in Italy is not bearing your marks, and it is therefore obvious that they use your metal internally and re-export their own (i.e. they can only re-export on the basis of their imports from the USSR . . .). I see no other solution but that you curtail your exports to Yugoslavia as long as they dump their own metal in this manner in Italy.'

3.5.9. At a meeting of a working group of the Hungarian-Italian Commission for Economic

Cooperation, a joint government/industry body, held in Budapest from 31 January to 2 February 1972, the Hungarians were interested in the use of Italian technology to begin production in Hungary of aerosol cans. The Italian delegation had expressed an interest in using Hungarian aluminium slugs (a semi-manufacture) in payment for the know-how. When this came to the notice of Swiss Aluminium through its Italian subsidiary, Swiss Aluminium caused Brandeis Goldschmidt to intervene with Metalimpex, which agreed that slugs were covered by the Brandeis agreements (which imposed an annual ceiling of 1 016 tonnes on exports of semi-manufactures by Metalimpex).

3.6. *Enforcement of obligation to take up eastern metal*

3.6.1. Membership of the EPAA entailed an obligation to buy a prescribed quota of eastern metal. The observance of this obligation was supervised by members of the EPAA executive committee.

3.6.2. In 1974 Alsar informed Brandeis Goldschmidt that it was unable to take delivery of 1 210 tonnes, the balance of its 1974 quota. The EPAA executive committee (then composed of Swiss Aluminium, PUK, Montedison, Ardal, VAW and BACO) put pressure upon Alsar to take the consignment, but was willing to allow the consignment to be assumed by another member of the EPAA. When the Alsar quota was not taken up by any other EPAA member, Swiss Aluminium sent a telex to Alumetal, on 30 September 1974, requesting the assistance of that company to compel Alsar to meet its contractual commitments.

Alsar commented on this incident in the following statement given by its legal adviser at the hearing:

> '. . . There was some reluctance on the part of Alsar . . . It was obvious that starting with new plants and new financement Alsar was not very keen on assuming also part of the quotas from the Brandeis agreement. On the other side it was quite impossible, in a system which has been described as an oligopolistic system, to produce or to sell aluminium without having a friendly relationship with all the other producers, and the documents show that at first stage Alsar tried to be a member of EPAA without assuming the quotas, and in the end was more or less convinced to do so because it had a very fair and strong necessity to sell and distribute metal.'

4. **The price**

4.1. *Objective from the beginning*

From the beginning the objective of the western producers was to prevent fluctuations of price. It was not the quantities imported: table 8 shows that only in Belgium and Luxemburg had the 1962 quantities increased significantly over previous years. In respect of the United Kingdom, imports had peaked in 1959 and, in 1962, were still below a threshold which had been agreed government-to-government up to October 1961.

4.2. The original group of western producers agreed, between November 1962 and February 1963, that 'it would be desirable to ascertain the likely terms on which (Raznoimport) would be prepared to sell their export quota of virgin aluminium exclusively to the western European aluminium producers instead of disrupting western aluminium markets by selling the same at dumped prices to merchants or consumers in these markets (1)'. The same point was put contemporaneously and somewhat more tactfully by Brandeis Goldschmidt to Raznoimport in the passage set out in 1.4.2. Brandeis Goldschmidt went on to say:

> 'In our opinion the advantages for you of our proposition are that in the first place you would receive a better return for your aluminium and you will also have an outlet for a fixed tonnage. As you undoubtedly know your aluminium is often offered because of barter deals at very depressed prices which tends to undermine the world price structure . . .
>
> Our idea would be to arrange distribution, as far as is possible, so that we serve the same merchants and consumers who have received your metal in the past with the minimum disturbance of the existing price structure.'

In its report to the western producers on the first meeting with Raznoimport, Brandeis Goldschmidt stated:

> 'We considered it necessary during our negotiations to intimate to Raznoimport that we had the backing of certain producer interests. We explained that the main reason for our approach was to preserve the existing price structure which was just as much in their interests as in ours . . .'

(1) From particulars supplied by BACO in response to a notice issued by the UK Registrar of Restrictive Trade Practices under section 14 of the Restrictive Trade Practices Act 1956.

4.3. In the first contract (No 68/3326) Raznoimport was permitted to sell *inter alia* to Argentina and Sweden, but undertook to sell in those countries at 'prices not lower than those mentioned in this agreement'. Intrac later made a comparable agreement in respect of Sweden. By a letter dated 18 May 1964 Raznoimport amended its second agreement (No 68/4364, which had been substantially the same as the first) whereby, if it became free to sell billets, it would do so at prices which would not 'undermine the spirit of the above agreement'. Similar price clauses appeared in all later agreements with all the foreign trading organizations.

Where the possibility of exporting small quantities of semi-manufactures to the EEC was left open under the Brandeis agreements (such freedom existed only in the case of Raznoimport and Metalimpex), the parties agreed that:

> 'Lowering of prices of aluminium products would endanger the aluminium market and undermine this agreement, therefore sellers undertake to handle their sales of semi-manufactured aluminium products in the spirit of this agreement.'

This commitment was not confined to the small quotas of semi-manufactures permitted to be sold in countries other than the excepted countries, but as a general commitment by Raznoimport and Metalimpex on all their export sales.

4.4. Some of the complaints made by the western producers about violations of the agreement show that the price was an exacerbating factor: Polish metal to Argentina (3.4.7). On 4 December 1970 Swiss Aluminium complained about an offer to its subsidiary in Belgium of 200 tonnes at £ 198 net which would, it said, have 'a bad effect on the price level'. A complaint about small imports of sheet into the United Kingdom from Russia in 1971 pointed out that the price according to the import statistics was between £ 171 and 177 less than the list price and undercut the stockholder price by about £ 100. A complaint about low prices was made later in that year involving exports from Yugoslavia.

4.5. Why the Russian prices in 1963 should have then worried the western producers is not obvious. In its reply to the Commission's statement of objections, Alcan indicated that in 1963 'the USSR was selling small but increasing quantities of metal in London at £ 20 or 25 a tonne below the Alcan export price (equal to a discount of 11 to 14 %)'. There was nothing to support that statement. In that year the producers' list prices were being discounted. The United States National Bureau of Economic Research considered that at that time 'large buyers . . . could usually find aluminium at one or two cents below the list price'. This represents a discount of 4 to 8 %. The Russians were not well established in the market and an additional discount given in a weak market would not be untoward. Furthermore, the quantities traded in the free market have always been marginal, which means that prices tend to be volatile, and in a weak market would drop further than would those of the established suppliers. Without more knowledge of transaction prices at the time, of both the Russians and the western producers, it is not possible to assess how low the Russian prices really were.

4.6. Some of the western producers argued that the Russian prices were unfair prior to 1963 and all implied that without the Brandeis arrangements the eastern European pricing would have continued to be unfair. The latter point is unprovable, but the arguments about the pre-1963 prices were far from conclusive. Elkem called them 'political' prices because supplies were erratic and the eastern organizations intended only to collect western currency. It was not made clear why, if hard currency were the only objective, the eastern organizations were and would have continued to be content with getting less then they could. RTZ argued that the prices were unfair because the eastern Europeans enjoyed a monopoly position on the domestic markets and were in no fear of retaliation, so that they could with impunity sell excess quantities 'at almost any price covering marginal costs'. The true marginal costs and average costs of the eastern producers are known neither to the Commission nor to RTZ, so that an attractive argument comes to no more than an unprovable assertion.

4.7. Alcan alleged that the Russian prices were dumping and sought to prove this. Alcan based its calculation of the domestic market price for primary aluminium in the USSR on a work published by G.D. Kuznetsov (1). Using the prices quoted in that work, and converting them into US dollars at the prevaling official rate of exchange, Alcan was able to show that the Brandeis price was a dumping price, so that any sale at prices below

(1) Tsenoobrazovanie v. Tsvetnoi metallurgii (Price Formation in non-Ferrous Metallurgy) – G.D. Kuznetsov, published Metallurgiya, USSR 1977.

that level would have increased the margin of dumping. This argument depends entirely on which rate of exchange is used notionally to convert currencies which are not convertible. It was stated by Alcan's expert at the hearing, in reply to a question as to the commercial significance of the official exchange rate, that '. . . the domestic price system is so completely disarticulated from the external price system that the usual measures of purchasing power parity simply do not apply . . .' (transcript, page 180). The Kuznetsov work, relied on by Alcan, also contained a comparison between western market prices and USSR domestic prices. It was confirmed at the hearing that those comparisons were not and could not have been based on the USSR official dollar/rouble rate of exchange (1).

The method which Alcan used in purporting to show dumping is not one which is used under the rules of GATT with respect to State-trading countries, partly because of the difficulty of relying on official rates of exchange. Public authorities, which alone are entrusted with the determination of dumping, have not used such a method, at least since adoption of legislation giving effect to the supplementary note (1955) to Article VI of GATT.

4.8. *Pricing under the Brandeis agreements*

4.8.1. All the western producers paid the same price for each grade of aluminium purchased from the foreign trade organizations under the Brandeis and Eisen agreements. In addition each purchaser paid a commission to Brandeis Goldschmidt in consideration of its services as agents. The rate of commission charged per tonne was the same for all purchasers.

4.8.2. Until the Zurich Eastern Metal Conference (7 and 8 June 1972), the price was fixed by reference to the 'price for Canadian/US and UK aluminium delivered works as published in the current issue of the "Metal Bulletin" in London', from which an agreed discount was deducted. The price published in the Metal Bulletin was in fact the Alcan list price. At the hearing, a director of Alcan explained that 'Alcan was the largest producer of metal available for independent companies around the world. It was also the largest exporter of metal out of Canada. It therefore tended to be the company that published a price and probably one of the most competitive of the prices at that time because of the quantities we needed to sell. To give an example, in the United Kingdom, one-third of the metal shipped to the United Kingdom had to be sold to independent companies who were completely free to buy' (transcript, page 218 H).

The price between May 1972 and July 1973 was fixed at £ 186 per tonne from May to December 1972 and £ 191 per tonne thereafter. This latter price was raised to £ 215 per tonne from February 1973. At the Zurich Eastern Metal Conference of 16 to 18 April 1973, the parties agreed on a price of £ 232,50 per tonne or the UK list price minus 11 %, whichever was the higher. After the Brno conference (6 to 8 September 1973), a formula was adopted whereby the price in pounds sterling was to be converted into other currencies by reference to the average rates of exchange of 'eleven member currencies'.

4.9. *List price formulae*

4.9.1. As a result of the Paris Eastern Metal Conference held on 30 and 31 October 1973, the first such formula was introduced for the first half of 1974. It was the average of the list price of the largest producers (2) in the Netherlands, the Federal Republic of Germany, Spain, Italy, France, Japan, Austria, Switzerland, Norway, Sweden, the United Kingdom and Belgium less a discount of 7,25 %. The dissatisfaction of Raznoimport at the price it had been receiving during the latter part of 1973 (when the Metal Bulletin free transaction price was higher than most list prices) led to the adoption in May 1974 of the so-called 'Venice formula': 50 % at the average of 12 national list prices less a discount of 5 and 50 % at the mean Metal Bulletin price less a discount of 5 %. The 'Munich formula' adopted for 1975 and 1976 was the same as the Venice formula, but without a discount.

4.9.2. In reply to a request for information from the Commission, pursuant to Article 11 of Regulation No 17, Brandeis Goldschmidt indicated that the list prices used to calculate the purchase price under the Brandeis agreements were 'in principle checked with producers in the countries concerned'.

(1) The method used by Alcan leads to the conclusion that supplies from the USSR would have had to sell at prices at least some 40 % above western European prices in order to avoid the charge of dumping.

(2) These producers were Holland Aluminium, VAW, Endasa, Alumetal, PUK, NLM, VMW, Swiss Aluminium, Ardal og Sunndal Verk, Gränges Aluminium, Alcan UK and Alcan respectively.

At the end of 1973 Brandeis Goldschmidt submitted the 12 list prices to Alcan (1) for confirmation. Thereafter the parties freely exchanged information on their prices wherever Alcan, as the primary source of information, expressed uncertainty.

4.10. *Commission paid to Brandeis Goldschmidt*

Throughout the running of the Brandeis agreements Brandeis Goldschmidt received a commission for every tonne of primary aluminium sold under the agreements. The amount of commission so received from 1970 is set out in table 9.

4.11. *Comparison of prices*

4.11.1. An exact comparison between the price paid under the Brandeis agreements and western market prices is difficult. The degree of vertical integration in the industry implies that most intermediate products are not sold, but transferred within a producing group. Again, sales of 99,5 % ingot are a minority of sales of primary aluminium products which include such important categories as rolling slab, extrusion billet, wire bar, etc. Furthermore, 99,5 % ingot cannot be used without remelting, since an ingot is not a re-usable form, unlike billet or rolling slab. Accordingly, the market is limited to purchasers having their own remelting facilities, or to traders for subsequent resale.

Furthermore, allowance must be made for:

(a) duty;

(b) differences in conditions of supply;

(c) differences in purity (99,5 % and 99,7 to 99,9 %);

(d) differences in terms of payment.

4.11.2. Some of these matters were discussed in an exchange of letters between Metalimpex and Brandeis Goldschmidt in 1971. By letter dated 16 April 1971 Metalimpex queried the 11 % discount on the Canadian/UK list price (the price then agreed under the Brandeis agreements) in these terms:

'Regarding virgin aluminium ingot 99,5 %, the Canadian price indicated in the Metal Bulletin less 11 % allowance has been agreed upon during our discussions. This price formula has been accepted by us since we were told by our western partners – including your Company too – that they had met losses on the price of the former contract, i.e. the Canadian price, less sixteen and one-third pounds sterling (2), when selling the aluminium they had bought from the Socialist countries.

The allowance they had to grant to their clients exceeded even the price of the Canadian quaotation less 11 % on the contracted terms, in most of the cases cif port of the destination country.

As far as I can remember the full allowance of 11 % indicated by our western partners as being granted to their own clients on the Canadian price has been composed of the following factors:

1. duty generally amounting to 7 % is covered by sellers;
2. sales are effected on clients' premises and are covered by sellers;
3. 30 to 40 days financing fees are reimbursed by sellers instead of buyers.

. . . We would highly appreciate your confirming us the arguments – mentioned by you and accepted on our part, i.e. that the allowance granted to your clients on the Canadian price – according to experience of the past few years – amounted to 11 % and therefore the club insisted on the price of the new contract, envisaged for the following five years being fixed accordingly.'

By letter dated 28 April 1971 Brandeis Goldschmidt replied in these terms:

'We refer to your letter dated 19 April, and to the discount of 11 % in the contract for aluminium which you have with Brandeis Goldschmidt and Co. AG, Basle.

. . .

Western producers sell aluminium:

(a) duty paid;

(b) delivered works;

(c) generally 99,7 %;

(d) 60 days' payment.

Of course it depends on duties in each country but we would estimate that 11 % in many cases does not cover the abovementioned. As you know at the negotiations a discount of 15 % was mentioned as a more realistic figure.

(1) Alcan UK explained that the reason why Alcan was asked to confirm the list prices was that 'Alcan, with its international organization and wide knowledge of domestic market list prices (as set by local aluminium producers) was most readily able to verify the correctness of price calculations by Brandeis' – letter to the Commission of 14 October 1976.

(2) This represented a discount of approximately 6 %.

> On present market conditions we want to add that we do not think a contract would be concluded at a discount of 11 %.'

(a) Duty

The Metalimpex letter referred to a duty payable by the buyers of 7% on the eastern metal purchased. This level of duty was the amount payable on import into the EEC under the Common External Tariff (CET). The United Kingdom, before accession, did not levy duty on imports of primary aluminium so that western producers importing eastern metal into the United Kingdom (Alcan, BACO and to a lesser extent Swiss Aluminium, and PUK) did not have to meet this added cost of eastern metal.

(b) Differences in conditions of supply

4.11.4. The prices paid under the Brandeis agreements was a cif price mainly to a western European port. The price therefore contained no element to meet the cost of transport from that port to the buyers' smelter. The prices of western producers, however, were and are generally delivered prices, necessarily containing some cost element to provide transport to the works in question. It would therefore be natural to expect a producer's delivered price to be higher than the producer's cif price for an equivalent transaction involving a foreign sale.

The table produced by Swiss Aluminium for the Brno Eastern Metal Conference shows an allowance for 'handling and inland freight' of 3,7 % for the Federal Republic of Germany, 3,2 % for France, 1,6 % for the Netherlands, 1,5 % for Belgium, 2,6 % for Italy, 1,7 % for the United Kingdom and 3 % for Austria and Switzerland. These allowances were deducted *inter alia* by Swiss Aluminium from 'free delivered' prices in those countries, in order to calculate the 'net price cif terms'.

(c) Differences in purity

4.11.5. The grade purchased under Brandeis agreements was generally 99,5 % but shipments of 99,7 % were also made. In its reply Alcan indicated that 'the general run of production of a modern smelter is likely to be of metal of between 99,7 and 99,9 % purity', and later:

> 'Comparing smelters installed since 1960 with those installed before that date, the following are among the principal improvements:
>
> . . . (iv) The average quality of the metal produced from the reduction process has improved from around 99,65 % pure aluminium to the order of 99,75 to 99,8 % pure aluminium.'

In its letter of 28 January 1970, referred to above, the Aluminium Company of Canada referred to 99,7 % ingot as being the 'commercial grade'.

4.11.6. The prices established by the Metal Bulletin for 'Canadian, US and UK delivered' ingot show that a premium was normally payable for ingots of higher purity (1). The amount of such premium was around 4 % on the 99,5 % ingot price (the Metal Bulletin 'certain other transactions' prices record a premium of a similar size for the higher purity ingot (minimum 99,7 %)). Whether such a premium would be charged to a customer or waived would naturally depend on the state of the market. Alcan in its reply referred to the matter in these terms: 'Suppliers may waive or reduce such premia as a form of what is . . . effectively price competition'. At the hearing BACO indicated that 'it was not common practice among the producers to charge any premium for 99,7 % metal' and that 'premiums normally start only if you go to 99,8 % or beyond'.

4.11.7. While a premium for 99,7 % purity may not in fact have been charged by certain western producers, the Brandeis agreements provided for a premium to be paid on shipments of 99,7 % purity aluminium, and the premium was paid on such shipments. At the hearing BACO described this matter as a 'concession' made 'in part of the give and take of a commercial negotiation'.

(d) Differences in payment terms

4.11.8. In its reply Alcan indicated that 'the terms for payment represent an important element in any contract for the supply of aluminium and the grant of extended payment terms is often used as an effective competitive weapon, despite the cost to the supplier . . . Suppliers on occasion offer a discount for prompt payment'. Alcan itself recalled having given a discount of 2 % for prompt payment.

4.11.9. The terms of payment offered by western producers to customers were in 1971 around 60 days, but according to Swiss Aluminium longer terms of up to 120 days were granted in 1973, while Alcan stated that its standard terms were net

(1) No reference is made here to the 'super-purity' 99,99 % grade, which is understood to form a particular market.

monthly account, giving an average of 45 days credit. According to Alcan these terms were extended as necessary to meet competition.

4.11.10. The Brandeis agreements provided for payment in cash against documents. 'Payment is to be effected three days after receipt of telegraphic advice of the bank in the suppliers country that the documents were received from the sellers and dispatched to the buyers'. In other words no credit was given nor was any discount given for prompt payment.

4.11.11. These terms caused some surprise to RTZ and BICC which joined the group of buyers in 1971. The reaction of RTZ is evidenced in the following exchange of correspondence between the two companies, which were both at the time shareholders in Anglesey Aluminium Ltd and buying its allotted quota of eastern metal through Swiss Aluminium.

BICC stated in a letter to RTZ Aluminium dated 2 November 1971:

> '. . . We have now received from Swiss Aluminium Ltd their confirmation of our order for 800 tonnes of 99,5 % Russian aluminium. Having already made some direct comments to you about the terms, which I think are absolutely deplorable, I am intrigued to see that the acknowledgement states £ 228,91 per tonne cif Weston Point, plus expenses.
>
> As you know, I have had no part in these negotiations whatsoever and references such as this leaves our situation wide open to charges which may not have already been defined . . . What does annoy me is the terms of payment where I think we have been too hasty by far in accepting three days from date of invoice . . .
>
> I think that payment three days after date of invoice is an insult to any buyer's professional ability and I am still mystified as to how this came to be accepted.'

RTZ Aluminium replied on 22 June 1972 in these terms:

> 'We, like you, have been in dispute with Swiss Aluminium over interest charges on Russian metal shipments.
>
> We have been taking a pretty hard line with them up until now; however, they have squealed so hard that we have finally come to accept that they are only acting as agents in this matter and, rightly or wrongly, feel they are performing some service for the industry as a whole.
>
> Why they ever agreed to such prompt payment terms in the first place I shall never know.'

BICC replied on 26 June 1972 in these terms:

> 'Having given this matter much thought I am still of the opinion that we should not accede to their requests, as we have always felt that the contract generally is just about the worst we have ever come across and certainly to suggest prompt payment for any aluminium is just about the most ludicrous thing I have heard for a very long time . . .'

4.11.12. All the factors set out in (a) to (d) must be taken into account in any comparison of the prices paid under the Brandeis agreement with those obtained by western producers. The latter have argued strongly that they did not generally and intentionally pay a 'premium' to the foreign trade organizations, in the sense of a price noticeably above their own prices achieved in similar transactions. The prices which have been disclosed are close to the Brandeis levels, and the producers concerned have argued that the Brandeis prices were 'very much in line', or 'comparable' with the prices they achieved in western markets. At the hearing PUK set out to show that the Brandeis prices were 'at arm's length' by comparing those prices with PUK's transaction prices (transcript pages 431 to 437). However sales of 99,5 % primary ingot are not, given the integrated structure of the industry, a major component of total aluminium sales. (In the case of PUK, for example, sales of ingot to independent users amounted by volume to around 5 % of all aluminium sales.)

4.12. *Contemporaneous views of the buyers*

4.12.1. Whatever the western undertakings now argue about the price they paid, at the time some of them appeared discontented. Apart from the exchange of correspondence already quoted (4.11.11), and despite the contention of Alcan during the proceedings that the Brandeis price was itself a dumping price, statements made by the western producers throughout the running of the Brandeis agreements indicate that they did not regard the aluminium bought under those agreements as being cheap. The western producers remarked on the high price they were expected to pay, as may be illustrated in the following passages relating to the period 1963 to 1970.

4.12.2. At a meeting held on 20 July 1967 between the Board of Trade, Alcan and BACO, the two companies are recorded as stating:

> 'Every tonne extra taken from the Soviet bloc meant a tonne less which the western group could supply from their own sources and

represented an increase in the "danegeld" (1) that the western group aid to maintain a relatively stable market (2).'

4.12.3. A similar reference was made to the price paid under the Brandeis agreements in BACO's note on the Rome Eastern Metal Conference on 21 to 23 January 1970:

> 'Both the USSR and Romania clearly believe that they are in a position to increase the "danegeld" for protection against market disruption . . . The existing contract of 95 500 tonnes is already more than the East would be able to sell under free conditions and at a much better price.'

4.12.4. At the Zurich Eastern Metal Conference held on 9 and 10 September 1970 there was considerable discussion on the discount on the Canadian/US and UK delivered works price as published in the Metal Bulletin. At the previous Eastern Metal Conference PUK had argued for an increase in this discount to 10 %. The Brandeis price had at that time been set at the Metal Bulletin published list price with a discount of £ 16 per tonne, or 6 %. At the Zurich Conference Swiss Aluminium, PUK, Alcan, BACO and Ardal og Sunndal Verk had pressed for a discount of 11,5 %. The foreign trade organizations were not willing to grant a discount of this size. BACO's note of the Zurich conference indicates that BACO thought 'that the eastern group will come back with a counter offer of 10 % discount with perhaps a small concession on payment terms'. BACO considered that a discount of 10 % still did not represent a price lower than those ruling in the West. 'In any event at this level the price of eastern metal into western fabricating plants is likely to be above those charged from other sources in the West'. There was eventual agreement on a discount of 11 % on the price for Canadian and UK aluminium delivered works as published in the Metal Bulletin.

4.12.5. Alcan had also considered the price paid under the 1968 to 1970 agreements to be a burden. In a letter from the Aluminium Company of Canada Ltd, dated 28 January 1970 to Alcan UK, it was stated:

> '1,75 cents discount is extremely low for anyone purchasing even the quantities of the present agreement and when cash on surrender of shipping documents is required it makes it even more onerous. Indeed such discounts and credit terms must provide the Eastern bloc with a hot-metal return of something in the neighbourhood of 24 cents per lb, which is certainly far in excess of what we and presumably other western producers are able to obtain (3).'

In a further letter from the Aluminium Company of Canada to Alcan UK, dated 23 March 1970, reference was made to the above letter in these terms:

> 'In one of my previous letters I drew attention to the fact that the 1,75 cents off the UK list, coupled with cash with documents, was, to say the least, a burden and that we should push for a much lower price.'

4.12.6. Documents prepared by Swiss Aluminium for the Brno Conference (7 and 8 September 1973) and by PUK for the Copenhagen Conference (December 1974) all tried to show that the prices paid under the Brandeis agreements were generally above the market price, but these documents were designed to be produced to the eastern foreign trade organizations and may contain an element of pleading (4).

