JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
14 September 1995 *

In Case T-171/94,

Descom Scales Manufacturing Co. Ltd, a company incorporated under Korean law, with its registered office at Seoul (Korea), represented by Pierre Didier, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Laurent Mosar, 8 Rue Notre-Dame,

applicant,

v

Council of the European Union, represented by Bjarne Hoff-Nielsen and Jorge Monteiro, of its Legal Service, acting as Agents, and Philip Bentley, Barrister of the Bar of England and Wales, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

* Language of the case: French.

Commission of the European Communities, represented by Marc L. F. De Pauw, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for the annulment, in relation to the applicant, of Council Regulation (EEC) No 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea (OJ 1993 L 263, p 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, R. Schintgen, R. García-Valdecasas, C. W. Bellamy and P. Lindh, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 17 May 1995,

gives the following

Judgment

Facts

1 This is an action for the annulment of Council Regulation (EEC) No 2887/93 of 20 October 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Singapore and the Republic of Korea (OJ 1993 L 263, p. 1; 'the contested regulation'), which imposed an anti-dumping duty on the applicant of 26.7%. That regulation follows Commission Regulation (EEC) No 1103/93 of 30 April 1993 imposing a provisional anti-dumping duty on the same imports (OJ 1993 L 112, p. 20; 'the provisional regulation'). Those regulations were adopted on the basis of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1; 'the basic regulation').

2 The applicant, Descom Scales Manufacturing Co. Ltd, Seoul ('Descom') is a joint undertaking, half owned by Dailim Scales, Seoul, Korea ('Dailim') and half by Ishida Scales, Kyoto, Japan ('Ishida Japan'). The product subject to anti-dumping duty is an electronic weighing scale for use in the retail trade with a digital display of the weight, unit price and price to be paid, under the model name of 'NOVA'. The product is manufactured by Descom, marketed in Korea by Dailim, and marketed in the rest of the world by Ishida. In Europe, it is marketed by Ishida Europe Ltd ('Ishida Europe'), a wholly owned subsidiary of Ishida Japan.

3 In the Community, Descom's retail scales are sold by three buyers/distributors, established in Denmark, Greece and the Netherlands, which buy the scales in Korea, the first on an FOB basis and the two others on a CIF basis. Those buyers are neither directly nor indirectly linked either to Descom or to Ishida Japan. The

scales are invoiced by Descom to Ishida Japan, which itself invoices them to Ishida Europe, which in turn invoices them directly to the Danish and Greek buyers, and indirectly to the Netherlands buyer through the intermediary of a company established in Liechtenstein, which is completely unrelated to the Descom/Ishida group.

4 Following a complaint by a number of Community producers, the Commission initiated an anti-dumping proceeding in January 1992 concerning imports into the Community of certain electronic retail scales originating in Singapore. In April 1992, following a further complaint, the Commission announced the extension of that proceeding to cover imports of certain electronic scales originating in Korea. In that complaint, Descom was named as one of the producers exporting electronic scales originating in Korea, and Ishida Europe as the importer of the scales manufactured by Descom. The Commission addressed investigation questionnaires to Descom and Ishida Europe.

5 On the basis of the information gathered in the course of the preliminary investigation, the Commission provisionally established the anti-dumping margin applicable to scales exported by Descom to the Community at 29% of the net free-at-Community-frontier price, duty unpaid. In adopting the provisional regulation on 30 April 1993, the Commission thus imposed on scales manufactured by Descom a provisional anti-dumping duty equal to 29% of the net free-at-Community-frontier price, duty unpaid. Recital 33 of the preamble to the provisional regulation states that a comparison between the prices of representative models marketed by the Community industry on the one hand and Descom on the other, on the basis of sales taken at the same level of trade (prices to unrelated distributors or dealers) on the major Community markets during the investigation period 'showed price undercutting which ... exceeded ... 30% in the case of the Korean exporter found to have the highest dumping margin'.

6 In adopting the contested regulation on 20 October 1993, the Council established the definitive weighted average dumping margin for Descom at 26.7% of the net free-at-Community-frontier price, duty unpaid, of the products concerned

(recital 13 of the preamble). An *ad valorem* anti-dumping duty of 26.7% was therefore imposed on imports into the Community of electronic scales manufactured by Descom (Article 1 of the contested regulation) since the level of duty necessary to remove the injury, as set out in the provisional regulation (recitals 32, 33 and 55) and confirmed upon definitive examination of the facts (recital 20 of the contested regulation), was higher than the dumping margin which had been established.

7 Before the adoption of the contested regulation, another proceeding had been initiated in respect of exports of the same type of product from Japan and had resulted in the adoption of Council Regulation (EEC) No 993/93 of 26 April 1993 imposing a definitive anti-dumping duty on imports of certain electronic weighing scales originating in Japan (OJ 1993 L 104, p. 4), which imposed an anti-dumping duty of 31.6% on the prices of scales exported by Ishida Japan, the Japanese parent company of the applicant.

Procedure

8 In those circumstances, by application lodged at the Court Registry on 8 January 1994, the applicant brought this action.

9 On 8 January 1994, by a separate document, the applicant also lodged an interim application for the suspension of the operation of the contested regulation. By order of the President of the Court of 11 March 1994, that application was dismissed.

10 By order of 18 April 1994, the Court of Justice transferred this case to the Court of First Instance, pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993, amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), and pursuant to Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29).

11 On 16 May 1994 the Commission lodged at the Registry of the Court of First Instance an application to intervene in support of the Council. By order of 6 July 1994, the President of the First Chamber allowed the intervention.

12 The Commission lodged its statement in intervention on 31 August 1994 and the applicant lodged its observations on that statement on 6 and 21 October 1994.

13 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry.

14 The parties presented oral argument and replied to the oral questions of the Court of First Instance at the public hearing on 17 May 1995.

Forms of order sought

15 The applicant claims that the Court should:

— annul Regulation No 2887/93 in so far as it concerns the applicant;

— order the Council to pay the costs.

16 The Council claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

17 The Commission claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

18 The applicant essentially makes four pleas in law in support of its application. The first alleges infringement of Article 2(8)(b) of the basic regulation, in that the calculation of the applicant's export price is vitiated by manifest error. The second alleges infringement of Article 2(9) and (10) of the basic regulation by virtue of the refusal to make adjustments to the normal value of the applicant's products in respect of salesmen's salaries in the domestic market. The third alleges infringement of the rights of the defence, in that the institutions refused to communicate the decision rejecting the above adjustments to the applicant. The fourth alleges infringement of Article 7(4) of the basic regulation, in that the Commission refused to communicate to the applicant information which was essential for the defence of its interests.