4.13. *Other price comparisons*

4.13.1. There were occasions, notably in 1972 and 1973, when the Brandeis price was higher than the statutorily controlled list prices of the United Kingdom and Italy. There is also evidence that Norwegian producers sold primary aluminium in Germany at below the Brandeis price.

4.13.2. Moreover, from documents supplied by BICC Ltd at the hearing, it is clear that when that company resold parts of its quota under the Brandeis

(1) A tax first levied in England in the ninth century to provide protection of England against the Danes. Under Ethelred the Redeless (978 to 1016) 'it was the normal way of buying off the Danes' (G.M. Trevelyan – A Shortened History of England).

(2) In assessing the probative value of this, it should not be forgotten that the undertakings concerned were out to make a case to the UK Board of Trade. The same cannot be said for the documents the undertakings exchanged between themselves and which they did not intend any outsider should see.

(3) At this time, eastern metal imports into the United Kingdom did not incur an import duty.

(4) The Swiss Aluminium document compared Brandeis prices with the Metal Bulletin 'certain other transactions'. The latter is an average of prices quoted by dealers, often on small consignments, and it may therefore be a reflection of a marginal market. For this reason, the 'certain other transactions' price was challenged subsequently by the western producers as not being an accurate representation of real market prices. Yet in 1971 that Metal Bulletin price was regarded by Alcan and BACO as a reliable indication of the price in the United Kingdom of aluminium from eastern Europe.

agreements on the free market it incurred substantial losses. In 1972 the loss was up to 20 % on the Brandeis price, while in 1975 the average loss was around 11 %. Most striking is the fact that on sales of eastern metal to RTZ, its partner in Anglesey Aluminium, which was also taking a quota of eastern metal under the Brandeis agreement, BICC incurred a loss of 20 % on the Brandeis price.

4.13.3. In a letter, dated 17 February 1971 to the Department of Trade and Industry, Alcan declared:

> 'We have had reports of Romanian sales and offers of aluminium at the 20 to 21 cents per lb level (for 99,5 % ingot) (i.e. about £ 190 per tonne) which the Metal Bulletin publishes as the current index for "certain transactions" and we regard these reports as confirmation that the Metal Bulletin still gives a reliable indication of the price in the United Kingdom for eastern metal.'

The Alcan list price at the time was 27,85 cents per lb, so that the Romanian metal was selling at an apparent discount of 25 to 28 % (1).

If 99,5 % aluminium ingot from other countries of eastern Europe, apart from Romania and Yugoslavia, had been sold in the free market in the United Kingdom or other countries of western Europe and the Community, it does not seem probable that it would have been more expensive than Romanian metal. The western producers were aware that the foreign trade organizations were able to compete on price with Romanian metal. At a meeting held on 3 September 1970 the Alcan representative was reported by the Board of Trade to have said that 'the Romanians had been hiding behind the skirt of the agreement, and that the Russians, who objected to this on the grounds that if they were free to do so they could more than match the Romanian competition, might very well use this as a strong argument for not making a further agreement'. The removal of Romania's eastern European competitors effected by the Brandeis agreements was moreover said by BACO to have enabled the Romanian suppliers to raise their prices.

5. Effect of the agreements

5.1. *Industrial background*

5.1.1. In the commercial production process, primary aluminium passes through three stages from or to metal: bauxite, alumina and primary aluminium. Primary aluminium is subsequently worked into a wide variety of semi-finished and ultimately finished products. Scrap which arises from such production processes can, if not excessively contaminated, be re-used as clean production scrap in the production of primary metal by primary producers. In other cases, such as the re-cycling of aluminium products, scrap is used to produce secondary metal. Secondary aluminium, having a necessarily lower degree of purity than primary aluminium, is used particularly in the production of foundry casting alloys. Such alloys typically contain about 85 to 90 % of aluminium.

5.1.2. The established integrated primary aluminium producers have always controlled much of the western world's bauxite capacity. In 1977 six companies owned 57,7 % of world capacity excluding the USSR, Hungary, Romania and the People's Republic of China. The primary aluminium producers also controlled much of the western world's alumina capacity. In 1975 the same six companies had 63,3 % of western world capacity.

5.1.3. Primary aluminium is obtained by electrolytic reduction of alumina. The electrolytic reduction process is a prodigious consumer of electricity. In the USA for example, the aluminium industry consumed, in 1974 to 1975, over 4 % of US supplies of electricity. A smelter of 100 000 tonnes annual capacity consumes approximately the same quantity of electricity as a town of 400 000 inhabitants. It is not surprising that the location of primary smelters is strongly influenced by availability of cheap and abundant supplies of electricity. As a general rule hydro-electric power is the cheapest source of electricity and that from oil-fired power stations (especially since 1973) the most expensive. The proportionate reliance on the various sources of fuel in certain countries in 1974 is set out in table 10.

5.1.4. The cost of energy to the various aluminium producers varies widely. In 1973 the OECD estimated the range to extend from less than 0,2 cent to around 0,7 cent per kWh. In 1977 the cost range was estimated to be from 0,4 to 1,8 cents. With consumption of electricity ranging from around 17 000 kWh per tonne produced at older smelters to around 13 000 kWh in more modern plants, a 0,1 cent difference in energy cost is equivalent to a difference of US $ 17 to 13 in the final cost of primary aluminium.

(1) The Brandeis price at the time was US $ 566 per tonne, a discount of 7,8 %.

5.1.5. From a report prepared in 1976 by a leading Canadian financial analyst (1), it appears that Alcan's energy costs incurred in Canada are the lowest in the western world:

> 'Alcan's Canadian power costs range from one to 20 cents per pound below various worldwide competitors, an advantage that should widen over coming years . . .'

Principally, for this reason, Alcan has been the price leader among the western producers.

5.1.6. The first primary aluminium producer in western Europe was PUK, followed by Swiss Aluminium and BACO. VAW began production shortly after, followed by Montedison. Each of these producers has been fully integrated since entry into production (i.e. each has its own bauxite and alumina production).

5.1.7. Since the Second World War there have been no undertakings embarking on the production of primary aluminium in western Europe without a partnership or association with the established producers, through a joint venture or otherwise, or an arrangement of some nature to secure access to bauxite or alumina. A number of new entrants have withdrawn from the partnerships by which they had entered into primary aluminium production, leaving the field to the integrated-producer partner.

5.1.8. The relative positions of the leading producers of primary aluminium within the EEC and western Europe are summarized in table 11. Seven producers, namely Swiss Aluminium, PUK, Alcan, VAW, BACO, Montedison/Alumetal and ASV accounted in the period under consideration for around 75 % of primary aluminium production in western Europe.

5.1.9. In the early 1960s, new producing countries, such as Greece, Ghana, Iceland, the Netherlands and Cameroon entered world trade in aluminium, reducing the share in world trade of the USA, Canada, Norway and France, which until then were practically the only western exporters of primary aluminium. A considerable proportion of the trade in primary aluminium takes the form of deliveries by producers to their integrated subsidiaries located in other countries. Exports from Greece and Cameroon are made mainly to France; PUK holds a controlling interest in the primary smelters in those countries. Exports from Ghana (Kaiser 90 %, Reynolds 10 %) are made to Japan, the United States and the United Kingdom.

(1) Greenshield report of February 1976, described by Alcan as 'fair and substantially accurate'.

5.1.10. Canada, Norway and the USSR are the world's leading exporters of primary aluminium. The world's leading producer of primary aluminium, the USA, has in recent years been a net importer of primary aluminium. The EEC has long been a net importer of primary aluminium, although, within the Community, France and the Netherlands have been net exporters.

5.1.11. Virtually every primary aluminium producer is also engaged in the production of semi-manufactures, while many produce finished products and remelt new and old scrap for the production of secondary aluminium. The scale of these operations is such that most primary aluminium is used for further processing or fabrication by those undertakings which produced the original primary ingot. By the early 1970s it appeared to certain members of the industry that the degree of vertical integration was around 80 %. These estimates are estimates for the entire industry.

Individual members of the industry will be more or less highly integrated than others. In addition the estimates are averages for all groups of aluminium products, whereas some groups of products are subject to higher degrees of vertical integration than others. Generally speaking the rolled-products sector (plate, sheet, strip and foil) is more highly integrated than the extruded and drawn-productions sector (rods, sections, tubes and wire) which is in turn more highly integrated than the castings sector.

5.1.12. The high degree of vertical integration produces two important economic effects. The first is that independent producers of semi and finished products are obliged to seek their supplies from producers who are also their competitors in the manufacture of these products, unless they have access to other sources. The second is that the market for intermediate products such as bauxite, alumina and primary aluminium is either non-existent or is marginal by comparison with the market for semi and finished goods. It is accordingly difficult to establish a market price at which these intermediate products are effectively transferred. The least highly integrated sector, castings, is particularly dependent on supplies of secondary metal (i.e. scrap) or upon ingot and so it is in this sector that supplies of ingot at the relatively low purity of 99,5 % are needed.

5.1.13. The assumption is made (it is also made by the industry) that the non-integrated part of the secondary and semis market is 20 % of total consumption of primary aluminium in Europe.

5.2. *Effect on the market of the Brandeis agreements*

5.2.1. The quantitative effects of the various provisions of the Brandeis agreements are summarized in table 12.

Primary aluminium

5.2.2. The western producers were reluctant to buy, and did not in fact buy, all the primary ingot which the foreign trade organizations considered they could offer. On virtually every occasion when a new series of Brandeis agreements was being negotiated, the primary ingot first offered by the foreign trade organizations was considerably greater than the amount eventually agreed upon.

The agreed amounts were frequently reduced at the request of the western producers at later Eastern Metal Conferences. At the Budapest Eastern Metal Conference held on 28 and 29 October 1971 the 'western group' achieved a 20 % reduction in the quantities to be delivered in 1972, while at the Brno Conference on 6 to 8 September 1973 the quota for the second half of 1973 was reduced from 67 000 to 53 000 tonnes. Similarly, at the Venice Eastern Metal Conference held 15 and 16 May 1974, the contractual quota remaining to be delivered under the 1974 allotment (60 600 tonnes) was reduced by one-third, and the western producers refused to allow the foreign trade organizations to sell the deducted tonnage in western markets, although a compromise was eventually reached whereby the foreign trade organizations were permitted to sell only to Japan and Turkey. The contractual tonnages for the first half of 1975 were again reduced by 30 % at the Munich Eastern Metal Conference held 14 and 15 November 1974.

5.2.3. Table 13 sets out the differences between the tonnages orginally agreed and those actually sold under the Brandeis agreements. The table also sets out the differences between the first offers of the foreign trade organizations and the amounts actually sold. In both cases the differences are considerable. No doubt the opening offers of the foreign trade organizations contained an element of bazaar bargaining, but no evidence was adduced during the proceedings to show that the foreign trade organizations could not have supplied the quantities of primary aluminium which they first offered. Particularly in the case of the USSR and Hungary, production capacity was expanded considerably during the Brandeis agreements, while in Czechoslovakia and the German Democratic Republic production has fallen well short of rated capacity.

The refusal of the Governments of the German Democratic Republic and of Poland to permit the export of aluminium in 1974 and 1975 had no effect. The contractual quantities available for the western producers were already more than they wanted to take and they were negotiating hard even to the extent of paying more per tonne – to reduce the quantities taken while still ensuring that the surplus did not reach their markets by other routes.

5.2.4. On the assumption (5.1.3) that the non-integrated part of the secondary and semis market is 20 % of total consumption of primary aluminium in Europe, the effect upon the non-integrated market can be seen from table 12.

5.2.5. In 1971 Alcan and BACO made an application to the UK authorities for the imposition of anti-dumping duties on Romanian aluminium. At that time Romanian imports into the United Kingdom were around 8 000 to 9 000 tonnes per annum, according to Metallgesellschaft statistics. BACO's application, which was supported by Alcan, referred to the fact that 'nearly 90 % of the UK market (with a consumption of nearly 400 000 tonnes) was tied by financial links or long-term contracts', and that accordingly 'the Romanian imports represent a substantial tonnage in relation to the relatively limited non-integrated market'.

The Romanian sales represented around 20 % of untied consumption in the United Kingdom. The BACO application stated that in the absence of these sales, 'in all probability, the company would have been able to obtain a return some £ 10 per tonne higher than that currently realized'. At the time the average price received by BACO for sales to independent purchasers was £ 236,85 per tonne, which represented a discount of 8 % on the Alcan list price of £ 257,20 per tonne. The effect of the Romanian sales was therefore in BACO's view to reduce prices by 4,2 %.

At the same time the imports into the United Kingdom of eastern European primary aluminium

under the Brandeis agreements were around 14 000 tonnes per annum.

5.2.6. The Commission is not concerned with the effect on prices within the United Kingdom at that time. It is reasonable to assume however that eastern metal, free of the Brandeis constraints, would have had a parallel effect upon the then Community.

The figures indicate by analogy the probable effect on the price in the then EEC if the Brandeis tonnages had reached that market without the Brandeis restrictions.

The market for secondary aluminium and scrap

5.2.7. The markets for primary and secondary aluminium are related. Movements in the price of primary aluminium will affect prices of secondary aluminium, since some quantities of primary aluminium are used in its production. The price of secondary aluminium is further affected by the availability and price of its chief raw material, namely scrap. The most important type of scrap is 'new' or 'clean production' scrap, a source which is largely controlled by the established integrated aluminium producers since it is from their operations that the material arises. Secondary producers are accordingly largely dependent on primary producers for supplies of their principal raw material.

5.2.8. The total annual quotas under the Brandeis agreements for secondary and scrap were:

— 1 July 1963 to 30 June 1964:
free of restriction,

— 1 July 1964 to 30 June 1965:
free of restriction,

— 1 January 1966 to 31 December 1967:
25 400 tonnes,

— 1 January 1968 to 31 December 1970:
15 240 tonnes,

— 1 January 1971 to 30 June 1976:
15 240 tonnes.

Table 12 shows the total consumption of secondary aluminium in the Member States of the EEC from 1966 to 1976, and the imports of scrap by the EEC countries in the same years (the Six to the end of 1972 and the Nine from 1973 to 1976). It is accepted that some of the material available under the Brandeis quotas would probably have found its way to the United Kingdom (in particular) prior to 1973. If the United Kingdom is included for the whole period, the Brandeis quotas represented the following percentages of imports:

Year	Secondary	Scrap
1966	4,6	19,0
1967	4,6	18,0
1968	2,3	10,8
1969	2,0	8,6
1970	2,1	8,6
1971	2,0	9,8
1972	2,0	7,1

Semi-manufactures

5.2.9. The quotas under the Brandeis agreements for the sales by the eastern trading organizations (table 12) were:

— 1 July 1963 to 30 June 1964:
free of restriction,

— 1 July 1964 to 30 June 1965:
free of restriction,

— 1 January 1966 to 31 December 1967:
4 000 tonnes,

— 1 January 1968 to 31 December 1970:
2 500 tonnes,

— 1 January 1971 to 30 June 1976:
2 540 tonnes
+
1 524 tonnes of cable.

5.2.10. Every primary producer party to the Brandeis and Eisen und Metall agreements was also a producer of semi-manufactures, or was a member of a vertically integrated group of companies which also produced semi-manufactures. The production of semi-manufactures (sheet, rod, tube, wire, sections, etc.) is by far the most important use of primary aluminium, while secondary aluminium is largely used in the production of castings. Semi-manufactures and castings account for over 90 % of EEC consumption of primary and secondary aluminium.

5.2.11. For all the western primary producers party to these proceedings the sale of semi-manufactures represented their largest and most valuable market. Semi-manufactures are considerably more valuable by unit of weight than primary aluminium, since the processing of aluminium into semi-manufactures on average doubles its value.

The inference contained in the Greenshield report already cited is that Alcan was able to increase the profits on its sales of semi-manufactures by a

considerable margin in the years 1964 to 1975. Semi-manufactures represented for all of the vertically integrated groups a very large and profitable market. There is no evidence to suggest that Alcan's record is in any way untypical. It also seems improbable that Alcan could have achieved such price increases for semi-manufactures uninfluenced by the prevailing price levels of the markets it was supplying.

5.2.12. The concern of the western producers for the protection of their most valuable and profitable markets is reflected in the provisions of the Brandeis and Eisen und Metall agreements. As may be seen in table 14 imports of semi-manufactures from eastern Europe were effectively prohibited. The quotas allowed to Raznoimport and Metalimpex were negligible, representing less than 0,1 % of production in the EEC alone (table 15). It is also significant that, where the foreign trade organizations were permitted to export semi-manufactures to certain countries (none of which was a Member State of the EEC), they undertook both expressly and through the 'spirit of the agreement' clause not to undercut the prices of the western producers.

The western producers were particularly concerned to enforce those provisions of the Brandeis agreements which prohibited the export of semi-manufactures. Raznoimport's request to be allowed to export up to 15 000 tonnes of semis annually under a new agreement for 1976 to 1981 was one of the matters which led to a breakdown in negotiations.

5.2.13. Semi-manufactures were produced in the USSR, Poland, Hungary, Czechoslovakia and the German Democratic Republic throughout the running of the Brandeis agreements. Semi-manufactures were also available for export from these countries. Exports from the USSR alone were around 100 000 tonnes in most years of the Brandeis agreements, the sales being made to the countries reserved under the agreements (particularly other countries of eastern Europe, Egypt and Cuba).

5.2.14. The quota on sales of aluminium cable, first included in 1968, was designed to protect Gränges and its Scandinavian markets. Until the entry of Denmark, that quota is of no concern to the Commission. From the date of accession, however, that quota had an effect in the EEC. Gränges had indicated it would refuse to accept the proposed 1976 agreement unless cable exports to Denmark were limited to an aluminium content of 500 tonnes.

Summary

5.2.15. The history of the Eastern Metal Conferences shows that not only were the first offers of primary aluminium by the foreign trade organizations considerably higher than the quotas eventually agreed upon, but that the foreign trade organizations also wished to be free to sell semis, secondary and scrap to western markets.

Such sales were in fact made on a very small scale in breach of the Brandeis agreements, demonstrating that these products were available for sale.

5.3. *The London Metal Exchange*

The 'spirit of the agreement' clause

5.3.1. From 1964 onwards the Brandeis agreements contained the so-called 'spirit of the agreement clause' (1.4.4).

During the negotiations held in June 1967 in Budapest, to renew the agreements for 1968 to 1970, the foreign trade organizations indicated they would sell their output through the London Metal Exchange unless an agreement was reached.

5.3.2. As a result in the next series of agreements for 1968 to 1970 the 'spirit of the agreement' clause was explicitly extended in the following manner:

> 'Should aluminium begin to be traded on the London Metal Exchange or should it become apparent . . .' (agreement No 2100, Brandeis Goldschmidt, Raznoimport, 5 February 1968).

5.3.3. Alcan's note of the Eastern Metal Conference held in Zurich on 9 and 10 September 1970, and attended by Raznoimport, Metalimpex, Impexmetal, Intrac, Metalimex/Kerametal, Swiss Aluminium, PUK, Alcan Aluminium Ltd, Alcan SA, BACO, AVS and Brandeis Goldschmidt, records:

> 'In the afternoon the eastern countries demanded 150 000 tonnes and the Hungarians, who are used by the Russians as assistant spokesman, stated bluntly that if there was no agreement they, in the East, would do the maximum damage they could to the western companies, including ensuring that their products were put on the London Metal Exchange. The threat was so blatant that I stated that they seemed to forget that £ 160 million pounds was being invested including large amounts of government

money, in new smelters in the United Kingdom, and such investments would not be allowed to be put in jeopardy.'

5.3.4. Each of the agreements made in 1971 by Brandeis Goldschmidt with the foreign trade organizations (agreements styled No 4000, No P 6000, No H/5000, No C/8000 A and No EG/1000) contained a provision for the renegotiation or termination of the agreement if aluminium were to be traded on the London Metal Exchange.

5.3.5. This provision was contained by implication in the agreement mady by Eisen und Metall AG with Intrac in 1971. In clause 1 of that agreement Intrac undertook not to sell primary aluminium or aluminium semi-manufactures in the Federal Republic of Germany other than the amounts contracted for. The parties then agreed:

'. . . otherwise the provisions of the Brandeis agreement shall apply.'

5.3.6. The provision also appeared in the RU, P, H, C and EG series of standard form agreements made between the western producers, situated outside the then EEC, and Brandeis Goldschmidt. The provision was in these terms:

'Sellers have agreed with their suppliers that should aluminium begin to be traded on the London Metal Exchange . . . the sellers and the buyers have the right to renegotiate terms by serving three months' notice. If both parties are unable to reach agreement at the end of the period of notice, the agreement will end on that date. Quantities to be cancelled on a *pro rata* basis.'

5.3.7. In the 'short form' agreements between Brandeis Goldschmidt and the western producers within the then Community (7.2), this clause became:

'Should it become apparent that exports of aluminium from other sources become of such importance that they interfere with the obligation of delivery and take-over of the agreed tonnages, then the sellers and buyers have the right to renegotiate terms by serving three months' notice. If both parties are unable to reach agreement at the end of the period of notice, the agreement will end on that date.'

The LME Committee proposals for an aluminium contract (1970)

5.3.8. In October 1970 the London Metal Exchange Committee invited Raznoimport, Impexmetal and aluminium producers in Hungary and Czechoslovakia to consider whether the creation of a market in aluminium on the London Metal Exchange would be of benefit and whether they would be interested in using such a market.

5.3.9. On 26 February 1971 Brandeis Goldschmidt sent the following telex message to Raznoimport, with a copy to Impexmetal:

'No doubt you are aware of the statement from the LME Executive Committee Chairman that his Committee has approved the general terms of an LME aluminium contract; furthermore, we are informed that this contract is based on supplies of aluminium from eastern countries.

Could you please confirm at once that neither you nor any of the other selling parties to the agreement have given any support to the LME aluminium contract proposal. We are certain that our friends would cancel the recently negotiated agreement with you if aluminium were to be traded on the London Metal Exchange. We therefore suggest that you and your friends should at once make it quite clear to the Chairman of the London Metal Exchange Board . . ., if you have not already done so, firstly that you are not in favour of LME trading in aluminium and secondly that you will have no aluminium to offer on the LME at any time in foreseeable future.

As you know an eventual LME contract is covered under the break clause. However we do hope it will not materialize. We do not know whether you have been approached by the LME Committee with regard to your interest in an aluminium contract last year and if at the time you indicated that you had no interest no further action is necessary.'

By a telex message on the same date (i.e. 26 February 1971) to Brandeis Goldschmidt, Metalimpex replied:

'We have learnt with surprise that the LME Committee would have accepted the aluminium contract with the intention to introduce this metal to the market based on east European supplies. Some time ago we have been approached in this question by the LME and we have informed them that in view of our existing commitments we would not deliver aluminium to the Exchange. I wish to emphasize that the agreement between Metalimpex and you for 1971 to 1975 is unamendedly firm and valid.'

5.3.10. Replies (if any) by Raznoimport and Impexmetal to the Brandeis telex message of 26 February 1971 were not disclosed to the Commission by Brandeis Goldschmidt. However, for the entire duration of the agreements which are the subject of these proceedings, none of the foreign trade organizations offered any quantity of aluminium to the London Metal Exchange. It is clear that any such offer would have been regarded by the EPAA members as a breach of their agreements with the foreign trade organizations.

5.3.11. Certain EPAA members (PUK, BACO, VAW, A/S Alnor (Norsk Hydro), Ardal og Sunndal Verk, Endasa, Svenska Aluminium (Gränges Aluminium), Swiss Aluminium, VMW, Holland Aluminium, Montecatini Edison) and other producers concerned directly or indirectly in these proceedings (Alcan, Alcoa, Mosal A/S, NLM, Reynolds Metals Co. and Kaiser Aluminium and Chemical Corporation) were also invited in October 1970 by a letter (1) from the Chairman of the London Metal Exchange Committee to consider using the facilities of a London Metal Exchange aluminium contract for the trading of aluminium on the Exchange. Not one of the above recipients gave a favourable reply to the above letter.

In their replies to the above letter from the LME Committee, many of the producers concerned in these proceedings used similar arguments. BACO (letter dated 24 November 1970), Svenska Metallverken (now Gränges Aluminium) and VAW (letters dated 25 November 1970), PUK (letter dated 27 November 1970), Mosal Aluminium A/S (letter dated 9 November 1970) and Ardal (letter dated 30 November 1970) each stressed their desire to maintain the price stability of aluminium. The replies of Alumined (now Holland Aluminium) and Swiss Aluminium are moreover virtually identical textually.

The role of the EPAA

5.3.12. The Committee of the LME persisted in its efforts to realize the trading of aluminium on the Exchange.

5.3.13. The possible trading of aluminium on the LME was discussed by EPAA members at a general meeting of the EPAA held in Munich on 31 October 1974. A note (dated 4 November 1974) of that meeting, made by Giulini, indicates that all the EPAA members were opposed to such trading and that BACO was appointed to observe developments and inform the other members. This report is corroborated by the minutes prepared by the EPAA and circulated to all members.

(1) The letter was in the same terms as had been sent to Raznoimport, Impexmetal, and producers in Hungary and Czechoslovakia (5.3.8).