The first plea, alleging infringement of Article 2(8) of the basic regulation

19 This plea comprises four limbs. In the first, the applicant maintains that the conditions for constructing the export price under Article 2(8)(b) of the basic regulation were not satisfied, and that the price paid to Ishida Europe by the three Danish, Greek and Netherlands importers should therefore have been taken to be the export price. In the second limb, the applicant argues in the alternative that, if it were permissible to construct an export price, that should have been done on the basis of the price paid by the first Community buyer to the three importers, and not on the basis of the price paid by the three importers to Ishida Europe. Thirdly, the applicant argues that, if Ishida Europe carried out import activities, the export price could be adjusted only to take account of costs connected with Ishida Europe's import activity. In the final limb, it argues that the fixing of the export price is vitiated by the double deduction of some of Ishida Europe's insurance and sales financing costs.

First limb: the legality of constructing the export price

Arguments of the parties

20 The applicant states that the Commission, and subsequently the Council, considered that the export price of its product was unreliable because Ishida Europe, a company established in the Community and connected with the applicant, incurred selling costs for the product which were normally borne by an importer. In those circumstances, the Community institutions constructed the export price, pursuant to Article 2(8)(b) of the basic regulation, by reference to the price invoiced by Ishida Europe to the three Greek, Danish and Netherlands importers and by deducting from that price the average overheads of Ishida Europe, namely 9.7% of its turnover, and a reasonable profit of 5%.

21 The applicant observes that Article 2(8)(b) of the basic regulation requires, for a construction of the export price to be permissible, either that there be no export price or that it appear that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable. In this case, none of those conditions have been met. For that reason, the institutions should have taken as the export price the price invoiced by Ishida Europe to the three importers, adjusted if necessary to take account of costs arising from Ishida Europe's export activity, rather than constructing the export price on the ground that Ishida Europe was a third party related to the exporter, which, in the opinion of the institutions, had to incur costs normally borne by an importer.

22 The applicant considers that when, as in the present case, the three importers and the exporter (Ishida Europe) charge market prices amongst themselves, the price cannot be constructed.

23 The applicant argues in that respect that the institutions were wrong to take the view that Ishida Europe incurred in the Community costs normally borne by an importer, and thus to deduct from the price invoiced by Ishida Europe to the three importers the average overheads of Ishida Europe, namely 9.7% of its turnover, and a profit of 5%, pursuant to Article 2(8)(b) of the basic regulation (recitals 5 and 6 of the contested regulation). Ishida Europe did not perform activities normally performed by an importer, since the various functions of the Ishida group in producing and exporting commercial electronic scales had been divided up, within the same undertaking, between three entities which were legally and geographically distinct but economically and functionally integrated. Thus, the products in question were manufactured by the applicant in Korea, Ishida Japan organized and generally supervised production and sale, while Ishida Europe dealt with sales and the administration of export sales to the Community. Ishida Europe thus performed commercial functions previously performed by Ishida Japan, such as the examination of market needs in cooperation with importers, negotiation of the price of their purchases from the Ishida group, communication of their orders, the invoicing of their purchases or the verification of their payments. In that respect, during the investigation period, the role of Ishida Europe was limited to the dispatch of fourteen invoices to the three Danish, Greek and Netherlands importers.

24 The applicant argues that, even though the case-law of the Court does recognize that the institutions enjoy a wide discretion in the matter, it cannot be inferred that, in the absence of any statutory definition of the functions of an importer or an exporter, the institutions are at liberty to define them. The applicant blames the Commission for not examining the exact function of Ishida Europe in greater depth during the course of the proceeding, for not requesting further clarification in that regard and for not carrying out an on-the-spot examination in order to check the facts of the matter. It concludes that, by considering that Ishida Europe played the role of an importer, the institutions manifestly misinterpreted the facts.

25 Moreover, in its reply, the applicant considers that the Council cannot rely on the judgments in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781 and Case C-172/87 *Mita Industrial* v *Council* [1992] ECR I-1301. It was only in the very special circumstances of those cases that the Court was able

to regard the functions of the Community subsidiary (Mita Europe) as functions typical of an importing subsidiary. The latter handled orders, bought products from the exporter and resold them to client concessionaires for the product in the Community, provided technical support and maintenance service to those concessionaires, incurred considerable sums advertising the product in the Community and maintained a bonded warehouse in the Netherlands. In this case, by contrast, the invoicing by Ishida Europe to independent importers constituted nothing more than sale by the Ishida group to an outside buyer, in the economic and legal sense of the term. Therefore, the price of that transaction was the export price.

26 The applicant argues further that an anti-dumping duty is a form of customs duty, and that, in the absence of any contrary provision in the basic regulation, the basic concepts to be applied must be identical for both anti-dumping and customs duties (see the judgment of the Court of Justice in Case C-11/89 *Unifert* v *Hauptzollamt Münster* [1990] ECR I-2275). Thus, the criterion arising from the expression 'sold for export' in Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1) implies that 'the price actually paid or payable is the total payment made or to be made by the buyer ... to the seller' (paragraph 23) and is equivalent to the concept of 'export price' in the anti-dumping rules. Therefore, the applicant considers that the administrative costs, especially the export sales costs incurred by Ishida Europe could not be deducted but should, on the contrary, remain included in the export price because they were included in the price paid to Ishida Europe by the three importers.

27 The applicant considers that its argument whereby the price obtained at the stage of presentation for customs clearance is the export price finds support in the judgment of the Court of Justice in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, paragraph 19, since it is apparent from that judgment that the starting-point for the adjustments to be made to the normal value or the export price, provided for in Article 2(9) and (10) of the basic regulation, is the sale price itself.

28 The Council states that in applying Article 2(8)(b) of the basic regulation it adopted the reasoning of the Commission as set out in recital 6 of the contested regulation. According to that reasoning, it was necessary to construct the export price 'since it became clear, from the limited information made available to the Commission, that the related company in the Community (Ishida Europe) was concerned with sales to unrelated customers by virtue of processing orders, performing marketing functions, invoicing these customers in the Community and receiving payment. This related company (Ishida Europe) therefore incurred costs normally borne by an importer. In these circumstances, the export price was constructed on the basis of the price to the first independent buyer, as provided for in Article 2(8)(b) of Regulation (EEC) No 2423/88. Consequently, the price actually paid to the related company in the Community by the first independent customer was adjusted by the costs of this related company, established according to Article 7(7)(b) of Regulation (EEC) No 2423/88, on the basis of the abovementioned information, and a reasonable profit of 5% as set out in recital 18 of Regulation (EEC) No 1103/93.'

29 The Council considers that that reasoning is perfectly in accordance with the case-law of the Court of Justice (*Gestetner* and *Mita* judgments referred to above). The fact that a company established inside the Community markets a product that has been exported from a non-member country, incurs costs, and invoices the product in question to the formal importer raises a presumption that that company markets the product subsequently to the export stage, and the applicant has not succeeded in rebutting that presumption.

30 As for the applicant's argument based on *Unifert*, the Council maintains that the concept of the price of a product 'sold for export' in the customs rules is not identical with the concept of 'export price' in the basic anti-dumping regulation. As for the argument based on *Canon*, the Council replies that, in that judgment, the Court stated that the calculation of the normal value and the calculation of the export price were distinct operations governed by different articles in the basic regulation.

31 The Commission argues that the applicant cannot rely on the fact that Ishida Europe did not carry out the formalities for importing the products in question into the Community, bearing in mind, first, the fact that Ishida Europe is established in the Community and not in Japan, and, second, all its activities.

Findings of the Court

32 Under Article 2(8)(b) of the basic regulation, 'in cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer ...'.

33 The Court finds, first, that the applicant does not deny that it is a joint undertaking, half owned by Dailim and half by Ishida Japan, and that Ishida Europe is a wholly owned subsidiary of Ishida Japan. It follows that Ishida Europe, Ishida Japan and Descom are connected undertakings.

34 Nor, secondly, is it denied that the scales produced by Descom are sold through the intermediary of Ishida Europe, which handles customers' orders, sends them the invoices and receives the relevant payments, and that Ishida Europe carries out commercial functions by examining market needs in cooperation with importers, by negotiating the prices of purchases from the Ishida group, and by invoicing directly to the Danish and Greek buyers, and indirectly to the Netherlands buyer, the scales which are invoiced to it by Ishida Japan.

35 Thirdly, the Court notes that Ishida Europe is established in the Community, and that the formalities for exporting the products from Japan were carried out by Descom and not by Ishida Europe.

36 Fourthly, it is apparent from the Commission's letter to the applicant of 28 June 1993 (Annex IV.4 to the application) that the unit price for the product paid by one of the three independent buyers to Ishida Europe does not correspond to the price invoiced to the latter by Ishida Japan. The Court finds, on the basis of the invoices referred to by the Commission in that letter, which have not been challenged by the applicant, that the price paid by the Community buyer to Ishida Europe was (...) per unit, whereas the price invoiced to Ishida Europe by Ishida Japan was (...).

37 It must be concluded in those circumstances, bearing in mind the association between Descom and Ishida Europe and the sales activity of the latter, that the price paid by the three independent buyers to Ishida Europe could not as such be used as the export price.

38 That conclusion is not affected by the interpretation of the *Gestetner* and *Mita* judgments advocated by the applicant. Indeed, contrary to the applicant's contention, the facts underlying those cases are similar to those in the present case. In the *Gestetner* judgment (paragraph 27) and in the *Mita* judgment (paragraph 19), it was established that the products were sold through the intermediary of the Community subsidiary (Mita Europe), which handled customers' orders, sent them the invoices and received the relevant payments, and that the price paid by buyers to the Community subsidiary was not the same as the price invoiced to the latter by the parent company. In those circumstances, the Court of Justice held, without any reference to the fact that the Community subsidiary maintained a bonded warehouse in the Netherlands, that the functions undertaken by that subsidiary were functions typical of an importing subsidiary, and that, 'in those circumstances, it must be accepted that it was appropriate to construct the export price on the basis of the price paid by the first independent purchaser, adjusting that price to reflect

the costs and the profits inherent in the role played by Mita Europe' (paragraph 34 of *Gestetner* and paragraph 22 of *Mita*).

39 This Court considers that the applicant cannot rely on the *Unifert* judgment, inasmuch as the latter concerns the interpretation by way of preliminary ruling of Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes, and, in particular, the interpretation of the concept of transaction value within the meaning of Article 3(1) of that regulation. The purpose of the Community anti-dumping rules is to adopt measures of commercial protection in respect of exports of products from non-member countries at prices lower than those charged in the internal market. Thus, the purpose of constructing the export price in the context of the anti-dumping rules is to establish a price (the export price) which can be compared with the normal value of the product in order to establish whether there has been price undercutting on the product's entry into the Community. By contrast, the purpose of Regulation No 1224/80 is to determine the real value of the goods on their entry into the Community in order to apply the Common Customs Tariff to them.

40 Nor can the applicant rely on the *Canon* judgment. As the Council has rightly emphasized, it is settled case-law that the calculation of the normal value and the calculation of the export price are distinct operations, the first being governed by Article 2(3) to (7) of the basic regulation, and the second by Article 2(8) thereof (see the judgments of the Court of Justice concerning an anti-dumping duty on imports of ball-bearings in Case 240/84 *Toyo* v *Council* [1987] ECR 1809, Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, Case 256/84 *Koyo Seiko* v *Council* [1987] ECR 1899, Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, Case 260/84 *Minebea* v *Council* [1987] ECR 1975, and the *Canon* judgment, cited above, at paragraph 37).

41 Moreover, paragraph 19 of the *Canon* judgment cannot be interpreted as the applicant claims. That paragraph states not that the sale price itself is the starting-point for the adjustments provided for in Article 2(9) and (10) of the basic regulation,

but that the normal value and the export price are both determined by reference to the first sale to an independent purchaser and that the figures thus obtained must then be compared with each other, subject to the adjustments provided for in Article 2(9) and (10). Paragraph (9) of that article provides for comparison to be made between the normal value, as established under paragraphs (3) to (7), and the export price, as established under paragraph (8).

42 It follows that the institutions were right to construct the export price in accordance with Article 2(8)(b) of the basic regulation, before proceeding to make the adjustments provided for in Article 2(9) and (10) of that regulation in order to compare it with the normal value.

43 The first limb of the plea must therefore be dismissed.

Second limb: determination of the price to be used as the basis for constructing the export price pursuant to Article 2(8)(b) of the basic regulation

Arguments of the parties

44 The applicant argues in the alternative that, if it is permissible to construct the export price in this case, such construction should, under Article 2(8)(b) of the basic regulation, have been based on the resale price in the Community, namely the price paid to the three importers by the first Community buyer, since that is the price at which the imported product is first sold to an independent buyer, and not on the export price itself, namely the price paid to Ishida Europe by the three importers. It was only after the import formalities had been carried out by the three buyers that the product could be regarded as an 'imported product' within the meaning of Article 2(8)(b).

45 The Council replies that, since Ishida Europe is established in London, resale of the product by that company does in fact take place in the Community.

46 The Commission argues that the method advocated by the applicant does not comply with the basic regulation.

Findings of the Court

47 Under Article 2(8)(b) of the basic regulation, the export price is to be constructed on the basis of the price at which the imported product is first resold to an independent buyer.