5.3.14. This question was again discussed at a general meeting of the EPAA held in London on the 30 September 1976 and attended by Alcan UK, Alsar, Alumetal, PUK, Ardal og Sunndal Verk, BACO, Elkem, Endasa, Giulini, Gränges Aluminium, Holland Aluminium, Kaiser Aluminium Europe, Metallgesellschaft, Norsk Hydro, RTZ, Swiss Aluminium, VAW and Reynolds Aluminium Deutschland Inc.

The EPAA minutes, circulated to all members, report:

> 'The chairman (BACO) informs the general meeting that the LME is again trying to introduce an aluminium contract. Therefore he has applied to the UK Government to explain that the aluminium industry is still opposed as in the past to such a contract . . .
>
> At the moment the question is still being discussed and the chairman will keep all EPAA members informed about further developments.'

5.3.15. The London Metal Exchange was discussed at the EPAA general meeting on 4 October 1977. The EPAA minutes report:

> 'London Metal Exchange (LME).
>
> The chairman (BACO) mentions that during the recent weeks reports concerning an aluminium contract appeared in various newspapers and magazines. Since these reports could be misunderstood, he explains that these contracts have been introduced by a single broker only to allow institutional investors to speculate with aluminium. They have nothing to do with a contract at the LME. Furthermore the UK Government has been informed by the aluminium producers as well as by the aluminium consumers that they are still opposed to such a contract . . . (BACO) will keep all EPAA members informed about any further developments regarding this matter.'

5.3.16. The London Metal Exchange was again discussed at an EPAA general meeting held on 11 April 1978. The statement of objections, alleging a boycott of the London Metal Exchange, was served on the parties to these proceedings in September 1978.

5.4. *Import arrangements applicable in the Member States in respect of eastern European countries*

5.4.1. In general all the western European countries had powers throughout the relevant period which enabled them to ban imports, to impose restrictions upon quantities imported or to impose duties upon imports, notably in respect of

'dumped' goods. Those States which were members of the General Agreement on Tariffs and Trade accepted, as between themselves, some restrictions upon their freedom to deal with imports as they saw fit but, of the eastern European countries, only Poland, Czechoslovakia and Hungary were members of GATT for any of the material time.

5.4.2. To take account of the difficulty in ascertaining with any accurancy the fair market price in the country of origin, especially in non-market economies, the anti-dumping legislation, inspired by GATT, provided and provides alternative means of establishing dumping. Initially this involved the estimation of costs of production, but later a change was introduced expressly to take account of countries with centrally planned economies where it was impossible to ascertain the fair market price. This change enabled the importing country to check the alleged 'dumping' price against prices of imports from a country other than the exporting country. Under GATT, in both cases, the importing country had to be satisfied that the consequence of the 'dumped' imports would be 'material injury' to the industry in the importing country.

5.4.3. In 1971 Alcan and BACO made an application under the new legislation in respect of aluminium from Romania. This application (which did not lead to the imposition of anti-dumping duties) was not based on the domestic market price of Romanian producers, but used the alternative means permitted under GATT rules and UK legislation (4.7).

5.4.4. During the period 1963 to 1976 trade between western European countries and the USSR and eastern Europe was progressively liberalized. This liberalization extended to aluminium and its products. In some countries, notably the United Kingdom, there were no formal restrictions on imports of primary aluminium and its products from the USSR and eastern Europe. Other countries operated a licensing system. Where licences were required to import aluminium, such licences could not in law be confined to EPAA members, and were evidently not so confined in fact, as may be seen from the sales effected outside the Brandeis agreements which were the object of action by EPAA members to enforce the agreements (point 3).

5.4.5. In France licences were required for the import of primary aluminium from State-trading countries until 1975. Imports of aluminium semi-manufactures from the USSR, Hungary, Poland and Czechoslovakia, however, were liberalized in 1966. Imports of aluminium semi-manufactures from the German Democratic Republic were liberalized in 1968.

5.4.6. In the Federal Republic of Germany licences were required for aluminium imports from State-trading countries except where trade agreements had been made with particular countries (as they were in 1969 and 1970 with Czechoslovakia, Poland and Hungary). In respect of the German Democratic Republic, trade was regulated by the 'Interzonenhandelsabkommen'. In this latter case the agreements made by Eisen und Metall held imports of primary aluminium down to half the level agreed by the Governments of the Federal Republic of Germany and the German Democratic Republic.

5.4.7. In the Netherlands a quota (of initially 3 000 tonnes) was fixed for imports of primary aluminium from State-trading countries. By 1973 this quota had been increased to over 9 000 tonnes. No quota restrictions were imposed on imports of scrap or semi-manufactures. Belgium and Luxembourg required licences for imports, and a quota of initially (1964) 5 100 tonnes, later increased to over 10 000 tonnes, was imposed.

5.4.8. In Italy licences were required for aluminium imports from State-trading countries, but the grant of such licences could not be and was not confined to the western producers, parties to the Brandeis agreements. As much is evidenced by the attempts of the western producers to enforce the restrictions of the Brandeis agreements on exports to Italy (notably the action taken by Swiss Aluminium to frustrate the work of the Hungarian-Italian Commission for Economic Cooperation).

5.4.9. At Community level the Member States have adopted common import arrangements in respect of State-trading countries. By Council Regulation (EEC) No 109/70 [1], certain products from State-trading countries were to be subject to no quantitative restrictions. Aluminium products falling within heading Nos 76.05, 76.08, 76.09, 76.10, 76.13 and 76.14 of the Common Customs Tariff (powder, extrusions and rolled products for use in construction, aluminium containers, mesh and trellis work) were to be subject to no quantitative restrictions where they originated in Bulgaria, Hungary, Poland, Romania or Czechoslovakia.

By Council Decision 75/210/EEC [2], the Member States adopted common unilateral import arrangements in respect of State-trading countries. By this Decision Member States adopted quotas for

(1) OJ No L 19, 26. 1. 1970, p. 1.
(2) OJ No L 99, 21. 4. 1975, p. 7.

certain products including, in some cases, aluminium. Where products were subject to quantitative restrictions, but were not the subject of quotas published in the Council Decision, the Member States agreed to permit imports from the country concerned up to the highest level, by value or volume, achieved in the course of the previous three years. The quotas were amended for 1976 by Decision 75/788/EEC (1).

5.4.10. The Brandeis quotas were allotted by company rather than country and given the international nature of the industry, it was not always the case that the allotment of a particular company would be delivered to the country in which it was established. However, on the assumption that the Brandeis quotas were shipped to the country of establishment of the various companies concerned, these quotas fell far below the permitted maxima (2). Only in the case of imports into the Benelux countries from Hungary in 1975 was the quota allotted by a Member State nearly exhausted (1 310 tonnes of a quota of 1 500 tonnes).

5.4.11. The common unilateral import arrangements under Decisions 75/210/EEC and 75/788/EEC relating to aluminium and its products are set out in table 16.

6. The attitude of national governments to the Brandeis agreements

Certain of the western producers, in particular Alcan, BACO and VAW, have argued that certain governments of States then or now members of the Community encouraged and supported the eastern metal arrangements. The only evidence which has been produced concerns the Governments of the United Kingdom and the Federal Republic of Germany.

6.1. *The UK Government*

6.1.1. A UK government department (the Department of Industry) made available to Alcan and BACO certain government records of meetings at which the eastern metal arrangements were discussed. While these records show no evidence of any compulsion by the UK Government on Alcan and BACO, they do show that the UK Government encouraged and supported the participation of Alcan and BACO in the arrangements.

6.1.2. The attitude of the UK Department of Industry has been set out in two notes prepared by the department in the course of, and with knowledge of, these proceedings. The first note, dated 17 March 1977, was sent to the Commission in April 1977, while the second, dated 8 November 1978, was sent to Alcan and BACO and subsequently formed part of the documents submitted in reply to the Commission's statement of objections.

6.1.3. These notes (they are essentially similar in terms) trace the history of the Brandeis agreements, accepting that those prior to 1965 were made without the intervention of the the UK Government. The UK Government did intervene with the Russian Government in 1965 and again in 1970 to intimate that, if there were no inter-industry agreement, the UK Government would act 'rather than allow the disruption of the British market'.

6.1.4. In October 1967, according to a note made by BACO, the UK Board of Trade advised Alcan and BACO to prepare themselves for an approach from the UK Registrar of Restrictive Trade Practices concerning the eastern metal arrangements. The registrar subsequently issued a notice under section 14 of the Restrictive Trade Practices Act 1956 requiring information to be supplied on the eastern metal arrangements. In reply BACO and Alcan described the Brandeis agreements and supplied copies of the agreements made up to 1968. BACO's reply to the section 14 notice issued by the UK Registrar of Restrictive Trade Practices records that 'between the months of November 1962 and February 1963' an agreement was made between BACO, Swiss Aluminium, Montecatini, VAW and Aluminium français that approaches be made to Raznoimport. The reply made no mention of any support from the UK Government.

6.1.5. Under section 8 (1) of the Restrictive Trade Practices Act 1956, registration is not required for 'any agreement which is expressly authorized by any enactment, or by any scheme, order or other instrument made under any enactment'. By section 11 (3) of the same act, the Board of Trade may direct that an agreement be placed in a special (non-public) section of the register if the agreement contains particulars the publication of which 'would in the opinion of the Board be contrary to the public interest'. Such a direction was given in respect of the BACO reply under the act. Had the

(1) OJ No L 332, 29. 12. 1975, p. 1.

(2) By Article 6 (2) and (3), the quotas under Decision 75/210/EEC could be increased in two stages of 20 %. Such increases were made, in particular, by Denmark for the import of aluminium cable.

agreement not been amended, the registrar would have been under a duty to refer it to the Restrictive Practices Court.

6.1.6. In 1968 amendments were made to ensure that there was only one British-registered company (i.e. BACO) as a formal party to a Brandeis agreement, Brandeis and Alcan participating through respectively a Swiss and a Canadian company. The amendments were made, according to Brandeis Goldschmidt, 'to eliminate the necessity of registering the agreements with the Registrar of Restrictive Trade Practices'. The 1968 agreements, described by BACO as the 'new arrangement', were in substance unaltered, only the formal identity of participants having been changed.

However, Brandeis Goldschmidt and Co. Ltd continued to operate the agreements (7.1.7), and Alcan UK continued to represent the Alcan group, in practice, by correspondence and by attendance at EPAA meetings.

6.1.7. In a statement made for the purpose of the hearing before the Commission, the then managing director of Alcan UK said 'I cannot, after the lapse of so many years, be sure who first suggested (the Brandeis agreements)' but that 'it seems quite possible that the suggestion . . . emanated from the UK Government itself'. This is not supported by any of the evidence available.

6.1.8. In 1965 Swiss Aluminium, in a letter to Alcan UK addressed to the above managing director, stated *inter alia* 'in the eyes of some of the participants a feeling prevails that the whole purpose of the contract with Raznoimport merely serves to protect the United Kingdom'. Against that passage the export sales director of Alcan UK marked in manuscript the words:

> 'We have been talked into it from the start by Germans and Swiss.'

6.1.9. At a meeting of 14 January 1970 Alcan UK and BACO were asked by the UK Board of Trade 'what objections the industry would have to the application of general UK policy on Soviet bloc imports, i.e. to liberalize imports on the clear understanding that if our home market should be disrupted we would impose anti-dumping duties or go back to quota restrictions'. Alcan and BACO are recorded as replying that:

> '. . . Disruption could not be considered only from the standpoint of imports of ingots into Britain. If British producers withdrew from "the gentlemen's agreement" it was probable that the agreement itself would be abandoned. That would mean unrestricted imports of eastern metal into western European countries and, as a consequence, fabricated products made from this metal in non-Soviet bloc countries would flow into Britain.'

In addition, Alcan and BACO stressed that:

> 'As this is an international problem, the most satisfactory solution lay in international action rather than in relying upon action taken in individual countries by imposing anti-dumping duties or quotas if disruption occurred.'

6.1.10. A telex message of 1 April 1971 by BACO, with the agreement of Alcan to PUK:

> '. . . It has always been accepted by western producers . . . that a five-year commercial deal represents longer term protection than government control.'

6.2. *The Government of the Federal Republic of Germany*

6.2.1. The documents produced by VAW concerning the Government of the Federal Republic of Germany consist essentially of letters sent to the 'Bundeswirtschaftsministerium' arguing for the restriction of imports from eastern Europe and records made by VAW of meetings with officials of that ministry.

6.2.2. The only contemporary documents produced from a government source are a note made on 8 June 1965 and a letter dated 15 November 1967.

6.2.3. The note, made by the Bundeswirtschafts-ministerium, refers to the fact that Hungary and Romania were requesting, from the German Government, an increase in their export quotas for aluminium and aluminium semi-manufactures, while an increase in the quota had been granted for exports of aluminium and aluminium alloys from the 'Sowjetzone' (the German Democratic Republic).

The note states that it was the opinion of that section that the Hungarian and Romanian requests should be refused and that no further concessions be made to the German Democratic Republic. The note also refers to the possibility of permitting an increase in scrap imports from eastern Europe because of the shortage in the Federal Republic.

> '3. In order to accommodate the Eastern bloc countries, quotas for aluminium scrap could be offered if, as in the case of Czechoslovakia, a price undertaking could be given. There was a definite need for scrap imports which in all probability could no

longer fully be met from North America (USA, Canada).'

While this department of the German Government may have been willing to see an increase in scrap imports from eastern Europe, this possibility was either excluded altogether or restricted by the series of agreements in force from 1966 onwards with the foreign trade organizations of the USSR, Poland, Hungary, Czechoslovakia and the German Democratic Republic.

6.2.4. The letter, dated 15 November 1967 from section IV/A/5 of the Bundeswirtschaftsministerium, gave two examples of 'gewisse Regelungen hinsichtlich der Osteinfuhren' which were considered to be of interest to VAW. The letter referred to two schemes used respectively for the import of crude oil from the USSR and coal from Czechoslovakia. It is evident from the description given that neither scheme bore any similarity to the Brandeis agreements, in particular because they did not exclude other potential purchasers and contained no provisions restricting the selling of quantities other than those in the agreement.

6.2.5. VAW has supplied its record of two meetings held with officials of the Bundeswirtschaftsministerium on 12 January 1968 and 5 April 1968. In the note of 5 April 1968 VAW states:

'We have particularly emphasized how far we were prepared to go in working together with Bundeswirtschaftsministerium.'

6.2.6. The documents disclosed to the Commission by VAW do not show that it had informed the German Government of its involvement in the Brandeis agreements prior to January 1968. The note of 12 January 1968 records that VAW informed the Bundeswirtschaftsministerium of the imminent signing of the Brandeis agreements (these were the 1968 to 1970 series). However, VAW had been effectively participating in the Brandeis agreements since 1963 through its arrangement with Alcan. By letter of 23 January 1980 to the Commission, Alcan explained that:

'VAW supported the proposed arrangements in principle, but was unable to participate directly in them because imports of eastern aluminium into the Federal Republic of Germany were at that time prohibited or very strictly controlled. In order to obviate that difficulty, Alcan agreed with VAW to take an allocation of Soviet metal on behalf of VAW in addition to Alcan's own allocation under the proposed arrangements.'

6.2.7. A letter dated 5 January 1979 from the Bundeswirtschaftsministerium to the chairman of VAW indicates that VAW had discussed, in 1968, its participation in the Brandeis arrangements and produced draft agreements (it is not clear, however, and neither was it made clear during the hearing, which form of agreement between Brandeis Goldschmidt and the western producers was discussed, the one containing a recital of the restrictions entered into by the foreign trade organizations, or the other in which all mention of these was suppressed).

The material terms of this letter are the following:

'Re: Exclusive contracts for aluminium from State-trading countries.

. . . From our files it appears that the proposed participation of VAW in the exclusive contracts of Brandeis Goldschmidt and Co. London, with aluminium producers in State-trading countries for the import of primary aluminium, and in the agreements of western producers with Brandeis for the taking up of eastern imports, has been the subject of oral and written representations between VAW and the Federal Ministry of Economic Affairs. The draft agreements were in fact also before the ministry.

According to the records, no economic policy objections were raised by the ministry to the participation of VAW in the agreements. The ministry was evidently prepared to tolerate the participation. The fact that in your opinion the conclusion of these exclusive contracts would be jeopardized if VAW did not participate appears to have been a determining factor. The danger you saw in that case of a serious restriction of the west European and German aluminium market by low-priced or even dumped imports from State-trading countries was evidently not simply to be dismissed out of hand.

The legal question whether VAW would contravene German law by participating in the agreements was also discussed at the time in question. It was established that, in principle, exclusive contracts (1), by themselves, were in conformity with the German law of competition. However, because of the intended horizontal understandings between the western producers concerning the taking up of the aluminium imported by Brandeis from the State-trading countries, the regulations on import cartels were to be observed. VAW was therefore recommended to submit the matter to the Bundeskartellamt.

(1) The references to 'exclusive' contracts suggest the ministry was shown only the short form of agreement. The long form did not use the term 'exclusive' or any analogous language, whereas the short form referred to 'sole purchasing rights' (of Brandeis).

According to the files there were particular doubts – shared also by your company – as to whether the agreements were in conformity with the competition law of the EEC. You were therefore advised to have these doubts resolved by submitting the agreements to the EEC Commission.'

6.3. *Other Member States*

6.3.1. There is no evidence that other Member States' governments were aware of the Brandeis agreements.

7. **The notification**

7.1. *The agreements*

7.1.1. Until 1968 the form of agreement made between Brandeis Goldschmidt and the western aluminium producers concerned reproduced all the material terms of the agreement Brandeis Goldschmidt had made with the foreign trade organizations. In particular, the restrictions undertaken by the foreign trade organizations were set out in full, using the formula 'the sellers' suppliers' in place of 'the sellers'.

7.1.2. The procedure by which this result was achieved is described in a letter dated 8 November 1979 from the legal advisers of Brandeis Goldschmidt to the Commission:

'. . . Brandeis Goldschmidt were instructed by Swiss Aluminium, acting in its capacity as coordinator for the western producers, to have the agreements between the western producers and Brandeis Goldschmidt, reflecting the contract between Brandeis Goldschmidt and Raznoimport (1), engrossed. After the final text of the agreements between the western producers and Brandeis Goldschmidt had been checked and approved by Swiss Aluminium, copies of those agreements were sent by Brandeis Goldschmidt to each of the western producers for signature.

Essentially the same procedure was followed by Brandeis Goldschmidt for all new agreements from 1963 until 1971 when the last series of agreements was entered into.'

7.1.3. By letter to the Commission dated 7 January 1980 Brandeis Goldschmidt stated that the usual form of producers' agreement was sent to all the then contracting parties. These were Aluminium français, Aluminium Company of Canada, Swiss Aluminium, BACO, A/S Ardal og Sunndal Verk, Montedison, VMW, Mosal Aluminium A/S, AB Svenska Aluminiumkompaniet, Endasa, NLM, Holland Aluminium 'Alumined' and VAW.

7.1.4. The form of agreement varied according to the identity of the foreign trade organization which had sold aluminium to Brandeis Goldschmidt. The RU series of agreements accordingly set out in full the restrictions imposed on Raznoimport, the H series the restrictions imposed on Metalimpex, the P series the restrictions imposed on Impexmetal, the EG series the restrictions imposed on Intrac, and the C series the restrictions imposed on Metalimex (Kerametal).

7.1.5. Brandeis Goldschmidt further indicated in its letter of 7 January 1980 that:

'In accordance with our usual procedure, the long form agreements were sent out by Brandeis Goldschmidt and Co. AG with standard covering letters.' (The long form is set out in Annex 3.)

7.1.6. Brandeis Goldschmidt has supplied copies of the standard covering letters mentioned which were sent to Aluminium français (now PUK) and confirmed that the copies enclosed were:

'Representative of those sent to all other participating producers subject to differences in origin, tonnages and destination where appropriate.'

7.1.7. The covering letters sent to Aluminium français were dated 19 March 1968 and referred expressly to agreement Nos RU 4006, EG 4007, H 4008 and P 4009. The letters informed Aluminium français that Brandeis Goldschmidt and Co. AG had appointed Brandeis Goldschmidt and Co. Ltd 'to handle all shipments and receipt of funds on our behalf'. Two letters referred expressly to the restrictions undertaken by the foreign trade organizations.

'We refer to our agreement No RU 4006. It is understood with suppliers that the restrictions on sales and exports of virgin aluminium (clause 2), secondary aluminium/scrap (clause 4) and of semi-manufactured products of aluminium and aluminium cables, include any such sales or exports by Bulgaria. It is understood that any sales or exports of Bulgaria to countries not mentioned in clause 2 of that agreement would be deducted from the tonnage to be purchased by buyers under clause 1 of that agreement.'

'We refer to our agreement No RU 4006. We have agreed with suppliers that, should the aluminium cable market in our territory become disrupted by exports from Socialist

(1) Indicating that agreement No 68/3326 was concluded in 1963.

countries, we shall draw the attention of the suppliers to this situation. If the situation is not remedied we have specifically reserved the right to invoke the last paragraph of clause 12 of the above agreement.'

7.1.8. Those agreements were numbered consecutively, beginning with RU 4001, the agreement made between Brandeis Goldschmidt and the NLM. Invoices sent by Brandeis Goldschmidt to each of the buyers bore the contract number of the agreement each buyer had entered into. These numbers remained unchanged on Brandeis invoices even after the agreement with EEC-based producers had been amended in the manner which will be described below. The following list is based on the contract numbers contained in Brandeis invoices:

Buyer	Agreement No
Nippon Light Metal Co. Ltd	RU 4001
Aluminium Company of Canada Ltd	RU 4002
	EG 4003
	H 4004
	P 4005
Aluminium français	RU 4006
	EG 4007
	H 4008
	P 4009
Swiss Aluminium	RU 4010
	EG 4011
	H 4012
	P 4013
	C 4014
Aluminium français	C 4015
BACO	RU 4016
	P 4017
Ardal og Sunndal Verk A/S	RU 4018
Mosal Aluminium A/S	RU 4019
Alumined	H 4020
AB Svenska Aluminiumkompaniet	RU 4021
Endasa	P 4022
VMW	RU 4023
	P 4024
	C 4025
Montedison	H 4026
VAW	RU 4028
	EG 4030
Nemag Metallhandels AG	P 4031
VAW	C 4032
Aluminium Company of Canada	C 4033
VMW	H 4034
Alnor A/S	RU 4035

7.1.9. After the agreements in the abovementioned long form had been sent to all the participating western producers, Swiss Aluminium informed Brandeis Goldschmidt that producers based in the EEC had called for amendments to be made to their agreements and in June 1968, Brandeis Goldschmidt were notified by Swiss Aluminium of the final wording of the amendments.

Brandeis Goldschmidt engrossed the amended copies and sent them to the western producers concerned, after checking by Swiss Aluminium.

7.1.10. The 'short form' agreement is reproduced in Annex 4.

These amendments eliminated all mention of the restrictions the foreign trade organizations had undertaken on the supply by them of primary aluminium, secondary aluminium, scrap and semi-manufactures. The amended form of agreement also eliminated all reference to the agreement by the foreign trade organizations to sell aluminium at prices not lower than those mentioned in the Brandeis agreements in certain territories, and removed the specific reference to the London Metal Exchange in the 'spirit of the agreement' clause. The restriction on conversion was also removed. None of these amendments was intended to, or did affect the operation of the Brandeis agreements in general, nor the enforcement by EEC-based producers of the now suppressed restrictions in particular.

7.1.11. The amended agreement used by the producers based in the EEC (in 1968, Aluminium français, Alumined, Montedison and VAW) was in an identical form for each producer. Each agreement bore a number the same as that of the RU or H series of agreements originally distributed in March 1968 by Brandeis Goldschmidt, except that the RU or H letter code was removed and replaced by the letter A. The Aluminium français agreement was accordingly numbered No 4006A. The table below summarizes the revised nomenclature of the agreements:

Producer	Original agreement	Amended agreement	Date
Aluminium français	RU 4006	4006A	2 July 1968
	EG 4007		
	H 4008		
	P 4009		
	C 4015		
Alumined	H 4020	4020A	24 June 1968
Montedison	H 4026		
VAW	RU 4028	4028A	28 June 1968
	EG 4030		
	P 4031		
	C 4032		

7.2. *The origins of the 'short form'*

7.2.1. The discussion leading to these amendments and deletions, or at least certain of them, is recorded in two letters from the legal adviser of VAW, dated 18 March 1968 and 24 April 1968, and statements made by the parties at the hearing.

7.2.2. The first letter recorded the outcome of a discussion on 15 March 1968 between 'Péchiney' (Aluminium français) and VAW. The following reference was made to amendments to the agreements.