48 The purpose of that article is to determine the real price of the product at the Community frontier, in order to define the price actually paid to the exporter for the product sold for export to the Community as opposed to the price paid when that product is marketed in the Community.

49 In this case, this Court finds that the first independent buyers are the three Danish, Greek and Netherlands importers/buyers, and that Ishida Europe is a company connected to Ishida Japan and the applicant (see paragraph 33 above).

50 In the *Gestetner* and *Mita* judgments (see paragraph 38 above), the Court of Justice held that the basic regulation was complied with where the export price was constructed on the basis of the price paid by the first independent buyer in the Community to the Community subsidiary connected to the exporting group.

51 The Commission was therefore right to construct the export price on the basis of the price paid to Ishida Europe by the three independent buyers.

52 It follows that the second limb of the plea must be dismissed.

Third limb: adjustments provided for in Article 2(8)(b) of the basic regulation

Arguments of the parties

53 The applicant argues in the further alternative that, even if Ishida Europe did perform the functions of an importer, the institutions could deduct from the export price only the costs and profits relating to those functions, and not the whole of the costs and profits of Ishida Europe, especially since that company is partly engaged in production.

54 The Council states that, pursuant to Article 7(7)(b) of the basic regulation, the institutions constructed the export price on the basis of the information supplied to them by the undertaking concerned, taking account of the costs incurred by the connected company and a reasonable profit margin.

Findings of the Court

55 Under Article 7(7)(b) of the basic regulation, if a party refuses access to necessary information or does not supply it within a reasonable period, the Commission may make preliminary or final findings on the basis of the facts available.

56 This Court finds that the applicant failed to supply the Commission with evidence of the costs and profits relating to Ishida Europe's importing activities by not replying to the importer questionnaire sent by the Commission on the ground that it did not consider that Ishida Europe performed the functions of an importer.

57 The applicant also failed to supply evidence of costs and profits relating to Ishida Europe's activities other than as importer, such as its production activities.

58 The institutions were therefore right, pursuant to Article 7(7)(b) of the basic regulation, to calculate the adjustments to be made in respect of Ishida Europe's costs and profit margin on the basis of the facts available, and to apply an allocation in proportion to turnover on the basis of the available accounting data, in accordance with Article 2(11) of the basic regulation.

59 It follows that the third limb of the plea cannot be upheld.

Fourth limb: double deduction of some of Ishida Europe's costs

60 The applicant maintains that some of Ishida Europe's costs, namely export insurance costs, sales financing costs, and 0.7% corresponding to export salesmen's

salaries have been deducted from the export price twice, both at the time of the comparison of the export price with the normal value and at the time of the construction of the export price.

(a) Double deduction of export insurance costs and sales financing costs

Arguments of the parties

61 The applicant claims that the export insurance costs and sales financing costs incurred by Ishida Europe have been deducted twice over. When constructing the export price, the Commission deducted the whole of Ishida Europe's costs (9.7%), pursuant to Article 2(8)(b) of the basic regulation. Those costs included sales financing costs and export insurance costs incurred by Ishida Europe, which had already been deducted from the export price pursuant to Article 2(9) and (10) of the basic regulation when the export price was compared with the normal value. That error is apparent from the statement of the calculation of the dumping margin issued by the Commission (Annex 2 to the reply).

62 The applicant claims that the double deduction of those costs is due to the fact that the institutions regarded Ishida Europe as an exporter until the end of the proceeding, whereupon they changed their mind and deducted the percentage of Ishida's costs and the profit margin on the basis that it was an importer.

63 The Council argues, first, that the documents submitted by the applicant do not prove that there has been double deduction of the sales financing costs and export insurance costs, since the documents relating to Ishida Europe's bank charges bear no direct relation to sales, and the documents relating to insurance do not prove that Ishida Europe bore those costs. For that reason, they were not included in its accounts. The Council points out that, in its letter of 28 June 1993 (Annex IV.4 to

the application), the Commission explained to the applicant how the deduction in respect of Ishida Europe's overheads was calculated, on the basis of the heading 'operation expenses' in Ishida Europe's accounts, and that that heading does not include either miscellaneous income or interest. Therefore, by deducting an amount of 9.7% in respect of overheads, the institutions did not deduct an amount for sales financing costs. Moreover, in accordance with the calculation of the dumping margin, the total amount of the adjustment for insurance costs is of the order of 0.0001%, which, in the Council's submission, is minimal, does not affect the calculation and can be disregarded in accordance with Article 2(10)(e) of the basic regulation.

Findings of the Court

64 The alleged double deduction of expenses claimed by the applicant would have arisen not at the time of the construction of the export price, as the applicant argues, but in the course of the adjustments made when the normal value was compared with the export price. Article 2(9)(a) of the basic regulation provides that the comparison is to be made between the normal value, as established under Article 2(3) to (7), and the export price, as established under Article 2(8).

65 Moreover, the Commission's statement of the calculation of the dumping margin shows that that margin was calculated on the basis of a comparison between the export price and the normal value, the export price having been constructed and adjusted pursuant to Article 2(8)(b) of the basic regulation, with the deduction from the price invoiced by Ishida Europe of 9.7% of its turnover in respect of its overheads and 5% as a reasonable profit margin. To arrive at a valid basis for comparison between the export price and the normal value, the Commission, pursuant to Article 2(9) and (10) of the basic regulation, adjusted the export price by deducting certain costs referred to therein, including export insurance and sales financing costs.

66 It is settled case-law that adjustments made under Article 2(9) and (10) of the basic regulation are different, as regards both their purpose and the conditions in which they are applied, from the adjustments made in the construction of the export price under Article 2(8)(b). Unlike the adjustments provided for in Article 2(8), which are made automatically by the Community institutions, adjustments under Article 2(9) and (10) are not made automatically, the party making a claim for them having to prove that they are necessary in order to ensure price comparability (*Nachi Fujikoshi* v *Council*, paragraphs 31, 32 and 33, *Nippon Seiko* v *Council*, paragraphs 43, 44 and 45, *Minebea* v *Council*, paragraphs 41, 42 and 43).

67 In this case, the applicant did not base any argument on the double deduction of these expenses until it lodged its reply in these proceedings, whereas under Article 2(9)(b) of the basic regulation it should, during the administrative procedure, have argued that the export price and the normal value calculated by the Commission were not comparable, by reason of the alleged double deduction of sales financing and export insurance costs from the export price, and also have claimed an adjustment to remove the alleged double deduction, proving that its claim was justified. It is apparent from the facts and from the documents attached by the parties to their various pleadings that the applicant did not claim any such adjustments during the administrative procedure. The Commission attached to its letters to the applicant of 6 May 1993 (Annex IV.2 to the application), 28 June 1993 (Annex IV.4 to the application) and 15 July 1993 (Annex IV.6 to the application) the various calculation statements for the provisional and definitive dumping margins, which made it possible for the applicant to discover and challenge the alleged double deduction which it asserts in its reply. However, in its letters of 6 June 1993 (Annex IV.3 to the application) and 9 July 1993 (Annex IV.5 to the application), the applicant did not challenge the basis of comparison adopted by the Commission between the normal value and the export price on the ground that it contained a double deduction of sales financing and export insurance costs from the export price. Nor did it react to the Commission's letter of 15 July 1993, to which the Commission had attached the statement of the calculation of the definitive dumping margin, and in which it indicated that it had taken into account only the deductions claimed by the applicant.

68 Finally, the applicant cannot claim that the institutions did not construct the export price until the end of the administrative procedure because they had always considered Ishida Europe to be an exporter. As is apparent from the correspondence between the Commission and the applicant, the role of Ishida Europe was discussed from the beginning of the investigation procedure. The fact that Ishida Europe did not respond to the 'importer' questionnaire sent by the Commission on 7 April 1992 shows that the applicant was aware of the problems that the role of Ishida Europe might pose, despite its stressing in its letter of 21 May 1992, which accompanied the investigation questionnaire, that Ishida Europe did not perform the functions of an importer or incur costs normally borne by an importer.

69 Moreover, and in any event, the applicant has not succeeded during the procedure before this Court in proving, on the basis of the bank and insurance invoices produced, either the real amount of the export insurance and sales financing costs relating to the dumped products or the fact that those costs had already been included in the overheads of Ishida Europe.

70 This claim must therefore be dismissed.

(b) Double deduction of 0.7% in respect of export salesmen's salaries

Arguments of the parties

71 The applicant maintains that, when comparing the export price and the normal value, the Commission deducted from the export price 0.7% in respect of the salaries of Descom's salesmen responsible for export sales. Since Descom was exclusively a production undertaking, that 0.7% could relate only to the salary of the person responsible for handling sales within Ishida Europe. Since that salary was

already part of Ishida Europe's overheads, it had already been deducted from the export price when it was constructed.

72 The Council states that, whilst a deduction in respect of the salaries of persons wholly engaged in selling was in fact made in calculating the provisional dumping margin, examination of the definitive calculation of the dumping margin clearly shows that no deduction was made in that respect.

73 The Commission states that, when the export prices and dumping margin were definitively established, it did not apply the specific provisions in the basic regulation concerning adjustments in respect of salesmen's salaries and did not therefore repeat the deduction of 0.7% from export prices made at the time of the preliminary determination of the facts. The applicant's argument is therefore baseless.

Findings of the Court

74 As the Council and the Commission have rightly pointed out, they did not deduct 0.7% from the export price in respect of export salesmen's salaries when comparing the normal value and the export price in order to calculate the definitive dumping margin. Even though the statement of the calculation of the provisional dumping margin (Annex 1 to the defence) shows that a double deduction was made at the time of the provisional calculation, the statement of the calculation of the definitive dumping margin (Annex 2 to the reply) shows that no such deduction was made in the definitive calculation.

75 Since the applicant has failed to rebut that evidence, it must be concluded that the deduction of 0.7% was not repeated in the calculation of the definitive dumping margin.

76 This claim and the fourth limb of the plea must therefore be dismissed.

77 It follows that the whole plea must be dismissed.

The second plea, alleging infringement of Article 2(9) and (10)(c)(v) of the basic regulation

Arguments of the parties

78 The applicant argues that the Community institutions have infringed Article 2(9) and (10)(c)(v) of the basic regulation because of their refusal to make adjustments to the normal value of its products in respect of salaries of salesmen in the domestic market. During the administrative procedure, the applicant requested that the normal value be reduced by 8.25% of the sales figure, corresponding to salesmen's salaries. To arrive at that figure, the applicant had taken the entry for salaries in the internal accounts of Dailim (the company which owns 50% of the applicant and markets the applicant's products in Korea), excluded directors and manual workers, divided the figure by the total number of Dailim's employees, then finally multiplied it by the 29.6 persons who were engaged in selling commercial scales. That calculation gave the average overall salary paid to the salesmen. The applicant contends that the Commission reduced its claim from 8.25% to 2%, on the ground that the amount of salesmen's salaries included, first, training, promotion and other

expenditure not directly linked to sales activity, such as the installation of equipment and the collection of invoices, and, secondly, expenses connected with the sale of other products.

79 The applicant concedes that its salesmen sell various products which are commonly referred to as commercial scales — including electronic scales intended for the retail trade — and which constitute a sub-heading of the overall turnover in Dailim's internal accounts, by contrast with industrial scales. Nevertheless, it considers that, by dividing the total turnover relating to commercial scales by the total number of salesmen assigned to products of that type and by then excluding the salaries of directors and manual workers, it has obtained a percentage representing very closely the salaries actually paid to personnel exclusively engaged in direct selling activities for those products.

80 The applicant also concedes that its salesmen spend a considerable amount of time, in particular, visiting potential customers to encourage them to buy its products, instructing customers how to use equipment sold, drawing up reports of activities or sales and studying the competition, but it considers that such promotion represents an integral part of the salesmen's work.

81 The applicant argues that the salary costs shown in its balance sheet comprise exclusively (a) salaries, (b) bonuses, (c) social security, (d) one other salary contribution and (e) pension contributions.

82 The applicant considers that the institutions are interpreting Article 2(10) of the basic regulation in an over-restrictive manner. The second sentence of Article 2(10)(c)(v), which allows for the deduction of salaries paid to salesmen, that is personnel wholly engaged in direct selling activities, should be interpreted in the light of the first sentence of that provision, which allows the deduction of an amount corresponding to the commissions paid in respect of the sales under consideration. The purpose of that provision is to place on the same footing those two types of costs connected with sales activities, in order to avoid discrimination

between undertakings which market their products through agents and those which market their products themselves. The institutions always allow commissions to be deducted, even though they must necessarily include canvassing and training costs, since, in order to sell, an agent must necessarily canvass for business, undertake training, attend to payments and so forth. A restrictive interpretation of that article, such as that put forward by the institutions, would result in putting small undertakings at a disadvantage as against large ones, since only the latter, by reason of their internal organization, are able to assign persons exclusively to the direct sale of a given product and thus establish the existence of a direct link between the sales under consideration and those persons.