> '1. Der einzelne Vertrag eines westeuropäischen Herstellers über den Einkauf von Ostaluminium mit Brandeis, London, fällt nicht unter Artikel 85 Absatz 1 EWG-Vertrag, wenn die Vertragsklauseln gestrichen werden, die als Reexportverbot an andere EWG-Länder verstanden werden können, und wenn die Ausschließlichkeit der Einkäuferstellung gestrichen und nicht von Einkaufsquoten gesprochen wird.
>
> Gegen diese Streichungen sprechen auch keine wirtschaftlichen Bedenken, weil das eingekaufte Ostaluminium von dem westeuropäischen Hersteller ohnehin entweder in seinen Verarbeitungsbetrieben verbraucht oder zusammen mit seiner eigenen Erzeugung zu deren Wettbewerbspreisen und entsprechend den Wettbewerbsbedingungen verkauft wird . . .
>
> . . . Im Sinne der Ausführungen zu 1. regte der Leiter der Rechtsabteilung (1) vielmehr an, auch noch Artikel 9 Absatz 3 des Brandeis-Vertrages zu ändern, weil dort vom Geist des Vertrages und einer Pro-rata-Basis die Rede ist. Diese Anregung erfolgte im Rahmen der Überlegung, daß der bereinigte deutsche Vertrag für Brandeis das Muster für die anderen Einkaufsverträge werden könnte.
>
> Ich möchte demnach für Artikel 9 Absatz 3 folgende Fassung vorschlagen.'
>
> (The suggested version was in fact ultimately adopted.)

7.2.3. The account of these events given by the legal adviser of VAW at the hearing indicates that it was VAW which had amended clause 2 of the agreement (2) by deleting the provision:

> 'Sellers undertake not to sell supplies of virgin aluminium with the exception of sales authorized by the buyers and approved by the buyers.'

and replacing it with:

> 'Sellers herewith grant to buyers the exclusive right to purchase these quantities for the Federal Republic of Germany from the above countries.'

7.2.4. This first amendment did not concern the restrictions entered into by the foreign trade organizations, which were all reproduced in the usual manner. VAW's legal adviser stated at the hearing:

> 'Um diese nationale Exklusivität von VAW verständlich zu machen, hatte nun VAW einen Absatz in dem Artikel 2 vorausgeschickt und doch die Exklusivitätsregelungen des grundliegenden Vertrages Brandeis-Osten wiederholt.'

He indicated that he objected to the amended form of clause 2. Subsequently VAW further amended clause 2 by deleting it altogether.

The legal adviser further stated that on 17 March 1968 he received a draft agreement which referred only to exclusive purchase rights of virgin aluminium, and not to the restrictions undertaken by the foreign trade organizations.

It will be recalled that in the letter dated 18 March 1968, recording the results of the meeting of 15 March 1968, the VAW draft was referred to as the 'cleaned' German agreement (der bereinigte deutsche Vertrag) which was to serve as a model for the other purchasing agreements with Brandeis Goldschmidt.

7.2.5. The VAW draft was subsequently discussed at a meeting between VAW and Montedison on 23 April 1968. A letter to VAW dated 24 April records that 'complete agreement' was reached on the proposals set out in the letter of 18 March, a letter evidently written after receipt of the VAW draft on 17 March 1968. At the meeting Montedison was given a copy of an amended Brandeis agreement by VAW.

> 'Sie / i.e. VAW / überreichten in Mailand Herrn . . . / Montedison / eine Kopie des auf Grund meiner Beratung geänderten Individual-Vertrages mit Brandeis. Diese Änderungen sind inzwischen von Herrn Brandeis gebilligt worden, ebenso von Péchiney. Der deutsche Vertrag hat daher die Bedeutung eines Mustervertrages zur Vermeidung von Beanstandungsmöglichkeiten im Sinne von Ziffer 1 meines Schreibens vom 18. März 1968.'

From the terms of the letter of 24 April 1968 it is evident that Alumined had already agreed to the amendments described.

(1) The legal department referred to is that of Aluminium français (PUK).

(2) The agreement is that of 1967 because no such provision was contained in any of the agreements distributed by Brandeis Goldschmidt in 1968.

7.2.6. At the hearing it was first maintained that these discussions were concerned not with the deletion of the restrictions undertaken by the foreign trade organizations but with the clause which had appeared in the earlier Brandeis/western producer agreements, that:

> 'Sellers undertake not to sell supplier's virgin aluminium, with the exception of sales authorized by the buyers at prices approved by the buyers.'

In view of the fact that, in the draft contracts sent in March 1968 to all the buyers, this clause and has already been deleted, the explanation advanced as to the object of the discussions would appear to be at least incomplete.

7.3. *The making of the notification*

7.3.1. The notification was first submitted to the Commission on 12 November 1970. It contained a so-called 'condition of non-publication'. This provided that the notification was only submitted on the condition that 'this application will not be published and, consequently, will not be decided upon'.

The notification was composed of a letter and form A/B together with powers of attorney signed by PUK, Giulini, Montedison, VAW and Holland Aluminium. The questions in form A/B relating to the content of the agreement, decision or concerted practice, were answered only by reference to the accompanying letter (das Begleitschreiben). In answer to question I.6 of form A/B, which called for the name and address of a representative or subsidiary situated within the common market in the case of undertaking situated outside, a list was supplied. This list bore the names of Aluminium Company of Canada Ltd, Alnor, ASV, BACO, Elkem, Endasa, Swiss Aluminium, AB Svenska Metallverken (now Gränges Aluminium) and VMW.

7.3.2. Such answers as were given to form A/B were made in German, which was also the original language of the accompanying letter. The material parts of that letter are set out below:

> 'Re: Imports from Eastern bloc countries by western European aluminium producers.
>
> Western European producers of an important sector purchase, each one for itself, the total import quantities of Eastern bloc products, of not entirely comparable quality, offered by a number of Eastern bloc countries, and fabricate most of this material in their second-stage production plants. The remainder is sold, together with their own production, within the framework of competition existing among western European producers.
>
> In my opinion this procedure is not contrary to Article 85 (1) of the EEC Treaty.
>
> Acceptance of 100 % of the import quantities is a condition of the offer, which entails the addition of the individual purchasing intentions of western European producers, and excludes competition for the imports by dealers because the tonnages involved exceed their marketing possibilities.
>
> The disappearance of the possibility of purchase by third parties, and particularly by dealers, brought about by the purchase contracts concluded outside of the EEC by individual western European producers with the representatives of all the Eastern bloc countries, with the exception of Romania and Yugoslavia, is therefore merely the consequence, in accordance with the free market principles, of the fact that the purchase of any item of merchandise always excludes other purchasers. Hence no concerted action aimed at restricting the purchasing possibilities of western European producers or dealers, within the meaning of Article 85 (1), exists.
>
> Moreover, any restriction of competition by exclusion of the dealers would be irrelevant. The integration of the EEC cannot bring about an expansion in sales by dealers; on the contrary, such sales are diminishing within the old national framework because ever decreasing quantities are being taken by customers in the form of raw material which would also be supplied by dealers. To an ever increasing degree, for technical reasons, material has to be supplied by the producers direct to the customers in specified sizes and alloys, together with know-how and advice on their fabrication. The dealers are therefore already encountering difficulties in disposing of the tonnages purchased in Romania and Yugoslavia to secondary smelters because the supplementary purchases of western European producers for their own semi-fabricating plants are decreasing.
>
> The exclusion of the dealers from the Eastern bloc imports purchased by western European producers cannot therefore detrimentally affect trading within the EEC at all, or at least not to any significant degree. This is also clearly demonstrated by the fact that the import purchases of western European producers accounted in all for only 2,9 % of the total western European consumption of 3 089 000

tonnes in 1968. They had risen slowly to this proportion since 1963. Their further growth is foreseen to correspond as in the years 1969 and 1970 to the increase in consumption.

Furthermore, it could not be said that the purchases are likely to be detrimental to trading between the member countries and to distort the existing competition. On the contrary, the purchases are aimed at preventing distortion of the existing competition by the prices and terms of sale of the Eastern bloc imports which, unlike those of the western European producers, are not determined on the bases of the production cost of the products and free competition, but by political considerations or by foreign currency requirements to purchase other goods which the Eastern bloc needs. That is why the purchases by western European producers are approved, from an economic viewpoint, by their national governments, and why, in 1963, several governments also counselled the industry to take its own defensive measure against the Eastern bloc dumping at that time, and then paved the way for the purchase negotiations in Moscow through diplomatic channels.' (Parties' own contemporaneous English version.)

7.3.3. No text of any of the then current series of agreements with the foreign trade organizations was disclosed. The parties made no disclosure of the text of any agreement or draft agreement with the foreign trade organization for the period 1971 to 1976. The only description given to the Commission of the terms of the agreements in question was contained in the paragraphs cited above.

7.3.4. At the time the notification was made, the participation of some parties was not mentioned. Although Aluminio de Galicia, Kaiser-Preussag, and Metallgesellschaft had purchased aluminium under the agreements which are the subject of these proceedings at least since the beginning of 1971, such activity was first notified to the Commission on 27 February 1976, after the Commission had commenced its investigations. (This notification stated only that these undertakings had concluded agreements for the purchase of primary aluminium from Eastern bloc countries 'inzwischen gleichfalls Kaufverträge über Rohaluminium aus der Produktion von Ostblockstaaten abschließen'.) The participation of Reynolds Aluminium Deutschland, Alsar SpA, RTZ and BICC was never notified to the Commission, although Reynolds and Alsar had concluded agreements with Brandeis Goldschmidt in 1973 and RTZ and BICC had purchased eastern metal from Swiss Aluminium since 1971 on the same terms, and subject to the same conditions as those accepted by all the other EPAA members.

The names of Brandeis Goldschmidt, Raznoimport, Metalimpex, Kerametal, Impexmetal and Intrac did not figure at all in the notification.

7.3.5. The investigation of the case revealed that the description given in the notification omitted 12 important elements of the series of agreements which became the subject of these proceedings.

7.3.6. None of these omissions was apparent on the face of the documents submitted, but the director of the competent directorate initially refused the notification (on 7 December 1970) because of the unilateral condition of non-publication. The documents were re-submitted without this condition on 16 December and registered with the Commission on 17 December 1970.

7.3.7. The draft notification had been discussed and approved at a meeting of the EPAA held on 7 October 1970 and attended by Alcan UK, Alnor Aluminium Norway A/S, Holland Aluminium, Aluminium français, A/S Ardal og Sunndal Verk, Baco, Elkem A/S, Empresa nacional del aluminio, Gebrüder Giulini, Montecatini-Edison, Swiss Aluminium, AB Svenska Metallverken, VAW and VMW. Also present were Anglesey Aluminium and Metallgesellschaft. Thus, all these undertakings which were notified, and these named in the notification, must have been aware of the inadequacy of the notification.

7.3.8. The texts of the agreements were first disclosed to the Commission in reply to requests for information made under Article 11 of Regulation No 17 in November 1975, by which time the expansion of the Community had brought within the physical jurisdiction of the Commission some western producers with 'long form' agreements as well as the original notifying parties with 'short form' agreements.

7.3.9. On 27 February 1976, Aluminio de Galicia, Kaiser-Preussag and Metallgesellschaft notified the Commission of their participation in the Brandeis agreements. The notification was by reference to the 1970 notification.

8. Involvement of individual undertakings

8.1. In setting out the facts it has been convenient to use the terms 'the western producers' and 'the foreign trade organizations'. However not every undertaking was as involved as others nor were all undertakings active in the Brandeis arrangements from beginning to end.

8.2. The western producers may be divided into three rough groups:

(i) The chief instigators, organizers and supporters:

Swiss Aluminium, BACO, PUK, Alcan, Montedison/Alumetal, VAW and ASV (all were involved throughout).

(ii) The followers:

— Holland Aluminium	(1968 to 1976),
— Kapal	(1971 to 1976),
— Metallgesellschaft	(1971 to 1976),
— Reynolds	(1974 to 1975),
— Endasa	(1963 to 1976),
— Norsk Hydro (Alnor)	(1970 to 1976),
— VMW	(1963 to 1976),
— Gränges	(1963 to 1976),
— Elkem	(1963 to 1976).

(iii) The peripheral participants:

RTZ, BICC, Alsar, Alugasa (a subsidiary of PUK), NLM (50% owned by Alcan) and Giulini.

8.3. These classifications roughly represent the involvement and the degree of interest in being involved.

8.4. Those in the first classification represented around 70% of primary aluminium production in western Europe, purchased between 60 and 70% of all the aluminium purchased under the Brandeis arrangements and, with the exception of BACO, had the greatest interest in 'protecting' the original EEC of the Six; after 1973, BACO was a large manufacturer in the enlarged EEC.

8.5. Those in the second classification participated fully in the Brandeis arrangements, though for varying periods, and sometimes more to protect their home (non-EEC) markets than deliberately to distort Community trade.

8.6. The third category covers those who, though vital to the watertightness of the system, were of lesser importance or relatively unenthusiastic or both. One, NLM, did not trade in the Community at all.

8.7. Of the undertakings involved in the arrangements, three have since ceased to exist as separate entities.

8.7.1. Gebrüder Giulini went into liquidation. It was later acquired by Alcan, but Giulini (owing to its liquidation) did not offer a defence to these proceedings and Alcan cannot be visited with the consequences of Giulini's conduct.

8.7.2. Kapal (Kaiser-Preussag Aluminium GmbH), which had entered into a 'short form' agreement with Brandeis in 1971, was at the time owned as to one half by the United States Corporation, Kaiser Aluminium and Chemical Corporation. With effect from 31 December 1975 the two shareholders of Kapal transferred the entire share capital to Kaiser Aluminium Europe Inc., a wholly owned subsidiary of Kaiser Aluminium and Chemical Corporation. Kaiser Aluminium Europe contended that it could not be held responsible for the actions of Kapal, although (apart from acquiring the shares and assets in Kapal) Kaiser Europe took over, without interruption, certain Kapal employees and officers, some of whom had been closely connected with Kapal's involvement in the Brandeis agreement, and the Kaiser Aluminium and Chemical Corporation had throughout been represented on the governing body of Kapal.

8.7.3. BACO was acquired by Alcan in 1982 through a merger of the BACO and Alcan UK companies.

8.8. Some companies have changed names. Alsar/Alumetal SpA changed its name to Alluminio Italia SpA.

II. LEGAL ASSESSMENT

A. *ARTICLE 85 (1)*

Article 85 (1) of the EEC Treaty declares incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 85 contains a list of particular examples of such agreements, decisions and concerted practices. The examples relevant to these proceedings are agreements, decisions or concerted practices:

'which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply.'

The agreements which are the subject of these proceedings were made by Brandeis Goldschmidt with certain foreign trade organizations (namely Raznoimport, Impexmetal,

Metalimpex, Metalimex/Kerametal and Intrac) and with western primary aluminium producers ('the western producers'). These agreements have been termed the 'Brandeis agreements'. Also concerned in these proceedings are agreements which were made to implement the Brandeis agreements. These agreements were those made by Eisen und Metall Aktiengesellschaft and between the western producers.

9. Whether the participants were all 'undertakings' within the meaning of Article 85

9.1. *The western producers*

The western producers which purchased aluminium under the Brandeis agreements are all undertakings for the purposes of Article 85. Each of them was engaged in the business of producing primary and other aluminium either by themselves or through a joint venture or other relationship with an established primary aluminium producer. It also follows that the European Primary Aluminium Association (EPAA), to which all but two of the western producers belonged, is an association of undertakings for the purposes of Article 85.

9.2. *The foreign trade organizations*

The foreign trade organizations Raznoimport, Impexmetal, Metalimpex, Metalimex/Kerametal and Intrac are also undertakings for the purposes of Article 85. The function of each of the organizations was to engage in the import and export of a range of goods. In the matters concerned by these proceedings each of the foreign trade organizations was engaged in selling aluminium, one of the activities for which each had been specifically established under the law of the country in which it was situated. Entities which engage in the activity of trade are to be regarded as undertakings for the purposes of Article 85, whatever their precise status may be under the domestic law of their country of origin, and even where they are given no separate status from the State.

It follows that the applicability of Article 85, since it relates to trading activities, is not defeated by claims of sovereign immunity. Such claims are properly confined to acts which are those of government and not of trade. Even if the foreign trade organizations were indistinguishable under Socialist law from the State, no sovereign immunity would attach to their participation in the Brandeis agreements since this was an exclusively commercial activity. Furthermore the domestic law of Member States does not accord so vereign immunity to foreign trade organizations of the type concerned by these proceedings.

9.3. *Brandeis Goldschmidt and Eisen und Metall*

Brandeis Goldschmidt Ltd and Brandeis Goldschmidt AG are to be treated as one for the purposes of this Decision. At all material times, Brandeis Goldschmidt AG was a subsidiary of Brandeis Goldschmidt Ltd and there is no proof that Brandeis Goldschmidt AG ever exercised any autonomy. Both Brandeis Goldschmidt and Eisen und Metall are undertakings for the purpose of Article 85. Both are long-established traders in non-ferrous metals, and continued such activity during the running of the Brandeis agreements. Brandeis Goldschmidt has claimed that it cannot be treated as an undertaking for the purposes of Article 85 (1) since it was, at all material times, only the agent of the western producers and enjoyed no independent status. If this were correct it would also apply in respect of Eisen und Metall.

However neither Brandeis Goldschmidt nor Eisen und Metall were acting under the instructions of any person when they decided to take part in the agreements which are the subject of these proceedings. Brandeis Goldschmidt was under no obligation to enter into the agreements or to assume such a material role in their implementation and enforcement. Brandeis Goldschmidt decided of its own will as an independent economic operator to take part in an arrangement which could exclude its competitors from the trade in aluminium in eastern Europe. Both Brandeis Goldschmidt and Eisen und Metall could have withdrawn at any time from the agreements without going out of their line of business. Neither company escapes liability for its participation in a restrictive agreement by alleging that it had no independent status, but merely acted on instructions. The relationship within which those instructions were given arose only from their choice to enter into the restrictive agreement.

10. Whether the matters concerned in these proceedings were 'agreements' within the meaning of Article 85

It was argued that, if it could be demonstrated on behalf of certain undertakings, that the arrangements were the acts of their governments, those undertakings would not have infringed Article 85 and the Community's recourse would have to be diplomatic representations to the governments concerned, or retaliation of some kind (if the government were that of a non-member State).

The agreements were neither acts to which the governments were signatory, nor did governments oblige the undertakings to enter into the arrangements.

A further possibility which the parties put forward is that the governments concerned encouraged and supported the arrangements without obliging the undertakings to enter into them. These arrangements were consequently part of the external commercial policy of the States concerned and so not subject to scrutiny by Community institutions under Article 85 (1) of the Treaty.

Each of these possibilities will be examined in relation to:

(a) the undertakings subject at all material times to the jurisdiction of the Government of the Federal Republic of Germany,

(b) the undertakings subject at the material times to the jurisdiction of the UK Government.

10.1. *The intervention of the Government of the Federal Republic of Germany*

In the findings of fact, the Commission has already established that the Government of the Federal Republic of Germany did not participate directly in the Brandeis and Eisen agreements as a party. The German Government lacked the statutory power at the time to force the parties to enter into the arrangements. The most that can be said, from the letter written by the Bundeswirtschaftsministerium on 5 January 1979, is that the government was prepared to tolerate VAW's participation in the agreements; it did not advocate that VAW should take part, and expressly stated that, in 1968, it had made an explicit reservation as to the legality of the Brandeis arrangements under both German and EEC competition rules. On the evidence, the Commission has concluded that there was no encouragement or support from the German Government and that VAW did not make out its case on the facts.

10.2. *The intervention of the United Kingdom Government*

The facts do not show that the UK Government was ever in any sense a party to the Brandeis agreements, nor that the British producers were agents for the government in entering into the Brandeis agreements. Neither the support given by the UK Government nor the two notes from the Department of Industry can properly be described as ratification of the acts of the western producers so that they became acts of State. The contention of BACO that the acts became State actions is rejected.

The undertakings situated in the United Kingdom were not obliged nor instructed by the UK Government to enter into the Brandeis arrangements. At no time did the UK Government have statutory powers to force those undertakings to enter into those arrangements. Alcan expressly stated that the UK Government did not exercise any form of legal compulsion in order to secure participation in the arrangements. This must be so, for otherwise the parties would not have felt themselves obliged to give the UK Registrar of Restrictive Trade Practices details of the arrangements in 1969; the arrangements would have been exempt from registration by virtue of section 8 (1) of the Restrictive Trade Practices Act 1956. At the time the relevant ministry did not argue section 8 (1), but did direct the registrar to place the registration upon the special section of the register under section 11 (3) of the act. This would not have been necessary if the UK Government and the UK-based western producers had been acting within the scope of some legal enactment.

There is insufficient evidence to show that the UK Government induced any UK-based undertaking to make an agreement with other western producers appointing Brandeis Goldschmidt to negotiate with Raznoimport in early 1963. Nor was evidence produced to show that the UK Government induced Alcan and BACO to enter into the agreements when their terms were settled in mid-1963. Both companies merely claim that 'there can be no doubt that the UK Government knew and approved of the arrangements from their inception'.

The evidence shows that the initiative to negotiate and conclude the Brandeis agreements in 1963 lay at all times with the western producers and that the involvement of the UK Government was restricted to being informed apparently sometime in 1965 and onwards and giving approval. The Department of Industry note in April 1977 stated that the agreements in 1963, as in 1964, 1965 and 1968, were made without the intervention of the UK Government. The contemporaneous reports and notes of the 1963 negotiations made by Brandeis Goldschmidt, and correspondence relating thereto, made no reference to any involvement by any government. From the note made by Brandeis Goldschmidt of its meeting with Raznoimport in Moscow on 6 February 1963, it appears that no mention was made of the interest of any government in securing an agreement. Brandeis Goldschmidt stated merely that:

'We considered it necessary during our negotiations to intimate to Raznoimport that we had the backing of certain producer interests.'

It is significant that Brandeis Goldschmidt at that time made no mention of the interest of any government, because it would have been a strong inducement for Raznoimport to enter into an agreement. The note on the 1965 letter (6.1.8) being nearly contemporaneous, indicates also that the contract with Raznoimport was a private initiative.

The failure both of the UK-based parties and of the UK Government to use, in respect of the Brandeis arrangements, the exemption possibilities in the UK restrictive practices laws indicates that, whatever arguments the UK parties now adduce, they did not at the time consider that they were merely carrying out UK Government policy and only that policy.

The Commission accepts as fact that, from 1965 onwards, the UK Government gave support to the UK-based undertakings to enter into the Brandeis arrangements. This does not mean that the encouragement and support of the UK Government reflected a sovereign decision that Community trade should be affected. The fact that the UK Government, in pursuit of its own legitimate national interests, permitted a private restriction upon competition within the Community does not mean that it either sought or desired a breach of the law within the Community and still less that it favoured that breach. Even if the UK Government had intended such a breach (which the Commission does not believe was ever the case), that would not alter the position of the undertakings.

The Community cannot and has never sought to attack the Brandeis arrangements so far as they concerned, and their effect was confined to, the territory of the United Kingdom until the date when the United Kingdom became a Member of the Community. The UK Government was fully entitled to take whatever action it liked within its own territory and to encourage others to commit acts within its own territory and having effects within its own territory, as it saw fit.

The Commission has the duty to enforce the EEC Treaty and therefore does not accpet that any encouragement given by the UK Government could be a defence for the acts of the UK-based undertakings so far as those acts violated Community law and affected trade between the Member States of the Community up to 1973.

After 1973 the United Kingdom became subject to, in particular, Articles 5 and 90 of the EEC Treaty.

11. Restrictions and distortions of competition

The parties in these proceedings entered into an arrangement the chief purpose and effect of which was to maintain prices for aluminium ingot and aluminium products in the EEC and other western markets. The primary means used were a sharing of a source of supply of ingot and removal from the market of semi-manufactures and scrap, and the control of barter and conversion contracts. Other restrictions were accepted by the western producers upon their conduct in the knowledge and on the understanding that the other parties would follow the same policy. These restrictions were:

— the agreement not to resell eastern metal to third parties without remelting,

— that aluminium should not be made available for trading on the London Metal Exchange.

11.1. *The protection of prices*

Numerous statements were made by the parties to the Brandeis agreements which show clearly that the purpose of the arrangement was to protect prices in western markets.

The western producers were so concerned for the protection of price levels that they took vigorous action to prevent the sale of even the smallest quantities of aluminium and especially of semi-manufactures in western markets, as it is clear *inter alia* from 3.5.3 and 3.5.4.

The western producers and the foreign trade organizations expressly agreed in the Brandeis agreements that the prices charged by the latter in certain territories were not to be lower than those quoted in the agreements. Furthermore the foreign trade organizations gave contractual undertaking to maintain the prices of aluminium products, a reduction in whose price would have had an effect upon ingot prices.

In those exceptional cases where sales of eastern metal were permitted to western markets, the western producers were shielded in this way from any risk of price competition.

Even though it was expressed in more general terms, the 'spirit of the agreement' clause also required an abstention from price competition

between the western producers and the foreign trade organizations. In 1974, when a surplus was available for export by the foreign trade organizations, a promise to charge Brandeis agreement prices did not induce the western producers to accept sales in 'their' territory.

The price paid by Brandeis for the eastern metal has been discussed in Part I. It is not necessary for present purposes to decide whether the price Brandeis paid was above or equal to the market price which, in the circumstances of the industry, is hard to establish. PUK attempted to show that the Brandeis price was close enough to the 'arms-length' price, while during the currency of the agreements there were signs enough that many of the western producers thought the price too high.

The western producers at the Venice Metal Conference reduced the quantities of ingot taken (which suited them because there was a glut of ingot at the time) while increasing the price per tonne they paid. Until 1976 the prices paid (together with the assured outlet) were interesting enough for the foreign trade organizations to offset the contractual prohibition on sale of ingot to other purchasers and on any sale of scrap and semi-manufactured products.