83 The Council points out that, under Article 2(9)(b) of the basic regulation, 'where an interested party claims an adjustment it must prove that its claim is justified'. It considers that, in this case, the applicant has not proved that its claim for adjustment in respect of salaries paid to personnel wholly engaged in direct selling activities is justified. It has provided no breakdown of salary costs between those relating to employees wholly engaged in direct sales and those relating to other employees, or between those attributed to direct sales activities and those attributed to other activities. The Council maintains that, if a salesman is engaged in selling various products, it is necessary to break down his activities as amongst those products on the basis of the available information, such as copies of visit reports, diaries and time-sheets, which the applicant has not done.

84 The Council argues that it has not denied the principle of an adjustment, since it allowed a deduction of 2%, but that, in the absence of justification, it had to base its calculations on the direct selling expenses borne by other exporters.

85 The Commission states that the information it gathered in the course of the investigation procedure led it to conclude that the applicant had not justified, within the meaning of Article 2(9)(b) of the basic regulation, either its initial claim — which

concerned a total of 35.8 persons employed and an amount corresponding to 10.29% of prices charged to distributors and 8.11% of those charged to end buyers — or its revised claim under Article 2(10)(c)(v). The figure of 35.8 persons was reduced by the applicant to 29.6 persons, then to 23.4 persons, and did not correspond to the cost of salesmen directly linked to the sales under consideration established in the case of the two other Korean firms involved in the investigation procedure, which represented only 1 to 2% of the sale prices charged on the Korean market.

86 As for the applicant's allegation that the Commission's interpretation of Article 2(10)(c)(v) of the basic regulation puts small undertakings marketing a large number of products at a disadvantage, the Commission emphasizes that the applicant has not adduced any evidence in support of its allegation, and that the experience gained by the institutions in anti-dumping investigation procedures carried out with large undertakings over a very wide range of products shows that the adjustments claimed in respect of salaries paid to salesmen very rarely exceed 2% of the normal value of the product or products under consideration.

Findings of the Court

87 It is settled case-law that adjustments made under Article 2(9) and (10) of the basic regulation are different, as regards both their purpose and the conditions in which they are applied, from the adjustments made in the construction of the export price under Article 2(8)(b). Unlike the adjustments provided for in Article 2(8), which are made automatically by the Community institutions, adjustments under Article 2(9) and (10) are not made automatically, the party making a claim for them having to prove that they are necessary in order to ensure price comparability (*Nachi Fujikoshi*, at paragraphs 31, 32 and 33, *Nippon Seiko*, at paragraphs 43, 44 and 45, and *Minebea*, at paragraphs 41, 42 and 43).

88 It is therefore necessary to determine whether, in this case, the applicant has succeeded in proving that a part of the total cost of salesmen's salaries amounting to more than 2% of the sales figure could be regarded as directly linked to sales.

89 This Court cannot accept the applicant's calculation, whereby it divides the total turnover for commercial scales by the total number of salesmen for such products and then excludes the salaries of directors and manual workers in order to obtain a percentage very close to the salaries actually paid to personnel wholly and directly engaged in selling those products. Although that calculation excludes part of the costs relating to salesmen's salaries by eliminating products other than commercial scales, such as industrial scales, it does not enable the costs directly linked to sales of the NOVA product, which is the subject of the anti-dumping duty, to be determined, since the category of 'commercial scales' includes yet other products. Moreover, the applicant does not deny the Commission's assertion that the NOVA is a simple model which has matured and justifies less sales effort than other models which are more complex or in a state of development.

90 As for the argument that salesmen's activities in visiting potential customers to encourage them to buy their products, instructing customers in the use of equipment sold, and drawing up activity or sales reports constitute an integral part of the salesmen's work, it suffices to note, first, that Article 2(9) and (10) do not, as a rule, allow an adjustment in that regard, and, secondly, that in accordance with the case-law of the Court of Justice (Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraphs 24 to 30) travel, communication, advertising, sales promotion and representation costs cannot be regarded as directly related to sales for the purposes of Article 2(10)(c) of the basic regulation and cannot justify a downward adjustment of the normal value.

91 The fact that the entry for salaries in the applicant's balance sheet makes no reference to training or sales promotion costs does not prove that the salesmen do not carry out such activities, especially as the applicant claims that those activities form

an integral part of their work. Therefore, the 'salaries' entry of the balance sheet includes remuneration for those activities.

92 In those circumstances, the Commission was entitled to require the applicant to supply it with proof that the salary costs were linked to the sale of the product in question. Having regard to the documents which were presented and the discussions held during the administrative procedure, this Court finds that the applicant has not succeeded in demonstrating that the adjustment requested in relation to salaries satisfied the conditions of Article 2(10)(c)(v) of the basic regulation. The applicant cannot therefore complain that the Commission did not accept its request for adjustment.

93 As for the argument that the institutions' interpretation of Article 2(10)(c)(v) serves to put undertakings which market their products themselves at a disadvantage compared with those which use agents, it should be noted that the institutions have done no more than apply strictly the terms of that provision. The latter makes a clear distinction, as regards adjustments based on sales costs, between payment of commission and the case of salaried personnel, and allows adjustments in the latter case only for the amount of salaries which correspond to direct selling activities. As the Council has rightly pointed out, an agent is paid for having sold, and his remuneration is therefore a direct sales expense. A salaried salesman, on the other hand, is not paid by commission, and hence it is necessary to determine by other means whether he is wholly engaged in selling.

94 It follows that the deduction of 2% carried out by the Commission did not infringe Article 2(9) and (10) of the basic regulation.

95 This plea must therefore be rejected.

The third plea, alleging infringement of the rights of the defence

Arguments of the parties

96 The applicant has argued in its reply that the institutions, by failing to inform the applicant of their decision to reject its claim for adjustments for salesmen's salaries under Article 2(9) and (10) of the basic regulation when they verified the facts, that is in time for the applicant to supply information capable of justifying its request, and by not communicating a written note of the verification made, have disregarded their duty of sound administration and the rights of the defence. The applicant considers that the safeguarding of the rights of the defence requires that, at the conclusion of each verification, a written record should be drawn up summarizing not only the points verified but also the points on which, in the opinion of the persons responsible for verification, the information supplied is insufficient. It is unacceptable for an undertaking, as in this case, not to learn until reading the defence lodged at this Court that its request for adjustments was deemed suspect on the ground that the deduction requested was higher for its distributors than for direct sales to consumers of the product. Had it been informed of that ground before the contested regulation was adopted, the applicant would have replied that, as the Council could verify, all its end buyers were established in Seoul and that, in those circumstances, a very small number of salesmen could cover a very large number of buyers. By contrast, its distributors were spread across the whole of Korea and a larger number was therefore necessary, on the same turnover, to cover the provinces. The applicant pleads maladministration and infringement of the rights of the defence by the institutions entailing infringement of Article 2(9) and (10) of the basic regulation.