Each aluminium producer which purchased aluminium under the Brandeis agreements agreed to pay the same price as all the other purchasers and agreed to pay a uniform rate of commission to Brandeis Goldschmidt for its services. Similarly, each of the five purchasers (Alusuisse Deutschland, VAW, Kaiser-Preussag Aluminium, Metallgesellschaft and Gebrüder Giulini) party to the agreements made with Eisen und Metall AG and Intrac agreed to pay the same price for the material purchased, this being the same price as that under the Brandeis agreement.

By entering into such arrangements, each purchaser, including Brandeis Goldschmidt, effectively debarred himself from offering a higher or lower price for eastern metal than the one fixed by common agreement between all the purchasers. The foreign trade organizations similarly debarred themselves from selling at a higher or lower price than the one fixed by common agreement between them as sellers. In the absence of these agreements, the purchasers could have contracted their purchases at differing prices if they had wished to buy at all. The Brandeis price remained the same irrespective of the quantities purchased by each of the buyers. For example, PUK purchased around 20 times the quantity purchased by Giulini, but both parties paid the same price per tonne. By entering into these agreements the foreign trade organizations agreed not to compete with each other on the price and trading conditions for supplying aluminium to the EEC and other western markets.

11.2. *The sharing of a source of supply*

Just as the purchasers under the Brandeis and Eisen und Metall agreements had no freedom to negotiate individual prices with the suppliers, so they had no real discretion as to the quantities they were to purchase. Some of the western producers would not have purchased at all, had they been free. These quantities were fixed by calculating the share of each purchaser's 'sales in western Europe' of the total in a given year and the subsequent allotment of a corresponding share of the total of eastern metal aluminium to be bought. The circulation of the lists of 'Eastern Metal Distribution' enabled each purchaser to compare his own allotment with that made to other purchasers, and to ask for explanations from Swiss Aluminium of the quotas to be taken up by the other purchasers.

The distribution of eastern metal was a matter which was raised at EPAA meetings. The unwillingness of Alsar to take up its prescribed quota was discussed by the EPAA Executive Committee. Alsar was eventually persuaded by members of that Committee to take up its quota. The system of allotment adopted under the Brandeis agreements and administered by Swiss Aluminium and the EPAA Executive Committee excluded by virtue of mutual disclosure and examination the possibility of purchasing a smaller quantity than that prescribed by the formula which all the purchasers had adopted.

11.3. *The removal from the market of secondary aluminium, scrap and semi-manufactures*

The agreements also restricted the import from eastern Europe of derived products. They prohibited the export to western countries (including the whole of the EEC) of secondary aluminium, scrap and semi-manufactures from Poland, and by fixing quotas for these products in the case of the USSR, Hungary, Czechoslovakia and the German Democratic Republic. Specific quotas were fixed for particular Member States of the EEC.

These quotas were fixed at so low a level that they effectively excluded access by independent aluminium users to supplies of these products. In the case of semi-manufactures the quotas were reduced from 4 064 tonnes in 1966 and 1967 to 2 540 tonnes per annum thereafter (table 2). These quotas represented less than one-quarter of 1 % of EEC production of semi-manufactures (including castings). Similarly the quotas for secondary aluminium and scrap were reduced in 1968 from a total of around 4,5 % of EEC consumption of secondary aluminium to around 2 %.

The restrictions on the supply of semi-manufactures, scrap, and secondary aluminium were the subject of vigorous enforcement of the Brandeis agreements. The western producers argue that these restrictions were imposed only to prevent evasion by the foreign trading organizations of their obligations concerning primary aluminium. Even if this could be shown to have been true, the provisions imposed were still restrictive both in their purpose and their effect, and aggravated the restrictions imposed on primary aluminium. (It may be noted that the imposition by a public authority of anti-dumping measures on one line of products to prevent dumping in another line of products is not permitted under the rules of GATT.) The consequences for the western competitors of the western producers is assessed below. By these clauses, the western producers also protected their own integrated semi-manufacturing operations and prevented semi-manufacturers in eastern European countries from trying to establish themselves as suppliers to the customers of the western producers.

11.4. *Restriction on opportunities for barter and conversion by third parties*

Barter transactions assume a particular importance in trade with countries whose currencies are not freely convertible. The history of the negotiation of the 1963 contract shows that Brandeis Goldschmidt was aware that aluminium from the eastern European countries was sold under barter arrangements.

From the beginning, Brandeis Goldschmidt was interested in buying aluminium from Raznoimport and the other foreign trade organizations provided that the sellers would guarantee that 'no quantities other than those bought by Brandeis Goldschmidt would be sold direct or under barter deals to those markets' (i.e. 'western markets').

However, it was not until 1968 that the contractual restrictions undertaken by the foreign trade organizations were extended to include exchange, barter or other forms of supply, and interventions of Swiss Aluminium to prevent barter transactions by Metalimpex, Impexmetal and Raznoimport show the operation of this restrictive clause.

The restrictions were also extended in that year to monitor the exports by the foreign trade organizations of aluminium for conversion in the EEC and other western countries and for re-importation into the USSR, Poland, Hungary, Czechoslovakia or the German Democratic Republic.

The sellers were thereby prohibited from contracting with any person within the EEC for the conversion of aluminium without the consent of the buyers under the Brandeis agreements.

Requests from the sellers for permission to export for the purposes of conversion were referred by Swiss Aluminium to the leading producer in a given country. The western producers so consulted included VAW for the Federal Republic of Germany, Holland Aluminium for the Netherlands and VMW for Austria. In the majority of cases the conversion was carried out by an EPAA member or subsidiary thereof.

Just as independent users of aluminium were denied access to supplies of eastern metal by the Brandeis agreements, so were they denied the opportunity of carrying out the conversion (for example, the production of aluminium powder, flake, foil and extrusion) of such material.

The agreement made from 1967 with Impexmetal mentioned in 1.4.2 excluded any non-member of the 'buyer's group' from carrying out such work.

The above restrictions on conversion decreased still further the range of activities open to independent processors and fabricators by preventing them from converting or transforming eastern metal even where the resultant products were to be re-exported to the USSR and eastern Europe. Moreover the restrictions on barter agreements prevented other undertakings trading with the USSR, Poland, Hungary, Czechoslovakia, the German Democratic Republic, and Bulgaria from receiving payment in aluminium for goods and services applied to those countries.

11.5. *Restriction on resale without remelting*

A further restriction of access by third parties to supplies of aluminium from eastern Europe arose

from an undertaking among the western producers that aluminium purchased under the Brandeis agreements was not to be sold in its original condition to third parties.

Even if enforcement of the agreement (2.3.6) had been the only reason for imposing this condition, the understanding was still restrictive in its purpose and effect since its result was in practice to prevent resale of eastern aluminium to third parties in original form.

The fact that it was agreed that eastern metal could be sold to other EPAA members without remelting demonstrates an intention to keep the circulation of eastern metal within the group of EPAA members. The remelt obligation served to ensure that eastern metal stocks of primary ingot did not reappear on the market, particularly in the hands of merchants. By taking mostly 99,5 % (and only in some cases 99,6 and 99,7 %) ingot the western producers minimized the risk of eastern metal reappearing on the market, since the number of potential customers for that material was lower than for extrusion billet or rolling slab, etc., which could have been purchased by the western parties according to the express terms of the Brandeis agreements.

That the requirement to remelt was an appreciable impediment to disposing of aluminium purchased under the Brandeis agreements in the form received may be seen from the evidence of VMW, which in 1976 had requested the supply of ingot from the USSR in a 'neutral' form (i.e. without cast marks).

11.6. *Concerted action and the London Metal Exchange*

11.6.1. The London Metal Exchange and the 'spirit of the agreement' clause

The action taken by the western producers in relation to the London Metal Exchange also demonstrated an intention to limit markets by confining the selling of aluminium in western markets to western aluminium producers. By entering into the form of Brandeis agreement in force from 1968 onwards, the foreign trade organizations expressly agreed that the trading of aluminium on the London Metal Exchange would give the parties the right to renegotiate and could bring about the termination of the agreement.

The western producers have argued that the clause relating to the London Metal Exchange was merely a *clausula rebus sic stantibus,* providing for renegotiation of the Brandeis agreements in the event of a change in the nature of the market. Even on that assumption the clause would still have been a restriction of competition in so far as it prevented or discouraged the development of new markets. The Brandeis agreements were after all adopted in the interests of the western producers and the foreign trade organizations, each of which knew that trading on the LME (which it was in the power of each to encourage and bring about) would jeopardize such interests. A *rebus sic stantibus* clause restricts competition when the parties have an interest in ensuring that the agreement remains in force and therefore in ensuring that the competition contemplated by the clause does not occur. Moreover the evidence shows that the adoption in 1968 of the clause relating to the London Metal Exchange was introduced to meet a specific contingency: the declared intention of the foreign trade organizations to sell their aluminium through the LME.

These intentions were made clear at the Eastern Metal Conference held in June 1967 in Budapest and again in Zurich on 9 and 10 September 1970. In the 1968 to 1970 series of agreements the 'spirit of the agreement' clause was expressly extended to cover the possibility of aluminium being traded on the London Metal Exchange and continued in later contracts.

In October 1970 the London Metal Exchange Committee sent circular letters inviting the recipients to consider the trading of aluminium on the London Metal Exchange.

These events set out in 5.3.8 to 5.3.11 show that the western producers did not want aluminium to be traded on the LME. Such trade in their view would have opened western markets to eastern metal and have affected the stability of prices. The evidence set out in 5.3.6 also shows that the 'spirit of the agreement' clause was intended to apply to both western and eastern parties. If any western producer or foreign trade organization had reserved the right to trade through the LME, this would have jeopardized the Brandeis agreements.

There was no specific reference to the LME in the 'spirit of the agreement' clause in the agreements between Brandeis Goldschmidt and producers then situated in the EEC. It is however clear that all the western producers must have known, whether or not this provision was explicit in their agreement with Brandeis Goldschmidt, that the

trading of aluminium on the LME would have threatened the continuance of the Brandeis agreements taken as a whole.

11.6.2. The shared policy of the EPAA members towards the London Metal Exchange

It is also clear from their replies to the circular letter from the LME Committee that the western producers concerned in this proceeding had decided that the sale of aluminium on the London Metal Exchange would be inimical to their interests. Their replies showed great similarities and were clearly the result of concertation.

It is also clear from the minutes and other records of EPAA meetings that the policy of members towards the LME was jointly determined or confirmed at those meetings.

Their decision to appoint BACO on behalf of all members to observe and report to all members on the attempts to create an aluminium market on the LME clearly demonstrates that the members of the EPAA had a shared policy on this question. The appointment of BACO, an EPAA member, 'to keep an eye on the tendencies on the London Metal Exchange' also necessarily implies that each EPAA member clearly understood that no other EPAA member would be making metal available for trading on the exchange, since any such action would run the risk of immediate disclosure to all members.

There was a general prohibition contained in the Brandeis agreements on selling aluminium in western markets, which in itself was sufficient to prevent the foreign trade organizations themselves trading aluminium on the LME. The parties acknowledge by the 'spirit of the agreement' clause that the trading of aluminium on the LME by any party would undermine the basis for these agreements.

This action was the means adopted by the parties to these proceedings to prevent the trading of aluminium in a market which they could not themselves expect to regulate. The parties strove to prevent the creation of a market which would have been a new means of distribution of aluminium and within which the pressures of supply and demand would have solely determined the price.

By formulating a joint policy on what markets they would supply, and what markets they would refuse to supply, the western producers and the foreign trade organizations infringed Article 85 (1) by agreeing to limit markets. Each party gave up its freedom to sell aluminium in a particular market in the knowledge and on the understanding that the other parties would also do so.

12. **The object or effect of the arrangements**

12.1. *The object or effect of the arrangements*

The western producers, Brandeis Goldschmidt, Eisen und Metall and the foreign trade organizations entered into an arrangement to stabilize prices, to share markets and to deny access by non-participating users to sources of supply not controlled by the western producers. That the arrangement was likely to have anti-competitive effects was inevitable and the effects which followed could have been objectively foreseen. The facts show that the object of the arrangement was largely attained and that there were appreciable effects upon competition.

12.2. *The arguments of the parties on effect on competition*

It was argued that the competition presented by the allegedly 'dumped' eastern metal was not competition in the context of a lawful free enterprise economy, so that Article 85 (1) could not apply; but if it was, then the effect on competition could not be appreciable because the sales of eastern metal would have been at dumping prices and all the conditions required to impose anti-dumping duties would have been satisfied. Either there would have been no sales because there would have been anti-dumping reactions (so the price of the eastern metal would have had to rise to where it could command no sales) or anti-dumping measures would have been ineffective (when Article 85 (1) could not apply because then the competition would not have been 'competition' within the meaning of Article 85 (1)).

This argument assumes that private parties may arrogate to themselves public functions. It obscures a clear difference between the regulation of trade by a public authority and regulation by cartels. A public authority must take into account the rights and interests of third parties as well as a general public interest. A cartel is habitually for the benefit of the participants and takes no account of the other two concerns. As a legislative provision Article 85 (1) is peremptory; its provisions cannot be contracted out of or otherwise undercut (unless in the scope of Article 85 (3)). The protection of the 'lawful free-enterprise economy' is also entrusted to a public authority. The Commission in particular has the duty to pursue a general policy designed to apply the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases 100 to

103/80 'Pioneer' [1983], paragraph 105, page 1825). That finding was in respect of the competition rules, but must be equally applicable to dumping cases.

The tonnages delivered to the EEC under the Brandeis arrangements entered the EEC legitimately as far as concerns import quotas and the like. Such circumstances cannot by themselves give rise to a situation of legitimate self-protection (see 'Pioneer' judgment, already cited (paragraph 89)).

Apart from this fundamental difference the purposes and methods of regulation of trade, which could have been adopted by the governments concerned, would have been significantly different from the Brandeis agreements.

The imposition by government of quota restrictions, even if imposed at the same level as those provided for in the Brandeis agreements, by all the countries concerned, would not by itself have reserved the supplies to the western producers. Independent users would have been free to buy the quantities concerned, and the fact of their having an additional and independent source of supply would have had an effect on the general price level for all supplies of aluminium, whether from western or eastern Europe.

The Brandeis agreements, however, were made to ensure that independent aluminium users would not have direct access to such supplies.

The imposition of a system of import licensing (as existed in certain Member States (5.4) would not by itself have confined supplies of aluminium from eastern Europe to the western producers. Other users of aluminium would have remained free to apply for and obtain the necessary licences. In the case of Italy and the Federal Republic of Germany, independent users did obtain import licences but the sales made or intended were the subject of interventions by the western producers under the Brandeis agreements.

Equally, the imposition of anti-dumping duties would not have confined the products subject to the duty to the circle of western producers.

None of the above governmental measures – the imposition of import quotas, anti-dumping duties, or an import licensing system – would have had the same effect on competition as the Brandeis agreements, even if the import levels decided upon had been the same as the quotas fixed under the Brandeis agreements. None of these governmental measures would have deprived independent users of access to supplies of aluminium to the extent achieved by the Brandeis agreements. Since these independent users were in competition with the western producers for the sale of aluminium products in both semi-manufactured and finished form, the denial of access achieved by the Brandeis agreements also brought about an appreciable restriction of competition.

The western producers' arguments rely on the presumption that the governments of all EEC Member States, and those of all western European countries outside the EEC, would have introduced measures having the same or more restrictive effects than those resulting from the Brandeis and Eisen und Metall agreements. The parties have, however, adduced no evidence to show that any or all of these governments together would or could have acted in such a far-reaching way.

Even if it were proved that the governments of all the European States concerned might have taken measures having the same effects in all respects as the Brandeis and Eisen und Metall agreements, for all the aluminium products concerned, undertakings are nevertheless not entitled to pre-empt such measures by deciding for themselves how much competition there should be in western Europe, or how much aluminium should circulate in those territories.

The evidence is that governmental measures, if any had been adopted, would not have been as restrictive as the Brandeis and Eisen und Metall agreements.

The Brandeis agreements imposed more restrictions on imports of aluminium from eastern Europe than were in fact imposed in the form of quotas or licensing requirements by the Member States of the EEC and other western European countries.

The quotas permitted under the Brandeis agreements were far below the legal limits imposed by certain western European governments and the Brandeis arrangements effectively frustrated the acts of those governments.

It was never the policy of the western governments to restrict the import of scrap and, in 1973, the EEC went so far as to control the exportation of scrap to alleviate one of the recurrent shortages. The shortage of scrap was at least in part the result of the removal from the western markets of eastern scrap, directly due to the operation of the Brandeis agreements. The restrictions on scrap imports in the Brandeis agreements were nevertheless maintained and enforced regardless of the scarcity

of supplies of scrap in western Europe and, to the extent that secondary smelters had to substitute (more expensive) primary ingot for scrap, the primary smelters in western European countries profited to the detriment of the customers of the secondary smelters.

The very fact that there were instances where independent users did obtain supplies of aluminium outside the Brandeis agreements demonstrates that the governments of the countries where such users resided were not prepared to impose, as acts of government, the same restrictions as those of the Brandeis agreement. There is no evidence that they would have done so in the absence of the agreements.

The measures which could have been adopted by Member States and other western European countries would not have been as restrictive as the Brandeis agreements. In particular, they would not have involved both quantitative limitations and minimum prices, nor would they have allocated the quantities only to the western producers, nor would they have excluded all primary and secondary aluminium, semi-manufactures and scrap. Nor would they have enabled the western producers to determine for themselves in negotiations with the eastern European producers what levels of imports would be permitted and at what price, for periods of up to five years at a time, without regard for the structure of competition or the interests of third parties.

In addition to their general arguments concerning unfair competition the western producers also argued that the Brandeis agreements were justified because the rules on dumping contained in the GATT and legislation made thereunder did not give them the protection to which they considered they were entitled since these rules allegedly could not in practice be applied to sales made by the foreign trade organizations.

Undertakings are not entitled to make restrictive agreements which damage the interests of competitors and consumers merely because they consider that the existing legislation is not adequate or practical for their own purposes. It is clear, from the evidence concerning the negotiation of the agreements and the conduct of the western producers in enforcing them, that the western producers sought and achieved a greater measure of protection from competition than would have been achieved through the application of anti-dumping legislation. Their argument as to the alleged impracticality of anti-dumping rules should be seen in that light. Since the arrangement they made was more restrictive, it is correct that anti-dumping measures would not have given the western producers as much protection.

Moreover, if governments of States, whether within the Community or elsewhere, decide to adopt legislation which requires a certain procedure to be followed and certain criteria to be fulfilled before a public authority will intervene to regulate trade, this decision in no sense justifies what is said to be remedial action, in the form of restrictive agreements, by the industries concerned should they think the procedure inconvenient or the protection given insufficient for their private interests.

The western producers have argued in the course of the proceedings that the anti-dumping rules of GATT and of legislation made thereunder could not in practice have been invoked to prevent dumping by aluminium producers in eastern Europe because of the difficulty of establishing the domestic market prices of those producers and hence determining a margin of dumping. If this were correct, then the western producers could hardly also argue, as they have done, that anti-dumping measures with similar effects would have been imposed in the absence of the Brandeis agreements.

The alleged impracticality of legislation is a matter for legislative correction and does not justify the making of restrictive agreements by undertakings. The argument that anti-dumping legislation could not be used because of the difficulty of establishing domestic market prices is based on an incorrect interpretation of the legislation in question, as explained in 5.4.2.

12.3. *Whether the effect on competition was appreciable*

An assessment of the effects of the Brandeis arrangement is made above in 5.2. As a percentage of the non-integrated market, which comprised the likeliest clientele for eastern ingot, it varied from 13,2 to 19,9 % of estimated consumption. This is a significant part of the market.

Some of the undertakings contended that even this was not in all the circumstances appreciable. If this were true, then the western producers were participating for up to 13 years, incurring expenditure which they considered onerous. That the agreement was continued for 13 years, and that its renewal for a further five years was actively sought, suggests that this contention is unfounded and was not seriously believed by the western producers during the running of the agreements. In contradiction of their arguments (rejected above)

that anti-dumping legislation would have been ineffective, the western producers also argue that the foreign trade organizations would have dumped aluminium in western Europe if the Brandeis agreements had not been made; this would have attracted anti-dumping duties. Accordingly, the western producers conclude, the Brandeis agreements had no appreciable effect on competition because any effect which did occur would in any event have occurred. This argument is a variation of the argument already dealt with above and the reasons for rejection need not be repeated.

It must be concluded that the Brandeis arrangements caused restrictions or distortions of competition which were appreciable, not to say substantial.

13. **Effects on trade within the Community**

The participants in the Brandeis agreements had between them important production or sales interests in all the Member States (both before and after the 1973 enlargement). An arrangement which allocated eastern metal to the incumbent participants in proportion to their own production was likely, out of necessity, to affect trade between Member States because unfettered access to the Community would certainly have caused different trade flows.

The Brandeis arrangement prevented third parties from effecting parallel imports into the Community and the remelt obligations also prevented inter-State trade because participants who were potential sellers of unaltered eastern metal were prevented from selling.

The restrictions imposed by the Brandeis agreements affected the supply of primary and secondary aluminium, scrap and semi-manufactures within the EEC. All of these products are, to a greater or lesser degree, the raw material for further processing or fabrication into finished products. Agreements which affect trade in raw materials must also necessarily affect trade in products made from those materials.

The removal from the market of eastern scrap at a time when Community scrap was in very short supply forced fabricators of semi-manufactures to use higher cost ingot from the western producers and some adverse results on their prices (and therefore their possibilities for intra-Community trade) was an inevitable result.

The structure of competition within the EEC was altered by the removal of an important alternative source of aluminium which independent fabricators and processors could have used to compete with the fabricating and processing operations of the vertically integrated primary aluminium producers. The participation of all the parties to an arrangement having this result must have affected trade between Member States.

The Brandeis agreements were furthermore designed to curtail the activities of traders, including those based within the EEC, in commerce between the eastern European countries concerned and western Europe. This was for instance one of the reasons why the restrictions in the Brandeis agreements extended to the USA. During the negotiations for a new agreement to run after 1976 BACO stated that 'the USA must be covered by the agreement because of ease of switching by merchants back into European market'.

If merchants could 'switch' with 'ease' between the USA and Europe, such transactions could have taken place within the EEC. The fact that traders and other independent users were denied access to aluminium from the USSR, Poland, Hungary, Czechoslovakia, Bulgaria and the German Democratic Republic, necessarily meant they could not trade aluminium from those sources between Member States of the EEC.

Opportunities for trading in aluminium within the EEC were also curtailed by the action taken by the western producers to prevent the foreign trade organizations from offering to sell through the London Metal Exchange. Contracts made in the course of LME trading may concern parties in several Member States: the seller may well be in one Member State, the purchaser in another and the metal warehouse holding the contract quantities in a third. The prevention of LME trading could not have failed to affect trade between Member States and would have affected prices for aluminium throughout Europe.

The major participants situated outside the EEC such as Alcan, Swiss Aluminium, Ardal og Sunndal Verk, Elkem, Norsk Hydro and VMW, either had important export markets in the EEC throughout the running of the agreements, or had subsidiary companies within the EEC producing primary and secondary aluminium and semi-manufactures during that time. The Brandeis agreements entered into by the above producers protected both the markets in which they were situated, namely Canada, Switzerland, Norway and Austria, as well as the EEC markets in which they had these interests and activities.

Producers outside the EEC and Swiss Aluminium in particular took action under the Brandeis agreements to interrupt supplies of aluminium from eastern Europe to purchasers in the EEC.

The evidence, particularly that provided by the history of the enforcement of the agreements, shows that the western producers themselves considered that markets in countries in western Europe outside the EEC could not be separated from those within the EEC. They knew that what occurred in those markets would have an effect on EEC markets and vice versa.

Once aluminium from eastern European sources was in free circulation in any country of western Europe, it would have been very difficult if not impossible to control its ultimate destination, as the western producers have themselves argued in the context of the restriction on sale without remelting. Alcan UK, BACO and later RTZ participated in the agreements to prevent aluminium from eastern Europe arriving in EEC and other western markets as well as that of the United Kingdom. The United Kingdom and EEC markets could not, in view of the structure of the industry, be regarded as commercially isolated from each other, as was well understood by the western producers. Alcan has itself argued that effects on prices in the United Kingdom would have been felt in 'mainland Europe' and that 'British suppliers would have been obliged to seek business in Europe to replace sales lost to eastern European suppliers'. The conduct of BACO and Alcan was consistent with this view.

The scheme of the Brandeis agreements required the participation of all the parties, whether situated within or outside the EEC, to make the arrangement effective.

Article 85 refers to agreements which affect trade between Member States and not the effects produced by individual participation in such agreements.

Even if it were to be proved that the individual participation of certain undertakings had in itself no appreciable effect on trade within the EEC, this would not mean that they had not participated in an infringement of Article 85 if the whole arrangement in which they took part affected trade between Member States.

The fact that some of the quantities of 99,5 % primary ingot sold under the Brandeis agreements did not pass through any EEC territory does not thereby mean that the Brandeis agreements produced no effects within the EEC. This was merely an incident of the arrangement; the whole arrangement was designed to and did produce effects within the EEC as well as elsewhere. Each participant could see, from the text of the agreements it entered into, that their purpose and effect was to restrict all other supplies of aluminium in its various forms to western countries, including the EEC. Furthermore, each participant knew that this was the basis on which all the other participants had entered into the agreements. All the participants were party to a restrictive arrangement to which Article 85 applies. It is therefore not a defence for individual parties to stress the small scale of their participation. In so far as the scale of participation is represented by the amounts purchased, this was fixed by common agreement to reflect market shares, and not a greater or lesser willingness to participate in the restrictive arrangement.

The criterion used to determine the quotas to be taken up by each western producer was 'sales in western Europe'. By the system described in 2.2 above, the western producers shared the amounts of primary ingot to be purchased in a ratio corresponding to their 'sales in western Europe'. The expression 'sales in western Europe' included supplies of primary aluminium by non-EEC producers to the EEC, whether by way of sale as ingot, delivery to subsidiary companies or deliveries as 'swap' transactions.

The implementation of the agreements thereby involved a close connection with the trade of each participant in aluminium within the EEC.

The Brandeis arrangements affected not only the quantities of metal traded within the Community. The arrangements neutralized an important competitive pressure on the price of aluminium and its products within the EEC. This effect on price necessarily affects trade between Member States because the agreements made the price of all aluminium circulating within the EEC different from (and probably greater than) what it might have been.

14. Jurisdiction to apply Article 85

14.1. Certain undertakings have argued that the Commission does not have, or ought not to

exercise, jurisdiction over undertakings which are not situated within the Community, nor over acts committed outside the Community affecting trade outside the Community even if these acts also affect trade between Member States of the Community.

14.2. The main object of the Brandeis arrangements was to limit the tonnages of ingot and cable offered and to amputate supplies of other aluminium products; the reduced supplies were directed mostly to the EEC and to the participants in the Brandeis arrangements in such a way that their market shares were protected. The protective effect was substantial within the EEC. Parts of the common market were isolated from each other and from non-member countries. It follows that this substantial restrictive effect upon competition was felt throughout the territory of the common market (the Six and then the Nine).

14.3. All the western producers, whether within or outside the Community, had a common interest in the efficient functioning of the Brandeis arrangements and took part in essentially the same fashion. The facts show that the participants were aware that the Brandeis arrangements would collapse if they were not comprehensive. The principal effect being felt within the common market, the Commission is competent to ensure that competition within the common market is not distorted, for that is its duty under the Treaty.

14.4. Concerning those of the participants who were established within the territory of the common market, there can be no questioning the Commission's jurisdiction over those undertakings.

14.5. Of those participants outside the Community, some controlled subsidiaries in the common market; the Commission has jurisdiction over those. Formal separation between parent and subsidiary companies, where the non-EEC parent acts in the common market through a subsidiary, cannot be used to escape from unity of conduct in the market in order to circumvent the rules of competition if the parent company exercises its power of control over the subsidiary to apply a restrictive agreement or impose abusive conduct (Judgments of the Court in Case 48/69 'ICI-Commission' [1972], page 619, and in Cases 6 and 7/73 'Commercial Solvents' [1974], page 223).

14.6. Others of the participants were outside the common market but traded into the territory. In its Judgment of 25 November 1971, the Court of Justice held 'the fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of Article 85 since the agreement is operative on the territory of the common market' (Case 22/71 'Béguelin' [1971], paragraph 11, page 949). The Béguelin case concerned a vertical exclusive distribution agreement between a non-Community manufacturer and a Community distributor. The reasoning must be equally applicable to horizontal agreements between competitors where some are in the Community and some outside. Moreover there is no reason to distinguish in such horizontal agreements between the restrictions accepted towards each other by those within the common market and those outside, and those restrictions accepted towards each other by those wholly outside, subject always to the overall requirement that there be a substantial effect on trade between Member States.

14.7. There is no prohibitive rule of international law which prevents the application of Community law to all the participants in the Brandeis arrangements. Moreover there are no reasons of comity which militate in favour of self restraint in the exercise of jurisdiction by the Commission. The exercise of jurisdiction by the Commission does not require any of the undertakings concerned to act in any way contrary to the requirements of their domestic laws, nor would the application of Community law adversely affect important interests of a non-member State. Such an interest would have to be so important as to prevail over the fundamental interest of the Community that competition within the common market is not distorted (Article 3 (f) of the EEC Treaty), for that is an essential means under the Treaty for achieving the objectives of the Community.

Undertakings in the United Kingdom prior to accession

14.8. The undertakings concerned are Alcan UK (from 1963 to 1967), RTZ and BICC (from 1971) and BACO (from 1963 to the accession of the United Kingdom). To the extent that the Brandeis arrangements served to protect the UK market

from competition from eastern metal prior to accession, the Commission does not have and has never sought jurisdiction over those undertakings. It does claim and exercise jurisdiction over them in respect of the effect of the Brandeis arrangements upon trade in the then Community. In this respect, the four undertakings are indistinguishable from undertakings which were at all material times outside the common market. The undoubted interest of the UK Government of the day in protecting the UK market from competition need not be balanced against the interest of the then Community in applying Article 3 (f) of the EEC Treaty. The two interests were not incompatible and the participants were free to act so as to respect both interests.

14.9. After accession, the four undertakings were Community undertakings and their actions in support of the Brandeis arrangements so as to protect the UK market must be considered and treated as indistinguishable from the similar actions taken to protect the 'old' Community by undertakings situated at all times within the 'old' Community.

B. *REGULATION No 67/67/EEC*

15. Kerametal and Metalimpex argued that the agreements that they had with Brandeis fell within the terms of Commission Regulation No 67/67/EEC (1). Although this argument was not made for the other sellers, it would serve them equally and is considered in relation to them all.

The supply of aluminium through Brandeis Goldschmidt was only incidental to the restrictions agreed between competitors which was the main object of the Brandeis agreements, and which could not have benefited from Regulation No 67/67/EEC.

The exemption under Regulation No 67/67/EEC could only apply to 'certain goods', that is to say those goods for which exclusivity was accorded (Article 1). In this context, this could only mean aluminium ingot. The agreements between the foreign trade organizations and Brandeis included a prohibition on sale of secondary and semis and an almost total prohibition upon the sale of scrap. These goods not being the subject of exclusivity of sale, the Regulation could not apply to the agreements concerning them.

Article 3 of Regulation No 67/67/EEC removed the group exemption from arrangements where the contracting parties made it difficult to obtain the goods to which the contract relates from other dealers within the common market, and in particular where the contracting parties 'took other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling the products within the territory covered by the contract'. It is clear from the facts that the actions of Brandeis Goldschmidt in putting, and of the foreign trading organizations in acceding to, requests to prevent imports into the Community and other western States, except through Brandeis Goldschmidt, fulfilled this test from the Regulation.

Any of these reasons is sufficient to remove the benefit of Regulation No 67/67/EEC from the Brandeis arrangements with the foreign trade organizations.

C. *ARTICLE 85 (3)*

16. **Introduction**

The provisions of Article 85 (1) may be declared inapplicable in the case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In accordance with Article 4 (1) of Regulation No 17, however, agreements which restrict, prevent or distort competition within the meaning of Article 85 (1) and in respect of which the parties thereto seek exemption, must be notified to the Commission and no exemption may be granted until such notification has been made.

16.1.1. Article 85 (3) and notification

Article 4 (1) of Commission Regulation No 27 (2) requires that all notifications made under Article 4 (1) of Regulation No 17 shall be

(1) OJ No 57, 25. 3. 1967, p. 849/67.

(2) OJ No 35, 10. 5. 1962, p. 1118/62.

submitted on the appropriate form (A/B). Article 4 (2) of Commission Regulation No 27 furthermore requires that the notification shall contain the information asked for in form A/B.

The requirement of the Regulation as to the notification is not a mere formality. In the absence of notification, in accordance with the requirements of the Regulation, the restrictions may not have exemption under Article 85 (3) (Case 30/78 'DCL v. Commission' [1980], points 23 and 24, page 2229).

A notification does not make eligible for exemption conduct which is not, or is not sufficiently, clearly described in the notification.

The first notification was made on form A/B on 17 December 1970 after the Brandeis arrangements had been in operation for more than seven years. It would in any event be impossible to grant exemption for the arrangements prior to that date, by virtue of Article 6 (1) of Regulation No 17.

The 1970 notification was deficient in respect of:

— the parties to the agreement,

— the contents of the agreement,

— the means for achieving the aims of the agreement.

The notification was deficient to a substantial degree, in particular in relation to the means for achieving the aims of the agreement.

The relevant questions of section III of form A/B require the parties to disclose whether and how far the notified agreement relates to:

— adherence to certain buying or selling prices, discounts or other trading conditions,

— sharing of markets or sources of supply,

— restrictions on freedom to . . . resell to third parties.

A correct response to these questions would have disclosed that the aluminium bought under the Brandeis arrangements was allotted on fixed quotas at a uniform price. The notification referred instead to the purchases as a 'Vorgang' ('procédé' in the French version and 'procedure' in the parties' own English version), giving the impression that the purchases were a way of conducting business. When combined, as it was combined, with references to the producers purchasing 'each one for itself', 'the individual purchasing intentions' of the producers and 'the purchase contracts concluded outside of the EEC' by the individual western European producers, the impression given is one of sales made on an *ad hoc* basis with each producer free to negotiate on price and quantity provided only that between them they took up all that was on offer. The notification also contained two incorrect statements which further obscured the aims and content of the agreement – the statement that the purchasing possibilities of dealers were not restricted and the statement that each western producer bought on his own account (when Swiss Aluminium and Alcan bought on behalf of other producers).

The notification must be seen against the background factors that:

— through the contacts with the Bundeswirtschaftsministerium, the parties had been put on express notice that the Brandeis arrangements might be questionable under Community law,

— the process by which the agreements made between Brandeis Goldschmidt and the EEC based producers came to be in a form which suppressed all mention of the restrictions undertaken by the foreign trade organizations was completed by June 1968. The letter from the legal adviser to VAW of 24 April 1968, following the meeting on 23 April between VAW and Montedison, shows that this process was undertaken in contemplation of approaches which might be made to the Commission to establish the legality of the Brandeis agreements under Article 85.

The third preamble to Regulation No 27 states that 'it is for the undertakings . . . to transmit to the Commission information as to facts and circumstances in support of . . . notifications under Articles 4 and 5 (of Regulation No 17)'. Article 4 of Regulation No 27 makes form A/B obligatory and that statutory form requires the representative of the notifying parties to attest that the contents of form A/B and any annexes is accurate.

In Case 106/79 'VBBB et al. v. Eldi' [1980], paragraph 10, page 1137, the Court of Justice held that:

> 'By means of notification the Commission must be supplied with the information necessary to enable it to take the decisions provided for in Regulation No 17. If the agreement has been reduced to writing, and if a copy of its entire text is attached to the form, the information given on that form is intended solely to facilitate verification. If that information is correct, and above all if it relates fairly to the provisions which at the time were considered the most important, the objectives of the notification seem to be obtained.'

In that case, the form A/B referred only to certain articles of the agreement, which were thought to be particularly relevant, but the full text of the agreement was attached. The full agreement was therefore notified and the notification was proper.

In the present case, the parties deliberately omitted to annex the agreement. Apart from being contrary to the express terms of question II.1 of form A/B, parties who choose not to annex the text of the agreement have a special duty to state fully correctly and fairly everything that would otherwise be apparent from the text of the agreement, and to omit nothing from form A/B that was relevant.

In their defence, the parties to the notification have argued that the Brandeis agreements necessarily implied joint purchasing at uniform prices and allotment in prescribed quotas, and that accordingly it should have been understood from the notification that the western producers were buying in such a manner.

However, in construing a notification to establish its meaning, the Commission is obliged to rely on statements made in the notification. In this case the details of the Brandeis agreements and of their implementation lay within the exclusive knowledge of parties making the notification. They were given the opportunity fairly and accurately to answer the specific questions of form A/B. They did not take this opportunity.

A notification must notify the terms of the agreements and must not leave the Commission to guess whether they exist or what they say. An undertaking cannot take advantage of a notification which is ambiguous (as this notification, even on the interpretation most favourable to it, is ambiguous) so as to obtain both protection from fines and, because the Commission has been misled, the opportunity to continue to practise unlawful behaviour.

Where, as in this instance, the parties set out to file a deficient notification, they cannot later be heard to say that the Commission is at fault because they succeeded. The Commission accordingly finds that the notification could not serve as a basis for an exemption of what the parties were really doing.

The second notification, on 27 February 1976, was as deficient as its predecessor and could not serve as a basis for a possible exemption either.

16.1.2. Estoppel

The western producers have argued that a principle of estoppel operates to prevent the Commission from denying the validity of the notification. They allege that sufficient information was imparted to enable the Commission to appreciate that the notification when submitted contained a number of omissions. They allege that the Brandeis arrangements were notorious from the press and that other directorates-general of the Commission should, in 1971, have been well aware of the Brandeis agreements; from these the Commission as an institution should have known their terms or at least their general trends. They allege that the notification was accepted as valid and that the lapse of time since then precluded the Commission from reopening the question of the accuracy of the notification.

These arguments do not withstand examination. The jurisprudence of the Court of Justice shows that the text of the notification (including the texts of annexed material) must stand on its own and be construed, strictly on what is notified, but fairly. Preliminary meetings with Commission officials cannot absolve the parties from the duty to make a fair and accurate disclosure in the notification of the arrangements they have made. This duty the parties failed to perform.

Even if officials of the Commission had in fact known the details or even the broad outlines of the arrangements, they had no power to commit the Commission to a suspension of the mandatory requirements concerning notification in Regulations No 17 and No 27.

Given the existence of a statutory method of notification, it cannot be right that the Commission should be treated as having known what it could have gleaned from newspapers or even what was known to some of its services. If it were so, there would be no need to notify – a newspaper cutting would suffice.

Similar considerations apply to the general assertion that the Commission cannot now deny the fair and accurate nature of the notification. The argument assumes that the Commission did at one time accept that the notification was fair and accurate (i.e. that it fully set out the nature of the arrangements made). Neither the Commission, nor any of its officials, could have come to such a conclusion without knowledge of all the relevant facts. What was known was that what appeared to be a notification had been made on form A/B and that the answers to the questions in that form were to be found mainly in the 'Begleitschreiben' which formed part of the notification. The notification did not, taken by itself, contain any evident errors or omissions.

The parties claim that registration of the notification demonstrated that it was accepted as valid. In a circular letter to those concerned dated 18 December 1970 it was stated that, although difficulties had arisen over the 'condition of non-publication', 'the legalisation of the purchases was not put into question'. (The use of the expression 'purchases' when describing the Brandeis agreements is noteworthy and confirms that throughout the period up to the notification and thereafter the restrictions undertaken by the foreign trade organizations had not been disclosed.)

The mere registration of a notification, or its physical receipt by a Commission official, cannot amount to the acceptance of its validity still less of its completeness or accuracy. All notifications are registered, but Article 15 (1) (a) of Regulation No 17 provides for fines should a notification be discovered to be inaccurate, while Article 15 (5) extends protection only to those matters falling within the limits of the notification. In both cases the necessary examination can only take place after the fact of registration.

The notifying parties at all times knew exactly the restrictive features of the agreements they had made. In 1968 the EEC-based producers took steps to suppress mention of most of these restrictions in the agreements they had made with Brandeis Goldschmidt.

They saw and approved the 'Begleitschreiben' which described the Brandeis agreements in a deficient manner. They are accordingly ill-placed to argue that the Commission should not have been misled by their notification. The parties are not protected by any principle of estoppel, especially where the conduct and statements relied upon were secured by misrepresentation.

16.2. *Article 85 (3) is inapplicable*

The Commission would have refused exemption even if the 1970 notification had been properly made, because the conditions laid down in Article 85 (3) were not met.

16.2.1. No improvement in the production or distribution of goods

An agreement which restricts access by actual or potential competitors to a source of supply hardly contributes to improving the production or distribution of goods or to promoting technical or economic progress. By restricting the freedom of competitors to obtain supplies from alternative sources the restrictions imposed seek the reverse of the benefits contemplated by Article 85 (3).

Even if the agreements had brought about objective advantages to third parties and the public, it would have to be shown that such advantages were of such a character as to compensate for the disadvantages which they cause in the field of competition.

In this case, whatever benefits the western producers may allege to have been brought about in respect of primary aluminium cannot justify the restrictions which were imposed on derived products such as secondary aluminium, semi-manufactures and scrap. Restrictions imposed on the supply of a base material which accordingly affect its price cannot contribute to an improvement in the production of derived goods since they must bear the burden of any increased costs, nor can it promote technical or economic progress.

The western producers have argued that without the agreement the market for aluminium would have been liable to have been seriously disturbed since uncontrolled imports from the East would have jeopardized the viability of western suppliers. Without the protection from the risks of what Alcan describes as 'gross, violent and unforeseeable fluctuations and depressions of price of the kind against which the arrangements were designed to guard', technical and economic progress would have suffered. The western producers argue that the fact that prices were in fact contained shows that consumers enjoyed the benefit of the agreements. The restrictions were, therefore, the parties claim, indispensable and did not eliminate competition in any respect.

If there were a risk, or even a likelihood of 'gross, violent and unforeseen fluctuations and depressions of price', it is a matter for public authorities to take into account in assessing what measures may be necessary for the regulation of trade. The public authorities in the countries in question, and the Community, in fact possessed powers to restrict imports or to impose duties. If the authorities in question did not have such powers, or if such powers were thought to be inadequate or unusable, this would be a matter for legislation and would not justify an agreement

between undertakings seeking to adopt or divert the existing rules to meet their own private purposes.

16.2.2. Consumers were not given any fair share of any benefit

The effect of the Brandeis arrangements on prices, both actual and potential, cannot be said to have reserved to consumers a fair share of the benefit resulting from the improvement in distribution. Third parties were deprived of access to sources of the raw material of their trade, without being given any opportunity to defend their own interests. Such a system can hardly be said to be one where they are ensured a fair or indeed any share of any benefit.

16.2.3. The restrictions were not indispensable

Even if the protection of the western aluminium market from competitive perturbation were accepted as an improvement in production or distribution, or contributed to economic progress, the Brandeis arrangements were not indispensable for the achievement of that purpose.

If EEC producers of aluminium had needed any protection from the competition offered by aluminium producers in eastern Europe, their proper course would have been to make an application to the public authorities entrusted by law with the regulation of trade.

16.2.4. Elimination of competition

Those parts of the agreements which had as their object or effect the confinement of supplies of eastern aluminium to the western producers and the maintenance of prices within their territories (especially the EEC) would not for a further reason qualify for exemption under Article 85 (3). The agreements enabled the western producers (themselves accounting for the entire primary aluminium production of the EEC) to regulate aluminium imports into the EEC from the only significant source which they did not directly own or control, thereby according them the possibility of eliminating competition in respect of a substantial part of the products in question.

These considerations would have sufficed to exclude the application of Article 85 (3) to all the agreements and concerted practices concerned by these proceedings.

D. *ARTICLE 15 (1) AND (2) OF REGULATION No 17*

17.1. The deficiencies of the notification have been considered, but the prescription period under Council Regulation (EEC) No 2988/74 [1] has expired and fines for the deficient notification are now time-barred.

17.2. The Commission may by decision impose fines on undertakings by virtue of Article 15 (2) where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. However, in the special circumstances of this case the Commission has decided not to impose fines.

E. *ARTICLE 3 OF REGULATION No 17*

18.1. It has been the Commission's consistent practice to issue a Decision establishing an infringement, even in cases where the parties have apparently brought an infringement to an end, if the Decision might clarify a point of law (see, for example, the express statement in Part IV of Commission Decision 75/497/EEC [2]). Such a practice makes for legal certainty and has been endorsed by the Court of Justice (see Case 7/82 'GVL v. Commission' [1983], paragraph 25, page 483).

18.2. There is now a considerable body of jurisprudence in competition matters which forms cohesive guidance to national courts. Articles 85 and 86 'create direct rights in respect of the individuals concerned which the national courts must safeguard' (Case 127/73 'BRT v. SABAM' [1974], paragraph 16, page 51), but these rights may be more apparent than real in cases involving horizontal cartels spread across many different national jurisdictions because of the difficulties for a private litigant in obtaining proof. It is the Commission's policy to encourage actions before national courts for enforcement of the prohibitions contained in Articles 85 and 86, as it pointed out in paragraph 218 of its Thirteenth Report on Competition Policy 1983. There is a further public interest therefore in producing declaratory infringement Decisions.

F. *CORPORATE SUCCESSORS AS ADDRESSEES OF A DECISION*

19.1. Kaiser contended that it could not be responsible for the actions of its predecessor Kapal when it

(1) OJ No L 319, 29. 11. 1974, p. 1.
(2) OJ No L 228, 29. 8. 1975, p. 17.

acquired Kapal as a going concern. BACO was merged into the British subsidiary of Alcan Canada in 1982.

19.2. So far as concerns Kaiser, it would be enough to rely upon existing jurisprudence, for the parent company of Kaiser Europe was itself directly involved in the earlier actions of Kapal and, following the judgment of the Court of Justice in Case 48/69 'ICI v. Commission' [1972], paragraph 662, page 619, no distinction should be made between the actions of parent and subsidiary unless the subsidiary can be shown to have real independence. The continuity of employment of senior officers of Kapal in Kapal and Kaiser Europe is also an indication of continuity of policy after the acquisition.

19.3. In respect of both Kaiser and Alcan, however, the Commission believes that they succeeded to the obligations of Kapal and BACO under the competition laws through the acquisition of those companies. Rights of action against any corporate body are not extinguished merely upon acquisition of the shares of the body and it would be against public policy to make an exception for rights under the competition laws. The Commission's decisions in other cases have adopted this view (see Decision 82/371/EEC [1], as amended by Decision 83/667/EEC [2], and see also Decision 84/405/EEC [3]),

HAS ADOPTED THIS DECISION:

Article 1

The following elements of the arrangements made by Brandeis Goldschmidt and Co. Ltd, and its subsidiary company Brandeis Goldschmidt and Co. AG, with the foreign trade organizations, and with the aluminium producers all named in Article 5, constituted infringements of Article 85 (1) of the EEC Treaty:

(a) the obligations undertaken by the foreign trade organizations not to sell, exchange, barter or otherwise supply primary and secondary aluminium, scrap and semi-manufactures to purchasers other than the aluminium producers named in Article 5;

(b) the obligations undertaken by the foreign trade organizations:

(i) not to sell aluminium in certain territories at prices lower than the purchase of the Brandeis agreements,

(ii) not to exceed an agreed quota for the export of aluminium cable in so far as it concerned Denmark, after accession of Denmark to the Community;

(c) the restrictions on import of aluminium into the EEC for the purposes of conversion and of the production of semi-manufactures;

(d) the 'spirit of the agreement' clauses relating to:

(i) exports of aluminium from other sources, in particular Yugoslavia and Romania,

(ii) the price of aluminium semi-manufactures,

(iii) the aluminium cable market;

(e) the arrangements not to make any quantity of aluminium available for trading on the London Metal Exchange, made:

— between the foreign trade organizations and the aluminium producers named in Article 5, through Brandeis Goldschmidt,

— between those aluminium producers.

Article 2

The following elements of the arrangements made by Eisen und Metall with Intrac on 20 March 1971 constituted infringements of Article 85 (1) of the EEC Treaty:

— the obligation not to export primary aluminium nor semi-manufactures to the Federal Republic of Germany except to or through Eisen und Metall,

— the agreement that those arrangements should operate within the framework of the agreement between Brandeis Goldschmidt and Intrac.

Article 3

The actions and decisions of the EPAA in support of the infringements referred to in Articles 1 and 2 constituted infringements of Article 85 (1) of the EEC Treaty.

Article 4

The application for exemption under Article 85 (3) of the EEC Treaty is hereby refused.

Article 5

This Decision is addressed to the following undertakings:

— Alcan Aluminium Ltd,
1, place Ville-Marie,
boîte postale 6090,
CND-Montreal H3C 3H2;

(1) OJ No L 167, 15. 6. 1982, p. 39.
(2) OJ No L 376, 31. 12. 1983, p. 7.
(3) OJ No L 220, 17. 8. 1984, p. 27.