97 The Council points out that that is a new plea, which was introduced by the applicant in its reply and is therefore inadmissible. It adds that, as Community legislation now stands, there is no obligation to prepare a record after each verification in the course of an investigation. The purpose of the verification is to check the information provided by the parties in their answers to questionnaires and, in order to ensure that the rights of the defence are observed, the position adopted by the Commission in the light of that information is the subject-matter of the communication provided for by Article 7(4)(b) of the basic regulation. By sending to the applicant its letter of 6 May 1993, the Commission discharged its obligation under that provision and enabled the applicant to present its observations, as it did in its

letter of 6 June 1993, without complaining in that letter of the absence of a report of the verification. The applicant is therefore barred from making that complaint in its reply.

Findings of the Court

98 Under the first paragraph of Article 19 of the Statute of the Court of Justice of the EEC, which applies to the Court of First Instance by virtue of the first paragraph of Article 46 of the same Statute, and under Article 44(1) of the Rules of Procedure of the Court of First Instance, the application must contain a summary of the pleas in law on which it is based. Further, under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which came to light in the course of the procedure. In this case, it was only in its reply that the applicant raised this plea, which was not referred to in the application, and it is therefore out of time (judgment of the Court of Justice in Case C-330/88 *Grifoni* v *EAEC* [1991] I-1045, paragraph 18; judgment of the Court of First Instance in Case T-16/91 *Rendo* v *Commission* [1992] ECR II-2457, paragraphs 130 and 131). Nevertheless, in the interests of judicial protection, it is appropriate to examine the merits of the plea.

99 As the Council has rightly pointed out, the basic regulation does not lay down any obligation to draw up a report after each verification in the course of an investigation. Article 7(4)(b) of the basic regulation provides that exporters and importers of the product subject to investigation may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties. Article 7(4)(c)(ii) provides that the information may be given either orally or in writing as considered appropriate by the Commission.

100 Moreover, this Court considers that the applicant cannot argue that the absence of such a record left it unable to present to the Commission the necessary information

to establish that its claim for adjustments was well founded. In this instance, the Commission communicated to the applicant the information referred to in Article 7(4)(b) and (c) of the basic regulation in its letter of 6 May 1993 (Annex IV.2 to the application), which reads: 'Hereunder follows, pursuant to Article 7(4)(b) and (c) of Council Regulation (EEC) No 2423/88 of 11 July 1988, the essential facts and considerations concerning dumping and injury calculations'. The letter stated that: 'Costs for salesmen salaries include expenses for training, promotion and other, not directly sales-related expenditures. Also the salesmen, as proved during inspection, are selling other products not linked to R. E. W. S. and performing other activities like collecting cheques or installing equipment ... A claim of 10.29% respectively 8.11% for salesmen salaries can therefore not be accepted as a reliable indication of expenses directly linked to R. E. W. S. sales. In these circumstances, a 2% allowance for salesmen charges is estimated reasonable.'

101 Moreover, in another letter of 28 June 1993 (Annex IV.4 to the application), the Commission informed the applicant that: 'The Commission's services cannot accept the arguments developed by the company in its comments to the disclosure [the Commission's letter of 6 May 1993] . The staff concerned is partly engaged in R. E. W. S. sales and partly involved in activities concerning other products. Furthermore, a considerable part of the salarial costs for which allowances are claimed relate to administrative and promotional activities (see annex 27) considered to be general overheads which do not affect price comparability'. The Commission also determined that: 'The company was not in a position to link the costs directly to the individual sales transactions'. Moreover, the changes in the applicant's request for adjustments (first 35.8 salesmen, then 29.6, and finally 23.4) and the exclusion

of certain products (such as industrial scales) show that the Commission and the applicant discussed those adjustments during the on-the-spot investigation.

102 It follows that the applicant was put in a position to know, in the course of the administrative procedure, the reasons for which the Commission intended to reject its claim for adjustments. It must therefore be concluded that the absence of a verification report stating the Commission's intention to reject that claim does not constitute an infringement of the applicant's rights of the defence.

103 This plea must therefore be dismissed.

The fourth plea, alleging infringement of Article 7(4) of the basic regulation

Arguments of the parties

104 The applicant maintains that the Commission has infringed Article 7(4) of the basic regulation by refusing to send it certain information essential for the defence of its interests. In Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, the Court of Justice required the Commission to reveal information allowing exporters effectively to defend their interests. In Case C-49/88 *Al-Jubail Fertilizer* v

Council [1991] ECR I-3187, the Court of Justice held that, in performing their duty to provide information, the institutions must act with all due diligence by seeking to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their own interests, choosing, if necessary on their own initiative, the appropriate means of providing such information. In any event, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury.

105 The applicant states that, in this instance, the Commission used for the present proceeding information from a previous proceeding concerning the export of scales originating in Japan, in particular as regards calculation of the target price. In that proceeding, Ishida Japan, the parent company of the applicant, asked the Commission to supply that information, but the latter failed to reply in a satisfactory manner. The applicant argues that, in the present proceeding, the institutions did not communicate to it the essential information which they had taken from the proceeding concerning Japan, and that, had it known its own theoretical resale margin and above all the target prices of the complainants, it would have been able to reduce considerably the price undercutting margin which was finally established.

106 The applicant acknowledges that it was indeed informed that the Commission would use the same method and information in order to calculate the target price in the present proceeding as it had used in the proceeding concerning Japan, and that it accepted that. However, it considers itself entitled to repeat in the present proceeding the arguments used by Ishida Japan in the proceeding concerning Japan, and refers in that regard to the content of the letters exchanged between Ishida Japan and the Commission in that proceeding.

107 The Council argues that that plea is unfounded, since, in the present proceeding, the applicant did not request that the information on the calculation of the target price carried out in the proceeding concerning Japan should be communicated to it, nor did it even indicate that it was repeating the arguments put forward by Ishida Japan in that proceeding. In reality, the facts show that, following the Commission's letter of 6 May 1993, it was clear to the applicant that the amount of the anti-dumping duties would be determined on the basis of the dumping margin not the injury margin, since the dumping margin (29.08%) was lower than the injury margin (45%), whereas, in the procedure concerning Japan, the situation was the reverse. It was therefore in the applicant's interest to discuss the calculation of the dumping margin rather than of the injury margin. The correspondence between the applicant and the Commission proves that the applicant had abandoned the argument on price undercutting and the target price, since its dumping margin was lower than the injury margin.

108 In the alternative, the Council considers that the information supplied by the Commission to Ishida Japan did enable the latter to defend its interests in the proceeding concerning Japan.

109 The Commission points out that, in the present proceeding, the applicant did not at any time consider it either appropriate or necessary to make a request for information like the one it had made in the proceeding concerning Japan.