— Alluminio Italia SpA,
(Alsar/Alumetal),
Piazza G. Marconi, 25,
I-00177 Roma;

— Ardal og Sunndal Verk,
Sørkedalsveien 6,
PO Box 5177,
N-Oslo 3;

— BICC Ltd,
PO Box 5,
21 Bloomsbury Street,
UK-London WC1B 3QN;

— Brandeis Goldschmidt and Co. Ltd,
4 Forestreet,
UK-London EC2P 2NH;

— Eisen und Metall AG,
Postfach 5 49,
D-4650 Gelsenkirchen;

— Elkem Spigerverket A/S,
Middelthuns Gate 27,
PO Box 5430,
N-Oslo 3;

— Gränges Aluminium,
Lux Backen 1,
Lilla Essingen,
S-Stockholm;

— Holland Aluminium BV,
Kantoorflat Damsigt,
Oosteinde,
NL-2270 AX Voorburg;

— Kaiser Aluminium Europe Inc.,
Rheinpark-Haus,
Postfach 30 02 30,
Cecillienallee 6 – 9,
D-4000 Düsseldorf 30;

— Metallgesellschaft AG,
Reuterweg 14,
D-6000 Frankfurt am Main;

— Montedison,
Foro Buonaparte, 31,
I-20121 Milano;

— Norsk Hydro A/S,
Bygdøy Alle,
N-Oslo 2;

— Péchiney-Ugine-Kuhlmann,
23, rue Balzac,
boîte postale 787-08,
F-75008 Paris;

— Reynolds Aluminium Deutschland Inc.,
Finkenwerderstraße,
Postfach 9 50 02 50,
D-2103 Hamburg 95;

— Rio Tinto Zinc Corporation,
6 St. James's Square,
UK-London SW1Y 4LD;

— Alusuisse Deutschland GmbH,
Seestraße 1,
D-7750 Konstanz;

— Vereinigte Aluminium Werke AG,
Georg-von-Boeselager-Straße 25,
Postfach 24 68,
D-5300 Bonn 1;

— Vereinigte Metallwerke Ranshofen Berndorf AG,
A-5282 Braunau-Ranshofen;

— v/o Raznoimport,
Smolenskaja Sennaja 32/34,
SU-Moscou G-200;

— Intrac Handelsgesellschaft mbH,
Schönholzer Straße 10/11,
DDR-Berlin (Pankow);

— Centrala Importowo-Eksportowa 'Impexmetal',
Przedsiebiorstwo Panstwowe,
boîte postale 6,
Wilcza 50 – 52,
PL-Warszawa 1;

— Kerametal Foreign Trade Co. Ltd,
Jasikova 2,
CS-829 66 Bratislava;

— Metalimpex,
Hungarian Foreign Trade Company for Steel and Metals,
boîte postale 330,
H-1393 Budapest;

and to the following association of undertakings:

— EPAA,
Königsallee 30,
Postfach 12 07,
D-4000 Düsseldorf.

Done at Brussels, 19 December 1984.

For the Commission

Frans ANDRIESSEN

Member of the Commission

TABLE 1

Brandeis agreement

Comparison between tonnages agreed, tonnages sold and first offers (1963 to 1976)

Year	Agreed tonnages							Tonnages bought (1)	Amount contracted for but not sold	Eastern group (first offer)	First offer minus tonnage sold
	USSR	Poland	Hungary	DDR	CSSR	Total	Part total				
	1	2	3	4	5	6	7 (6 – 2 – 4)	8	9 (6 – 8)	10	11 (10 – 8)
1963 (1 July 1963 to 30 June 1964)	40 000					225 200		17 500		88 000	
1964 (18 May 1964 to 18 April 1966)								40 500	17 498	86 000 to 88 000	36 149
1965	64 500		12 000 (2)	2 000				207 702			
1966	79 000		7 000	8 700				46 000			
1967		12 000	7 000	5 000				51 851			
1968 (5 February 1968 to 31 December 1970)	38 440	13 120	15 000	8 440	7 500	82 500		51 851			
1969	41 690	13 900	16 725	9 185	7 500	89 000		82 500		150 000	67 500
1970	44 950	16 085	17 975	8 990	7 500	95 500		89 000			
1971	47 818	17 110	19 124	9 568	7 980	101 600		90 000	5 500		
1972	52 602	18 824	21 035	10 522	8 777	111 760		93 500	8 100	150 000	56 500
1973	57 671	20 637	23 064	11 534	9 624	122 530		83 148	28 612	160 000	76 852
1974	63 600	22 760	25 435	12 721	10 612	135 128	99 647	100 505	22 025	170 000	69 495
1975	66 950	23 956	26 774	13 390	11 170	142 240	104 894	76 200	23 447	180 000	103 800
1976							50 000	68 820	36 074	190 000	121 180
								46 000			

(1) Alcan figures (1963 to 1970). Eastern Metal Distribution List (1971 to 1976).

(2) 1 July 1964 to 31 December 1965.

TABLE 2

Introduction of product limitations

Year	Supplier	Restriction	Remarks
1963	USSR	Primary aluminium ingots	Except 5 000 tonnes under existing obligations
1964	USSR	Alloy billets	3 000 tonnes free if western parties do not exercise option
1964	USSR	Not more than 3 000 tonnes of aluminium sheet to the United Kingdom	
1964	Hungary	Primary aluminium including wire rods	
1965	GDR	Existing semis exports are not to be increased	
1966	USSR	Supplies to Algeria are deducted from contractual quantity	
		Not more than 25 000 tonnes of secondary aluminium scrap to 'other countries'	
		Semis restricted to certain countries	2 000 tonnes free
1966	Hungary	Secondary aluminium scrap restricted	
		Semis restricted to certain countries	2 000 tonnes free
1966	DDR	Semis and secondary aluminium scrap restricted	1 500 tonnes cable free 1 000 tonnes scrap free
		No barter deliveries to Finland, Brazil, Argentina, India and Sweden	
		Interzonenhandel with the Federal Republic of Germany restricted to 1 250 tonnes per annum	
1967	Poland	Conversion into semis restricted to 1 500 tonnes	Can exclusively be done by western partners
1968	USSR	'Not to sell, exchange, barter or supply in any form or shape'	
		Approval of buyers required for conversion	
		Not more than 1 500 tonnes of secondary aluminium scrap per annum can be exported	
		'Spirit of agreement' clause includes trade on LME and aluminium cable market	
		Exports by Bulgaria are included in USSR quota	

TABLE 3

Contractual limitations

Year	Supplier	Restriction
1963	USSR	Argentina and Sweden free but sales price not lower than contract price
1964	USSR	3 000 tonnes of alloy billets not at prices which would undermine the 'spirit of agreement'
1964	Hungary	Aluminium ingots free to certain countries at prices not lower than agreed prices Western parties have first right of refusal for Canada and USA Increased exports of semis and/or lowering of prices by suppliers undermine the agreement
1965	GDR	Increased exports of semis and/or lowering of prices of semis by suppliers undermine the agreement
1966	GDR	Prices not lower than contractual prices for deliveries to Finland, Brazil, Argentina, India and Sweden
1968	All	Prices lower than contractual prices undermine the 'spirit of the agreement'
1971	USSR, GDR, Poland	No export of cable to Sweden
1971	Hungary	Cable to Sweden restricted to 700 tonnes of aluminium content per calendar year
1973	USSR, Hungary	No exports of aluminium dross allowed

TABLE 4

Tonnages bought from Brandeis Goldschmidt (1971 to 1976)

Company	1971	1972	1973	1974	1975	1976 (1 June)	As % of total
PUK	19 670	16 780	21 595	14 145	10 095	7 320	17,8
Alcan	12 810	11 650	14 260	9 325	8 815	6 330	12,5
Swiss Aluminium	13 800	12 514	14 530	11 280	11 090	6 600	13,9
VAW	8 780	7 665	9 385	6 420	5 685	3 970	8,3
BACO	5 490	5 605	6 080	2 765	3 040	2 830	5,1
Elkem	5 440	5 095	4 305	3 505	3 365	2 325	4,8
ASV	6 300	5 205	7 340	4 565	4 755	3 040	6,2
Endasa	4 110	2 570	3 320	2 415	2 270	2 025	3,3
Alugasa	—	1 738	2 240	2 005	1 880	1 475	1,9
Montedison (1)	3 510	3 035	4 070	5 480	2 995	1 750	4,1
VMW	3 090	2 495	3 085	2 270	2 015	1 245	2,8
Gränges	2 870	2 170	2 945	2 035	1 970	1 230	2,6
Norsk Hydro	2 190	1 813	2 485	1 795	1 675	1 260	2,2
Holland Aluminium	2 140	1 695	2 100	2 120	2 415	1 870	2,5
Giulini	600	580	470	710	1 135	825	0,9
Reynolds Aluminium	—	—	—	2 495	2 320	—	1,0
Metallgesellschaft	1 160	725	795	405	1 420	685	1,0
Kaiser-Preussag (2)	1 540	1 813	1 540	2 035	1 880	1 220	2,0
NLM	7 100	6 260	7 565	5 735	5 180	4 000	7,1

(1) Later Alsar/Alumetal.

(2) Later Kaiser Aluminium.

TABLE 5

Eastern metal contract (1968 to 1970)

Infringements

Year	Seller	Quantity (tonnes)	Quality	Destination	Comments by exporter	Conclusion
1969	Bulgaria	90	Ingots	Germany	—	Deducted from 1970 USSR quota
1970	USSR	1 000 (shipment)	Ingots	VAW (Germany)	—	To be deducted from 1971 quota
1970	GDR	2 200 (quotation)	Wire ingots	Germany	Reduced to 500 tonnes on conversion basis	Settled
1970	Czechoslovakia	10 000 (quotation)	Ingots	Switzerland and France	Unknown	Quotation through unknown Geneva dealer, apparently no business concluded settled
1970	USSR	19 (shipment)	Ingots	Turkey (Serratar of Istanbul)		Nominal quantity only for recording
1970	Hungary	200 (shipment)	Al Si-9	Alfa Romeo (Italy)	No shipment	To be deducted from 1971
1970	Hungary	4 000 (quotation)	Al Si-9	Alfa Romeo (Italy)	No quotation was made	
1970	Poland	1 000 (quotation £ 232 per tonne)	Ingots	England (from Rotterdam)	Destination 'free' countries only	To be deducted from 1970 quota
1970	GDR	3 000 (sold)	Ingots	Germany	Propose deduction in 1971	

TABLE 6

Enforcement of the agreements (1970)

Year	Source	Quantity (potential)	Destination (potential)	Remarks
1970	USSR	US $ 300 000	Turkey	Quota according to trade agreement
1970	USSR	1 000 tonnes	France (via Rotterdam)	
1970	USSR	Offer 5 000 tonnes per month	USA	
1970	USSR	152 tonnes	Spain	Redelivery under Brandeis Goldschmidt agreements
1970	Poland	1 000 tonnes	Switzerland	
1970	Poland	Offer US $ 523 per tonne	Argentina	
1970	Poland/Hungary	Offer 200 tonnes	Belgium	
1970	Poland	Offer 22 cents per lb	Hong Kong	Unlimited quantity
1970	Hungary	Offer 4 000 tonnes	Italy	
1970	Hungary	Shipment 200 tonnes	Italy	
1970	Hungary	Offer 500 tonnes	Greece	
1970	GDR	Contract 2 200 tonnes of aluminium wire	Germany	
1970	GDR	Contract 3 750 tonnes	Germany	
1970	GDR	Offer 5 000 to 7 500 tonnes	Germany	Offer for 1971
1970	GDR	Sale 3 000 tonnes	Germany	
1970	GDR	Offer 1 000 tonnes	Germany	

TABLE 7

Enforcement of the 1971 to 1976 agreements

Year	Source	Quantity (potential)	Destination (potential)	Remarks
1971	USSR	Exhibition in Basle	Western Europe	Potential export goods
1971	USSR	189 tonnes of aluminium sheet	United Kingdom	
1971	USSR	Offer to tender	Turkey	
1971	USSR	600 tonnes	Germany	Import licences (1969)
1971	USSR	Offer 1 000 tonnes	Netherlands	
1971	Yugoslavia	Sheet ingot	Italy	Re-export from USSR
1971	Yugoslavia	7 891 tonnes	Italy	Re-export from USSR
1971	Bulgaria	Not specified	Argentina	
1971	Bulgaria	471 tonnes	Italy	
1971	Poland	Not specified	Italy	Barter agreement
1971	Poland	200 tonnes	Italy	Discovered via import statistics
1971	Poland	780 tonnes	Switzerland, France, Italy	Conversion
1971	Hungary	Not specified	Italy	99,5 % granulated aluminium shot
1971	Hungary/Poland	500 tonnes	Rotterdam	Offer by Paris dealer
1971	Hungary	150 tonnes		Under contract price
1971	Czechoslovakia	500 tonnes	General	Offer to VAW
1971	Czechoslovakia	Not specified	General	Secondary alloy
1971	Czechoslovakia	120 tonnes	Austria	Approval was asked for conversion
1972	Bulgaria	1 000 tonnes	General	Offer by Paris dealer
1972	USSR/Hungary	17 788 tonnes	Western Europe	Secondary aluminium and scrap (1971)
1972	USSR	17 781 tonnes	Austria	Scrap
1972	Bulgaria	1 000 tonnes	Switzerland	Approval for conversion
1972	USSR	2 000 tonnes per year	Western Europe	General request for approval for conversion
1972	USSR	500 tonnes	Germany	Request for conversion
1972	Poland	18 tonnes	Germany	
1972	Poland	100 tonnes	Sweden	
1972	Poland	Not specified	Austria, Germany, Spain	Aluminium dross
1972	Hungary	Not specified	Italy	Hungary/Italy (economic cooperation)
1972	Hungary	538 tonnes	Italy	
1972	Czechoslovakia	105 tonnes	Italy	
1972	Hungary	25 tonnes	United Kingdom	Secondary aluminium
1972	Hungary	Aluminium cable	Sweden	
1972	Czechoslovakia	1 004 tonnes	United Kingdom	
1972	Czechoslovakia	1 000 tonnes	France, Germany	Offer by Paris dealer
1972	Czechoslovakia	115 tonnes	Germany	
1972	Poland	101 tonnes	Germany	
1972	Czechoslovakia	784 tonnes	Germany	
1972	Czechoslovakia	1 109 tonnes	Austria	Secondary aluminium scrap
1972	Czechoslovakia	1 348 tonnes	Germany	Secondary aluminium scrap
1972	Czechoslovakia	142 tonnes	Italy	
1972	Czechoslovakia	15 tonnes	Netherlands	
1972	GDR	Aluminium cable	Sweden	
1973	USSR	1 000 tonnes	Japan	
1973	USSR	200 tonnes	Western Europe	99,99 % aluminium
1973	USSR	2 000 to 3 000 tonnes	Italy	Barter agreement
1973	Hungary	Aluminium cable	Sweden	
1973	Czechoslovakia	1 000 tonnes	United Kingdom	
1973	Czechoslovakia	7 000 tonnes per year	Germany	Slags (aluminium content 10 to 15 %)

Year	Source	Quantity (potential)	Destination (potential)	Remarks
1973	Czechoslovakia	1 000 tonnes per year	Germany	Scrap
1973	Czechoslovakia	2 000 to 3 000 tonnes	Italy, France, Austria	Secondary
1973	Czechoslovakia	1 050 tonnes	Germany, Netherlands, Austria	Approval for conversion
1974	USSR	'Substantial quantities'	France	Aluminium billets
1974	USSR	Aluminium wire	General	Quantity not specified
1974	USSR	Semis	Germany	Quantity not specified
1974	USSR	500 tonnes	Turkey	
1974	Poland	200 tonnes	Italy	
1974	Hungary	Not specified	USA	
1974	Hungary	400 tonnes	Italy	
1974	Czechoslovakia	500 tonnes	Germany	
1975	USSR	1 000 tonnes	United Kingdom	Aluminium sheets
1975	USSR	677 tonnes	France	
1975	USSR	25 000 tonnes per year	Japan	Conversion agreement
1975	GDR	6 065 tonnes	Germany	Conversion agreement
1975	GDR	907 tonnes	Germany	Scrap
1975	GDR	271 tonnes	Sweden	Aluminium cable
1976	USSR	2 816 tonnes	France	
1976	Hungary	Not specified	Western Europe	
1976	Hungary	1 295 tonnes	Sweden	Aluminium cable
1976	GDR	211 tonnes	Sweden	Aluminium cable

TABLE 8

Aluminium imported from USSR (1958 to 1962)

(tonnes)

Member State	1958	1959	1960	1961	1962
Belgium and Luxembourg	4 260	3 270	1 186	946	10 861
Denmark	—	—	—	600	700
Germany	1 368	1 388	505	734	—
France	2 787	—	—	—	—
Greece	—	200	300	100	50
Ireland	(1)	(1)	(1)	(1)	(1)
Italy	151	—	—	212	1 930
Netherlands	2 199	3 133	916	899	3 586
United Kingdom	11 405	15 854	3 789	5 396	8 826

(1) Not indicated.

Source: Metallgesellschaft *'Metal Statistics'*.

TABLE 9

Brandeis commission

Year	Rate per tonne	Quantity (tonnes)	Proceeds (rate × quantity) (£)
1970	87,5 p	90 700	79 363
1971	86,1 p	93 500	80 504
1972	86,1 p	83 148	71 590
1973	86,1 p	100 505	86 535
1974	(1)	(1)	100 000
1975	£ 1,25	68 820	86 025
1976	£ 1,25	46 000	57 500
Total			561 517

(1) Flate rate.

TABLE 10

Reliance upon energy sources

(%)

	Hydro-electric power	Coal	Oil	Natural gas	Nuclear	Not identified
Western world	53,5	21,0	12,3	10,6	2,3	0,3
Germany	10,9	66,9	6,4	—	15,8	—
France	24,9	10,9	22,9	37,2	3,1	1,0
Italy	38,2	—	61,8	—	—	—
United Kingdom	11,3	35,2	—	—	53,5	—
Norway	100	—	—	—	—	—
Canada	100	—	—	—	—	—
USA	37,8	36,7	2,3	20,5	2,7	—
Japan	13,4	6,8	71,1	8,7	—	—
Australia	40,6	59,4	—	—	—	—
USSR	65,0					35,0
Romania	—	100	—	—	—	—

Source: Western world:
OECD 'Industrial adaptation in the primary aluminium industry 1976'.
Calculations from Balconi 'La strategia di espansione dei mercati: il caso dell'aluminio'.
Eastern Europe:
Stankovich 'The aluminium industry in the Soviet Union'.

TABLE 11

Concentration of capacity ownership

(%)

	EEC	Western Europe (including EEC)
1968		
Péchiney	44,0	28,0
Swiss Aluminium	10,0	12,0
VAW	23,0	11,0
Alcan	0,3	10,0
Total	77,3	61,0
1971		
PUK	36,0	24,0
Swiss Aluminium	17,0	15,0
VAW	22,0	10,0
Alcan	0,4	8,0
Total	75,4	57,0
1974		
PUK	25,0	21,0
Swiss Aluminium	7,0	11,0
VAW	18,0	11,0
Alcan	6,1	10,0
Total	56,1	53,0
1976		
PUK	26,6	22,2
Swiss Aluminium	10,5	13,2
VAW	18,3	11,0
Alcan	5,7	11,8
Total	61,1	58,2

TABLE 12

Quantitative effects of Brandeis agreements

Year	Consumption of primary aluminium in Europe (1) (tonnes)	Brandeis purchases (as % of column 1)	Brandeis purchases (3) (as % of free market)	EEC consumption secondaries (4) (tonnes)	Brandeis quotas (5) (as % of column 4)	EEC imports of scrap (4) (tonnes)	Brandeis quotas (as % of column 6)
	1	2	3	4	5	6	7
1963	1 361 100	1,3	6,4				
1964	1 535 700	2,6	13,1				
1965	1 568 200	2,9	14,6				
1966	1 813 400	2,9	14,3	395 500	6,4	116 700	21,8
1967	1 796 600	2,8	14,4	396 000	6,4	127 000	20,0
1968	2 069 800	4,0	19,9	500 000	3,0	128 000	11,9
1969	2 407 200	3,7	18,5	552 000	2,8	165 000	9,2
1970	2 606 300	3,5	17,3	550 000	2,8	161 000	9,5
1971	2 492 800	3,8	18,8	597 500	2,6	144 000	10,6
1972	2 791 800	3,0	14,9	575 500	2,6	200 000	7,6
1973	3 208 200	3,1	15,7	830 500	1,8	240 500	6,3
1974	3 389 700	2,2	11,2	790 000	1,9	227 000	6,7
1975	2 803 700	2,5	12,2	708 000	2,2	224 000	6,8
1976	3 501 400	2,6 (2)	13,1	827 000	1,8	271 500	5,6

(1) Metallgesellschaft *'Metal Statistics'*. 'Europe' includes the EEC, Austria, Iceland, Finland, Norway, Portugal, Sweden, Switzerland, Spain and Yugoslavia.

(2) First six months.

(3) Assuming 80 % vertical integration.

(4) The Six to end of 1972 and the Nine from 1973 to 1976.

(5) Scrap and secondary.

TABLE 13

Brandeis agreements

Tonnages agreed, sold and first offers as proportions European consumption

Year	Consumption of primary aluminium in Europe (1) (tonnes)	Brandeis purchases actual (%)	Brandeis purchases agreed (%)	Eastern group first offer (%)	Brandeis purchases actual (as % of free market) (2)	Brandeis purchases agreed (as % of free market) (2)	Eastern group first offer (as % of free market) (2)
1963	1 361 100			6,5			32,3
1964	1 535 700	2,6			13,1		
1965	1 568 200	2,9	2,8		14,6	13,9	28,0
1966	1 813 400	2,9			14,3		
1967	1 796 600	2,8			14,4		
1968	2 069 800	4,0	4,0	7,2	19,9	19,9	36,2
1969	2 407 200	3,7	3,7		18,5	18,5	
1970	2 606 300	3,5	3,6		17,3	18,3	
1971	2 492 800	3,8	4,1	6,0	18,8	20,4	30,1
1972	2 791 800	3,0	4,0	5,7	14,9	20,0	28,7
1973	3 208 200	3,1	3,8	5,3	15,7	19,1	26,5
1974	3 389 700	2,2	4,0	5,3	11,2	14,7	26,6
1975	2 803 700	2,5	5,1	6,8	12,2	18,7	33,9
1976	3 501 400	2,6	2,9	5,4	13,1	14,2	27,1

(1) Metallgesellschaft *'Metal Statistics'*. 'Europa' includes the EEC, Austria, Greece, Iceland, Finland, Norway, Portugal, Sweden, Switzerland, Spain and Yugoslavia.

(2) Assuming 80 % vertical integration.

TABLE 14

Provisions of the Brandeis agreements concerning secondary, scrap and semi-manufactures

(tonnes)

Period	USSR				Poland			Hungary			Czechoslovakia			GDR		
	Primary	Secondary	Scrap	Semis	Secondary	Scrap	Semis	Secondary	Scrap	Semis	Secondary	Scrap	Semis	Secondary	Scrap	Semis
1 July 1963 to 30 June 1964	5 000	Free	Free	Free												
1 July 1964 to 30 June 1965	Contract quantity	Free	Free	3 000				Free plus 3 000 primary	Free	Free				Free	Free	Free
1 January 1966 to 31 December 1967	Contract quantity	25 000		2 000 (1)	Pro-hibited	Pro-hibited	Pro-hibited	Combined with Raznoimport	25 000	2 000 (1)				Pro-hibited	Pro-hibited	Pro-hibited
1 January 1968 to 31 December 1970	Contract quantity	15 000		1 500 (2)	Pro-hibited	Pro-hibited	Pro-hibited	Combined with Raznoimport	15 000	1 000 (2)	Pro-hibited	Pro-hibited	Pro-hibited	Pro-hibited	Pro-hibited	Pro-hibited
1 January 1971 to 30 June 1976	Contract quantity	15 240		1 524 (3)	Pro-hibited	Pro-hibited	Pro-hibited	Combined with Raznoimport	15 240	1 016 (3)	Pro-hibited	Pro-hibited	Pro-hibited	Pro-hibited	1 016 (4)	1 524 cable

(1) Maximum 500 tonnes to France.
(2) Maximum 250 tonnes to France.
(3) Maximum 254 tonnes to France.
(4) None to United Kingdom.

TABLE 15

Community production of semis plus castings (1966 to 1976)

(tonnes)

Year	Germany	Belgium/ Luxembourg	France	United Kingdom	Italy	Netherlands	Total	Brandeis quotas	Brandeis quotas (as % of total production)
1966	540 600	173 500	322 175	444 373	242 000	58 626	1 781 274	4 064	0,228
1967	530 800	143 800	330 947	444 231	268 000	65 773	1 783 551	4 064	0,228
1968	663 900	159 600	340 248	475 691	313 000	85 423	2 037 862	2 540	0,125
1969	713 300	178 700	409 350	496 286	372 500	57 800	2 307 936	2 540	0,110
1970	795 900	181 800	434 028	475 791	407 500	66 800	2 361 819	2 540	0,108
1971	834 200	202 600	457 376	431 112	389 500	72 300	2 387 088	2 540	0,106
1972	872 800	222 800	509 808	466 391	442 000	78 400	2 592 199	2 540	0,098
1973	1 024 700	244 500	553 822	558 541	512 500	103 000	2 997 063	2 540	0,085
1974	1 046 000	255 800	554 992	570 697	556 500	107 800	3 091 789	2 540	0,082
1975	876 400	208 100	494 381	478 112	425 000	85 400	2 567 393	2 540	0,099
1976	1 152 500	262 500	595 428	534 715	568 000	118 200	3 231 343	2 540	0,079

Source: Metallgesellschaft *'Metal Statistics'*.

TABLE 16

EEC common unilateral import arrangements

1975

Member State	Hungary	Czecho-slovakia	USSR	Poland	GDR	Romania	Bulgaria
Benelux	76.01: 1 500 tonnes	—	—	—	—	76.01: 5 500 tonnes	76.01: 400 tonnes
Germany	76.01: DM 8 000 000 76.02: DM 1 700 000 76.12: DM 600 000	76.01 76.02 76.12: DM 3 900 000 79.01 79.03	76.01: secondary ingots (1) 13 000 tonnes	—	—	76.01: DM 30 000 000 76.02: DM 4 800 000 76.12: DM 600 000	76.01: DM 3 800 000
Italy	76.12: 1 320 tonnes (semis subject to article 2)	—	—	—	—	76.12: Lit 360 000 000 (semis 1 440 tonnes) 76.01: 1 500 tonnes	76.01: 1 440 tonnes (secondary)
Denmark	76.12: Dkr 3 500 000 (with the possibility of an increase)	76.12: subject to article 2	—	—	—	—	—

1976

Member State	Hungary	Czecho-slovakia	USSR	Poland	GDR	Albania	Romania	Bulgaria
Benelux	76.01: 1 500 tonnes	—	—	—	—	—	76.01: 5 500 tonnes	76.01: 400 tonnes
Germany	76.01: DM 8 500 000 76.02: DM 1 800 000 76.12: DM 640 000	76.01 76.02 76.12: DM 3 900 000 79.01 79.03	76.01: 13 780 tonnes (secondary ingots) (1) 13 000 tonnes	—	—	—	76.01: DM 31 800 000 76.02: DM 5 090 000 76.12: DM 640 000	76.01: DM 4 000 000
Italy	76.12: 1 320 tonnes (semis subject to article 2)	Semis subject to article 2	—	—	—	76.01: 200 tonnes	76.01: 1 500 tonnes 76.12: Lit 360 000 000 (semis 1 440 tonnes)	76.01: 1 440 tonnes (secondary)
Denmark	76.12: Dkr 3 500 000 (with the possibility of an increase)	76.12: subject to article 2	—	—	—	—	—	—

(1) Including metal through third countries.

ANNEX 1

Western producers

Name	Abbre-viation	Previously known as	Undertakings within this group	Remarks
Alcan Aluminium Ltd	Alcan		Alcan SA Alcan UK Ltd British Alcan Alcan Deutschland Endasa NLM	
Alluminio Italia SpA		Alsar/Alumetal Alsar Alumetal		Now a sole undertaking Successor of Alumi-nium Branche of *Montecatini Edison* (1)
Aluminio de Galicia	Alugasa			Part of PUK
(Aluminium français) (1)				Now PUK
Anglesey Aluminium				Part of Kaiser
A/S Ardal og Sunndal Verk (1)	ASV			
BICC plc		BICC Ltd		
(British Aluminium Co. Ltd) (1)	BACO			Now British Alcan (part of Alcan)
Elkem Spigerverket A/S	Elkem	Elektrokemisk A/S	Mosal Aluminium A/S (50 %)	
Empresa nacional del aluminio SA (1)	Endasa			Part of Alcan
(Gebrüder Giulini GmbH)				Since bankruptcy, part of Alcan
Gränges Aluminium		AB Svenska Alumi-nium Kompaniet AB Svenska Metall-verken (1)		Now part of Electrolux
Holland Aluminium BV (1)		Alumined		Part of Hoogovens
Kaiser Aluminium and Chemical Co.			Anglesey Kaiser Aluminium Deutschland GmbH Kaiser Aluminium Europe Inc.	
(Kaiser-Preussag Aluminium GmbH)	Kapal			Divested and now within Kaiser Group
Metallgesellschaft AG	MG			
Montedison		Montecatini-Edison		
Nippon Light Metal Co. Ltd	NLM			Part of Alcan
Norsk Hydro A/S	NH	Alnor Aluminium Norway A/S (1)		
Péchiney-Ugine-Kuhlmann	PUK	Aluminium français	Alugasa	

Name	Abbre-viation	Previously known as	Undertakings within this group	Remarks
Reynolds Aluminium Corporation			Reynolds Aluminium Deutschland Inc. Reynolds Aluminium Hamburg GmbH	
The Rio Tinto Zinc Corporation Ltd	RTZ			
Swiss Aluminium Ltd (also Schweizerische Aluminium, Alusuisse) (1)			Alusuisse Deutsch-land GmbH	
Vereinigte Alumi-nium-Werke AG	VAW			
Vereinigte Metall-werken Ranshofen-Berndorf AG (1)	VMW			

(1) Founder members of EPAA.

ANNEX 2

Contracts between Brandeis and the western parties

Name	1964	1966	1968	1971
Alcan			RU 4002 H 4004 C 4033 EG 4003 P 4005	RU 2 P 2000 H 1000 C 3000
Alsar/Alumetal			H 4026	3003
Alugasa				P 2007 H 1010
ASV	1011 1012	RU 1115 H 1116	RU 4018	RU 6
BACO	1007	RU 1127 EG 1129	RU 4016	P 2003
	1008	H 1128 P 1141	P 4017	RU 5
BICC				
Elkem			RU 4019	RU 7
Endasa		P 1147	P 4022 C 3005	P 2004 H 1009
Giulini			3504	
Gränges		RU 1121 EG 1123	RU 4021	RU 8
Holland Aluminium			H 4020 4020 A	1004
Kaiser				3506
Metallgesellschaft				3505
NH			RU 4035	RU 11
PUK		EG 1105	RU 4006 H 4008 C 4015 EG 4007 P 4009 4006 A	3501
Reynolds				RU 17 H 1015
RTZ				
Swiss Aluminium			RU 4010 H 4012 C 4014 EG 4011 P 4013	RU 4 P 2002 C 3002 H 1002 EG 3502
VAW			RU 4028 C 4032 4028 A EG 4030	3503
VMW			RU 4023 C 4025 P 4024 H 4034	C 3004 P 2005 H 1005 RU 9
NLM			RU 4001	RU 1

ANNEX 3

Agreement No RU 4010

Brandeis Goldschmidt and Co. AG, Hirzbodenweg 103, CH-4000 Basle 20 (hereinafter referred to as 'the sellers') of the one part,

and

Aluminium Suisse, PO Box 8034, CH-Zurich (hereinafter referred to as 'the buyers') of the other,

Have concluded this agreement on the following:

1

The buyers undertake to buy from the sellers during the period 1 January 1968 to 31 December 1970, on cif liner terms, to Hamburg, Rotterdam, Antwerp, Le Havre, Genoa, Venice, London, Liverpool, Hull, Swansea, Newport, Stockholm, Ellesmere, Copenhagen, Oslo, Hoyanger, Heroya, Mosjoen, Norrkoepping, Kristiansand S., Piraeus, Kobe, Osaka, Yokohama, Montreal, Kuibikenborg, Tyssedal and Eydehaven, and, should there be other destinations not mentioned, parties will always endeavour to reach mutual agreement in order to achieve a smooth running of the agreement.

Ports/destinations in buyers' option.

With regard to Canadian ports, buyers and sellers each pay one half of the extra freight and insurance between UK ports (London) and the Canadian ports nominated by buyers.

Quantity of virgin aluminium in ingots, purity 99,5 %, is 1 540 tons for 1968 and a corresponding tonnage in 1969 and 1970. The exact quantity for 1969 and 1970 will be mutually agreed upon between buyers and sellers before 30 September of the preceding calendar year of contractual delivery.

Weight of ingots is about 15 kg each.

Aluminium is delivered without packing.

The buyers have the right to purchase the higher purities of aluminium in ingots or aluminium in rolling slabs and wire bars subject to sellers' suppliers' confirmation instead of aluminium, minimum 99,5 %, in ingots. In this case, the parties are to agree upon the rate of premium to the price for slabs and/or wire bars, agreed upon for virgin aluminium 99,5 % mentioned in clause 3 of this agreement, and buyers must notify sellers at least 57 days before month of shipment.

The sellers' suppliers undertake to deliver 50 % of the abovementioned quantity, in ingots, 99,5 % minimum purity, with maximum silicon content 0,2 %, and balance with maximum silicon content 0,3 %. Each individual shipment will consist of only one of the above qualities if physically possible. The buyers have the option to take the balance of the high silicon content aluminium in 99,6 % minimum purity with maximum silicon 0,2 % with a premium of £2 18s 4d per ton.

The buyers have the option to specify aluminium rolling slabs, wire bars and billets including alloy billets, premiums for any of these shapes to be mutually agreed between the sellers and the buyers.

2

The sellers' suppliers undertake not to sell, exchange, barter or otherwise supply, virgin aluminium in any shape or form to other countries with the exception of Albania, Bulgaria, Hungary, Cuba, the German Democratic Republic, Romania, Poland, Czechoslovakia, North Korea, China, Vietnam, Yugoslavia, Mongolia, Finland, Brazil, Argentina, India, the United Arab Republic, Sweden and Burma, and sellers' suppliers undertake that the material sold to the abovementioned countries is unloaded in the country of destination. Sellers' suppliers undertake to sell aluminium ingots at prices not lower than those mentioned in this agreement to Argentina and Sweden.

Should sellers' suppliers wish to convert aluminium in countries not mentioned in this clause prior approval of buyers is required.

3

Price for aluminium in ingots purity 99,5 % is fixed at £16 6s 8d per long ton below the price for Canadian and UK aluminium delivered works, as published in the current issue of the Metal Bulletin in London (presently £228 13s 4d per long ton), on the date of shipment indicated in the respective bill of lading per long ton – 2 240 lb. The price is understood cif liner terms to the ports specified in clause 1 of this agreement.

It is agreed that buyers will pay sellers a minimum price of £180 16s 8d per long ton should the abovementioned quotation in the Metal Bulletin fall below £197 3s 4d per long ton.

In case buyers purchase ingots purity 99,6 and 99,7 %, the buyers pay the sellers a premium of £2 18s 4d and £4 13s 4d per long ton respectively.

The discount of £16 6s 8d per long ton mentioned in the first paragraph of this clause, the minimum price mentioned in the second paragraph of this clause and the premium mentioned in the third paragraph of this clause are based on the present parities of exchange.

4

Sellers' suppliers undertake not to export more than 15 000 tons of secondary aluminium / scrap during any calendar year of this agreement to the countries not mentioned in clause 2 of this agreement with the exception of Japan, where sellers' suppliers can sell the quantity mentioned in the trade agreement between their country and Japan, and sellers' suppliers undertake that the material sold to Japan is unloaded in Japan.

5

The sellers' suppliers undertake not to sell semi-manufactured products of aluminium to other countries with the exception of:

(a) Hungary, Albania, Bulgaria, Cuba, the German Democratic Republic, Romania, Poland, Czechoslovakia, North Korea, China, Vietnam, Yugoslavia and Mongolia;

(b) Burma, Indonesia, Iraq, Iceland, Ceylon, Ghana, India, the United Arab Republic, Cambodia, Finland, Nepal, Morocco, Pakistan, Thailand, Japan, Saudi Arabia, Syria, Sudan, Ethiopia, Kenya, Guinea, Kuwait, Mali, Algeria, Sweden, Laos and Libya;

and sellers' suppliers undertake that the material sold to the countries mentioned under (b) is unloaded in those countries.

The above clause does not apply to maximum 1 500 tons of semi-manufactured products of virgin aluminium which sellers' suppliers have the right to export to countries other than those mentioned under (a) and (b) above during any calendar year of this agreement, it being understood that the maximum exportable tonnage to France is 250 tons during any calendar year of this agreement.

Sellers' suppliers have taken note of buyers' opinion that, in the spirit of this agreement, lowering of prices of aluminium semis would endanger the aluminium market and undermine this agreement and, therefore, sellers' suppliers undertake to handle their sales of semi-manufactured products of aluminium in the spirit of this agreement.

6

The goods are to be shipped in approximately equal monthly lots, commencing January 1968, to the ports and in the amounts specified by buyers under clause 7. The date indicated in the bill of lading is considered as the date of shipment.

7

The sellers undertake to inform the buyers of the quantities of aluminium to be delivered 57 days before the respective quarter of shipment.

The buyers are to advise the sellers of the ports of destination as well as quantities within 15 days from the date of receipt of such notification.

In the case of aluminium shipments to Norwegian and Swedish ports and to Swansea, the lots to be not less than 750 tons each and to Newport 1 000 tons each.

With regard to shipments to Genoa, Venice, Stockholm, Piraeus, Kobe, Osaka and Yokohama, buyers will give three months' notice for shipment to enable sellers' suppliers to bring the goods to the ports of loading. Should buyers be unable to give such long notice, sellers' suppliers will do their best to meet the requirements of buyers.

The buyers are to compensate the sellers all the losses which the sellers' suppliers may suffer at the port of loading due to the receipt of the notification of the buyers being outside the period stipulated in this clause.

8

The sellers' suppliers undertake to insure the goods for the full value of the goods, plus 10 %, against usual marine risks, including acts of elements in accordance with paragraph 2 of clause 2 of the Transport Insurance Rules published by the Foreign Insurance Department of the USSR 'Ingosstrakh', Moscow, and, in addition, covering with particular average, irrespective of percentage, including damage caused by hook, oil, freshwater (excluding sweat) and other cargo, including theft, pilferage and non-delivery, all irrespective of percentage, with claims payable in sterling in London by the Black Sea and Baltic General Insurance Co. Ltd, subrogated to Lloyds. The insurance should be covered from port of loading to port of discharge with extended cover to warehouse at the port of discharge.

Subrogation costs of a Lloyds' policy are for buyers' account.

9

Payment becomes due when sellers' payment is made to suppliers. Payment is to be effected to sellers' agents, Messrs Brandeis Goldschmidt and Co. Ltd, to their account with S.G. Warburg and Co. Ltd, 30, Gresham Street, London EC2, against confirmation by S.G. Warburg and Co. Ltd that sellers or their agents have been notified by suppliers' bank that the following documents have been received from suppliers and have been dispatched to sellers or their agents through suppliers' bank's correspondents in London:

1. Two-thirds original clean negotiable shipped on board steamship company's ocean bills of lading issued to order and blank endorsed, marked: 'freight paid', claused 'liner terms', ship's master's or steamship company's receipt confirming one-third original bills of lading have been

sent in the ship's bag to the notified party nominated by buyers.

2. Invoice in triplicate.
3. Insurance policy or certificate.
4. Suppliers' certificate of quality or letter of guarantee in triplicate.
5. Certificate of weight of the supplier or his agent at the port of loading, in triplicate.

For any delay in payment, sellers may charge interest to buyers at a rate of 1 % over the UK bank rate. Buyers shall not delay payment for more than six weeks.

Bank charges for remittance from sellers to suppliers are for buyers' account.

10

Sellers have agreed with their suppliers that, should any circumstances arise preventing either party from wholly or partially carrying out its obligations under this agreement, namely: fire, acts of elements, war, military operations of any nature, blockade or prohibition of export or import, the time stipulated for the performance of the agreement shall be extended, proportionately, for as long as the circumstances obtain.

In the event of these circumstances continuing for more than three months, either party shall have the right to refuse to continue the performance of its obligations under this agreement and in such case neither party shall be entitled to indemnification from the other party of any losses it may sustain.

A certificate issued by the Chamber of Commerce of the suppliers' or buyers' country, as the case may be, shall be sufficient proof of the operation and duration of such circumstances.

The party unable to carry out its obligations under the agreement shall immediately advise the other party of the commencement and termination of the circumstances preventing performance of the agreement.

Buyers agree that, in the event of *force majeure* being declared in the agreement between sellers and their suppliers, all rights and obligations of sellers towards their suppliers are to apply between the sellers and the buyers as if they were rights and obligations of the buyers.

11

Sellers have agreed with their suppliers that any dispute or differences which may arise under or in connection with their contract are to be settled by arbitration. Arbitration shall be composed in the following way.

Each party which wishes to apply to arbitration shall notify thereof the other party by a registered letter stating the name of an arbitrator and his address as well as the subject of dispute.

The other party shall nominate an arbitrator not later than 30 days upon receipt of the above letter and advise to the first party also by a registered letter the name and address of the arbitrator. If the party called to arbitration fails to nominate an arbitrator during the said period, the arbitrator for this party will be appointed by the Chamber of Commerce in Stockholm, Sweden. In such a case, an arbitrator is to be appointed not later than 30 days on receipt of a corresponding statement from the party advising of submitting the dispute to arbitration. Both arbitrators shall choose an umpire during 30 days.

If the arbitrators fail to agree on an umpire within the said period, at the request of the party interested an umpire will be appointed by the Chamber of Commerce in Stockholm, Sweden.

The arbitration is to be held in Stockholm.

The award of arbitration is made by a majority vote in accordance with the terms and conditions of the present contract and rules of law to be applied according to the principles of the conflict law.

The arbitration may also additionally apply the common international commercial usages.

The award of arbitration to be motivated and to contain the composition of arbitration, place and date of the award, the indication that the parties could state their contemplation and distribution of arbitration expenses between the parties.

The award of arbitration shall be made within six months from the date of the appointment of an umpire and shall be final and binding on both parties.

The parties shall not have recourse to legal proceedings.

Buyers agree that, in the event of arbitration between sellers and their suppliers, all rights and obligations of sellers towards their suppliers are to apply between the sellers and the buyers as if they were rights and obligations of the buyers.

The procedure for arbitration as outlined above shall also apply to buyers and sellers.

12

Buyers and sellers intend to prolong the validity of this agreement and will enter into negotiations to this effect during the first half 1970. It is further agreed that such negotiations must be concluded by 31 October 1970 at the latest.

If, by the above date, the parties do not come to an agreement on the above matter, this agreement is valid until 31 December 1970.

Sellers have agreed with their suppliers that, should aluminium begin to be traded on the London Metal Exchange or should it become apparent that exports of aluminium from other sources become of such importance

that they interfere with the spirit of the agreement, the sellers and buyers have the right to renegotiate terms by serving three months' notice. If both parties are unable to reach agreement at the end of the period of notice, the agreement will end on that date. The quantities to be cancelled on a *pro rata* basis.

13

Neither party shall be entitled to transfer its rights and obligations under this agreement to any third party without the written consent of the other party having been obtained thereto.

14

All taxes, dues and customs fees in connection with the execution of the present agreement, levied on the territory of the sellers' suppliers, will be paid by the sellers' suppliers and those levied outside the territory of the sellers' suppliers shall be paid by the buyers.

15

Any amendments and/or supplements to this agreement shall be valid only if they are made in writing and signed by the duly authorized representative of both parties.

16

In the event of a clause of this agreement being or becoming null and/or void, both parties agree that the remaining clauses shall remain in force. Both parties agree to reinstate in an amicable way a substitute clause for the clause declared null and void. If no amicable agreement can be reached on the substitute clause, the contract shall be submitted to arbitration in accordance with clause 11 of this agreement.

17

This agreement is made in English and signed in two originals, both of which have equal force.

Legal address of both parties

— The sellers:
Brandeis Goldschmidt and Co. AG,
Hirzbodenweg 103,
CH-4000 Basle 20.

— The buyers:
Aluminium Suisse,
PO Box 8034,
CH-Zurich.

Basle, 26 March 1968.

ANNEX 4

Agreement No 4006A

Brandeis Goldschmidt and Co. Ltd, Hirzbodenweg 103, CH-4000 Basle 20 (hereinafter referred to as 'the sellers') of the one part,

and

Aluminium français, 23, rue Balzac, Paris 8^{e} (hereinafter referred to as 'the buyers') of the other,

Have concluded this agreement on the following:

1

The sellers have entered into arrangements with Raznoimport/Moscow, Impexmetal/Warsaw, Metalimpex/Budapest, Intrac/Berlin and Metalimex/Prague, pursuant to which they have committed themselves to buy certain amounts of primary aluminium ingot totalling 267 000 long tons, during the period 1 January 1968 to 31 December 1970, upon the understanding that sellers have the sole purchasing rights for primary aluminium to be exported from the USSR, Poland, Hungary, East Germany and Czechoslovakia, to various countries, among them France, with the exception of aluminium sold under government trade agreements.

Buyers undertake to buy from sellers, during the period 1 January 1968 to 31 December 1970, the quantities specified below.

Delivery terms will be cif liner terms or for destination Marseilles, Le Havre or Antwerp and, should there be other destinations not mentioned, parties will always endeavour to reach mutual agreement in order to achieve a smooth running of the agreement.

Minimum quantities to be specified according to agreement.

With regard to Canadian ports, buyers and sellers' suppliers each pay half of the extra freight and insurance between UK ports (London) and Canadian ports nominated by buyers.

Ports/destinations in buyers' option.

Quantity of virgin aluminium in ingots, purity 99,5 %, about 19 560 long tons in 1968 and a corresponding tonnage in 1969 and 1970. The quantity for 1969 and 1970 has to be mutually agreed upon between sellers and buyers before 30 September of the preceding calendar year.

Weight of ingots is about 15 kg each.

Aluminium if possible to be delivered bundled.

2

Price for aluminium in ingots, purity 99,5 %, is fixed at £16 6s 8d per long ton (on the present parity of exchange) below the price for Canadian and UK aluminium delivered works, as published in the current issue of the Metal Bulletin in London (presently £238 per long ton), on the date of shipment/dispatch from sellers' suppliers' country. The date indicated on the steamer bill of lading or the railway bill of lading to be the date of shipment/dispatch from sellers' suppliers' country. The price is understood cif liner terms or for destination to the ports/destinations mentioned under clause 1 of this agreement.

It is agreed that buyers will pay sellers a minimum price of £180 16s 8d per long ton should the abovementioned quotation in the Metal Bulletin fall below £197 3s 4d per long ton (on the present parity of exchange.)

Notwithstanding buyers' and sellers' mutual consent to exceptions, sellers grant buyers the most-favoured-nation treatment for primary metal sold by sellers in the common market against sellers' commitments referred to in the first paragraph of clause 1.

3

The goods are to be shipped/dispatched in approximately equal monthly lots to the ports/destinations and in the amounts specified by buyers under clause 4.

4

Sellers undertake to inform buyers of the quantities of aluminium to be delivered 55 days before the respective quarter of shipment/dispatch.

Buyers are to advise sellers of the ports/destinations as well as quantities within 15 days from the date of receipt of such notification.

The buyers are to compensate the sellers for all the losses which the sellers' suppliers may suffer at the port of loading due to the receipt of the notification of the buyers being outside the period stipulated in this clause.

5

Sellers' suppliers undertake to sufficiently insure the goods. Subrogation costs of a Lloyds' policy are for buyers' account.

6

Payment becomes due when the sellers' payment is made to suppliers upon their filing of documents.

For any delay in payment, sellers may charge interest to buyers at a rate of 1 % over the UK bank rate.

Buyers shall not delay payment for more than six weeks.

Bank charges for remittance from sellers to suppliers are for buyers' account.

7

Sellers have agreed with their suppliers that, should any circumstances arise preventing either party from wholly or partially carrying out its obligations under this agreement, namely: fire, acts of elements, war, military operations of any nature, blockade or prohibition of export or import, the time stipulated for the performance of the agreement shall be extended, proportionately, for as long as the circumstances obtain.

In the event of these circumstances continuing for more than three months, either party shall have the right to refuse to continue the performance of its obligations under this agreement and in such case neither party shall be entitled to indemnification from the other party of any losses it may sustain.

A certificate issued by the Chamber of Commerce of the suppliers' or buyers' country, as the case may be, shall be sufficient proof of the operation and duration of such circumstances.

The party unable to carry out its obligations under the agreement shall immediately advise the other party of the commencement and termination of the circumstances preventing performance of the agreement.

Buyers agree that, in the event of *force majeure* being declared in the agreement between sellers and their suppliers, all rights and obligations of sellers towards their suppliers are to apply between the sellers and the buyers as if they were rights and obligations of the buyers.

8

Sellers have agreed with their suppliers that any disputes or differences which may arise under or in connection with their contract are to be settled by arbitration.

Buyers agree that, in the event of arbitration between sellers and their suppliers, all rights and obligations of sellers towards their suppliers are to apply between the sellers and the buyers as if they were rights and obligations of the buyers.

The same procedure of arbitration which is to settle any disputes or differences between sellers and their suppliers shall also apply to buyers and sellers.

9

Buyers and sellers intend to prolong the validity of this agreement and will enter into negotiations to this effect during the first half of 1970. It is further agreed that such negotiations must be concluded by 31 October 1970 at the latest.

If, by the above date, the parties do not come to an agreement on the above matter, this agreement is valid until 31 December 1970.

Should it become apparent that exports of aluminium from other sources become of such importance that they interfere with the obligations of delivery and take over of the agreed tonnages, then the sellers and buyers have the right to renegotiate terms by serving three months' notice. If both parties are unable to reach agreement at the end of the period of notice, the agreement will end on that date.

10

Neither party shall be entitled to transfer its rights and obligations under this agreement to any third party without the written consent of the other party having been obtained thereto.

11

All taxes, dues and customs fees in connection with the execution of the present agreement, levied outside the territory of the sellers' suppliers shall be paid by the buyers.

12

Any amendments and/or supplements to this agreement shall be valid only if they are made in writing and signed by the duly authorized representative of both parties.

13

In the event of a clause of this agreement being or becoming null and/or void, both parties agree that the remaining clauses shall remain in force. Both parties agree to reinstate in an amicable way a substitute clause for the clause declared null and void. If no amicable agreement can be reached on the substitute clause, the contract shall be submitted to arbitration in accordance with clause 9 of this agreement.

Basle, 2 July 1968.