110 The Commission states that in the provisional regulation (recital 55) and in its disclosure letter of 6 May 1993 it indicated that the anti-dumping duty would be calculated on the basis of the dumping margin, since the injury margin was higher, and that, in its reply of 6 June 1993, the applicant did not express any reservation. It was not until its letter of 9 July 1993, more than two months after the entry into force of the provisional regulation and the dispatch by the Commission of its disclosure letter of 6 May 1993, that the applicant expounded the argument that the method of calculating injury used for the purposes of establishing the anti-dumping

duty should not be applied to it, by reason of the nature of its exports (one model only), which presupposes, in the Commission's view, that the applicant had accepted that the injury margin calculated by the Commission on the basis of the price undercutting (more than 45%) was correct.

111 The Commission concludes that Article 7(4) of the basic regulation has not been infringed, since the applicant did not at any stage of the procedure consider it either necessary or appropriate to make a request under Article 7(4)(c)(i) of the basic regulation for precise information on the calculation of the injury margin used to determine the provisional and definitive anti-dumping duties.

Findings of the Court

112 As the applicant has acknowledged in its application, it consented to the Commission using in the present proceeding the same method and the same information as in the proceeding concerning Japan in order to calculate the target price.

113 As the Council and the Commission have observed, the applicant has not requested in the present proceeding that the information on the basis of which the target price was calculated in the proceeding concerning Japan should be communicated to it, nor did it even indicate that it was repeating the arguments raised by Ishida Japan in that proceeding.

114 Moreover, the provisional regulation states that the Commission's investigations concerning injury factors 'showed price undercutting which, for all companies, exceeded 20% and 30% in the case of the Korean exporter found to have the highest dumping margin' (namely Descom; end of recital 33); the existence and extent

of price undercutting was established by 'a comparison between the prices of representative models marketed by the Community industry and those of the comparable models of the exporters concerned on the basis of sales taken at the same level of trade (prices to unrelated distributors or dealers) on the major Community markets during the investigation period', with no account being taken of technical differences between the models compared (recital 33); since the level of injury established exceeded the dumping margin, the Commission calculated the provisional anti-dumping duty on the basis of the dumping margin (recital 55); and finally, a period of one month was fixed to enable the parties to present their observations on the conclusions reached, which were provisional and could be reconsidered (recital 58).

115 This Court also finds that, in its disclosure letter of 6 May 1993, the Commission indicated to the applicant that a comparison at the same level of trade between the prices of low-end-of-the-range models of Community producers and the prices of the applicant's comparable model showed price undercutting of more than 45%; the Commission intended to propose the imposition of an anti-dumping duty of 29% corresponding to the dumping margin found to exist; and, in the absence of any contrary indication in writing, the Commission would regard the facts and considerations set out in that letter as not being subject to any objections on the part of the applicant.

116 In those circumstances the applicant did not express any reservations in its letter of reply of 6 June 1993 either as to the Commission's intention to propose the imposition of a definitive anti-dumping duty based on Descom's dumping margin, or as to the facts and essential considerations underlying the Commission's approach (losses of the Community industry, basis for calculating the price undercutting, calculation of an undercutting margin of over 45%, indication that the injury margin based on comparison with a target price would inevitably be higher than the margin established by comparing prices charged), nor did it even request further information in that regard.

117 It is settled case-law that the rights of the defence have been complied with if the undertaking concerned has been afforded the opportunity during the administrative procedure to express its views on the truth and relevance of the facts and circumstances alleged (see, for example, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 109 and 110).

118 It must therefore be held that, since the applicant did not in the course of the present proceeding request that information on the calculation of the target price in the proceeding concerning Japan be communicated to it and did not challenge the information supplied by the Commission, it cannot claim that its rights of the defence have been infringed in the present proceeding.

119 In its letter of 9 July 1993 and at the hearing, the applicant maintained that the essence of its plea was that the method of calculation used by the Commission was not applicable to it because it markets only one product. In the applicant's submission, that method is appropriate only in cases where exporters or manufacturers export several products to the Community, and are thus able to offset the dumping margin from one product to another, as was the case in the proceeding concerning Japan.

120 It should be noted that the applicant admits in its application that it did not challenge the Commission's use in the present proceeding of the method of calculation it had used in the proceeding concerning Japan, even though the applicant has been aware since the beginning of this proceeding that it concerns only one model. Moreover, since the applicant was in a position to compare its NOVA model with each of the 'low-end-of-the-range' models referred to in the list of models sent to Ishida Japan at the time of the proceeding concerning Japan, it could have raised that argument at the beginning of the proceeding rather than waiting for the Commission to find, at the conclusion of the proceeding, that the dumping margin was lower than the injury margin. The applicant's argument cannot therefore be accepted.

121 Furthermore, the applicant cannot claim that, if it had been duly informed of the target price of the complainants, it would have been able to reduce the injury margin imputed to its imports well below the dumping margin, as it had done in the proceeding concerning Japan. In the first place, it has already been held that the applicant cannot complain of a lack of information from the Commission. Secondly, as the applicant stated at the hearing, the proceeding concerning Japan covered the various models which Ishida Japan exported to the Community, whilst the present proceeding concerns only one product so far as the applicant is concerned, namely the NOVA model. Where several models are exported, a much greater amount of information has to be taken into consideration in order to calculate the injury margin, thereby increasing the complexity of the calculations and consequently the possibilities for making adjustments in those calculations. If, therefore, in the proceeding concerning Japan, the information supplied by the Commission enabled Ishida Japan to demonstrate to the Commission the existence of a smaller injury margin, Descom should, *a fortiori*, have been able to do the same in the present proceeding. This claim must therefore be rejected.

122 As regards, finally, the argument alleging infringement of the rights of the defence in the proceeding concerning Japan, it should be noted that, for such a plea, which is based on facts extraneous to the present proceeding, to be relevant, the applicant must establish a link between those facts and the procedure which led to the adoption of the contested regulation. The only way of establishing such a link would have been to request the Commission, in the present proceeding, to supply the applicant with the same information as it had requested in the proceeding concerning Japan. In the absence of such a request, the facts of the proceeding concerning Japan remain outside the scope of the procedure before this Court.

123 The plea must therefore be dismissed.

124 It follows from all the above considerations that the action must be dismissed in its entirety.

Costs

125 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has asked for costs, the applicant must be ordered to pay the Council's costs. Under Article 87(4) of the Rules of Procedure, the Commission, as intervener, is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and to pay the Council's costs, including those relating to the proceedings for interim measures;

3. Orders the Commission to bear its own costs.

Lenaerts Schintgen García-Valdecasas

Bellamy Lindh

Delivered in open court in Luxembourg on 14 September 1995.

H. Jung K. Lenaerts

Registrar President