JUDGMENT OF THE COURT (Second Chamber)

27 September 2007 *

In Case C-351/04,

REFERENCE for a preliminary ruling under Article 234 EC, by the High Court of Justice of England and Wales, Chancery Division (United Kingdom), made by decision of 22 July 2004, received at the Court on 16 August 2004, in the proceedings

Ikea Wholesale Ltd

v

Commissioners of Customs & Excise,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, R. Silva de Lapuerta, J. Makarczyk and G. Arestis (Rapporteur), Judges,

* Language of the case: English.

Advocate General: P. Léger,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2005,

after considering the observations submitted on behalf of:

— Ikea Wholesale Ltd, by B. Servais and Y. Melin, avocats,

— the United Kingdom Government, by M. Bethell, acting as Agent, and R. Thompson, QC,

— the Council of the European Union, by J.-P. Hix, acting as Agent, and G. Berrisch, Rechtsanwalt,

— the Commission of the European Communities, by E. Righini, K. Talaber-Ricz and C. Brown, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the validity of Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan (OJ 1997 L 332, p. 1) and, second, the compatibility with Community law of Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97 and suspending its application with regard to imports originating in India (OJ 2001 L 219, p. 1), Council Regulation (EC) No 160/2002 of 28 January 2002 amending Council Regulation (EC) No 2398/97 and terminating the proceeding with regard to imports originating in Pakistan (OJ 2002 L 26, p. 1), and Council Regulation (EC) No 696/2002 of 22 April 2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001 (OJ 2002 L 109, p. 3) ('the subsequent regulations').

2 The reference has been made in the course of proceedings arising from the refusal of the Commissioners of Customs & Excise ('the Commissioners') to reimburse anti-dumping duties on imports of cotton-type bed linen from Pakistan and India paid by Ikea Wholesale Ltd ('Ikea').

Legal context

3 The provisions governing the application of anti-dumping measures by the European Community are set out in Council Regulation (EC) No 384/96 of

22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1995 L 56, p. 1) ('the basic regulation').

4 Article 1(1) of the basic regulation states that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

5 Article 2(6) and (11) of the basic regulation provides:

'6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

...

11. Subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on

the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis ["the symmetrical method"]. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised ["the asymmetrical method"]. This paragraph shall not preclude the use of sampling in accordance with Article 17.'

6 Article 3(5) of the basic regulation provides:

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

7 The basic Community legislation in the customs field is Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). The provisions of that regulation which are applicable to the present proceedings are Articles 236 and 239.

8 Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ 2001 L 201, p. 10), provides in recital (6) in its preamble:

'Recourse to the [Understanding on Rules and Procedures Governing the Settlement of Disputes, "the DSU"] is not subject to time-limits. The recommendations in reports adopted by the [Dispute Settlement Body, "the DSB"] only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force, unless otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date.'

9 Article 1(1) of Regulation No 1515/2001provides:

'Whenever the DSB adopts a report concerning a Community measure taken pursuant to the [basic regulation], [Council] Regulation (EC) No 2026/97 of [6 October 1997 on protection against subsidised imports from countries not members of the European Community] or to this Regulation ("disputed measure"), the Council may, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee established pursuant to Article 15 of Regulation (EC) No 384/96 or Article 25 of Regulation (EC) No 2026/97 ("the Advisory Committee"), take one or more of the following measures, whichever it considers appropriate:

(a) repeal or amend the disputed measure or;

(b) adopt any other special measures which are deemed to be appropriate in the circumstances.'

10 Under Article 2(1) of Regulation No 1515/2001:

'The Council may also take any of the measures mentioned in Article 1(1) in order to take into account the legal interpretations made in a report adopted by the DSB with regard to a non-disputed measure, if it considers this appropriate.'

11 Article 3 of Regulation No 1515/2001 is worded as follows:

'Any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for.'

12 Commission Regulation (EC) No 1069/97 of 12 June 1997 imposed a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan (OJ 1997 L 156, p. 11) ('the provisional regulation'). By Regulation No 2398/97 the Council imposed a definitive anti-dumping duty on those imports.

13 Having regard to the DSB's recommendations on those imports and the provisions of Regulation No 1515/2001, on 7 August 2001, the Council adopted Regulation No 1644/2001. On 28 January and 22 April 2002, the Council adopted Regulations No 160/2002 and No 696/2002 respectively. None of those three regulations provides for the reimbursement of sums already paid in accordance with Regulation No 2398/97.

14 The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103) ('the Anti-Dumping Agreement') is contained in Annex 1A to the Agreement establishing the World Trade Organisation ('the WTO'), signed in Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). Annex 2 to the Agreement Establishing the WTO contains the Understanding on Rules and Procedures Governing the Settlement of Disputes. Pursuant to the DSU, the DSB was established.

15 Article 3(2) of the DSU provides:

'... The Members recognise that [the dispute settlement procedure of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

Proceedings before the DSB

16 In its report of 30 October 2000, a dispute-resolution panel of the DSB ('the Panel') found that the European Communities had acted in a manner incompatible with their obligations under Articles 2.4.2, 3.4 and 15 of the Anti-Dumping Agreement, as regards the method used in the investigations which led to the adoption of Regulation No 2398/97.

17 The Community appealed against a number of the Panel's findings. The WTO Appellate Body ('the Appellate Body'), in its report of 1 March 2001, confirmed that the practice of 'zeroing' applied by the Community was incompatible with Article 2.4.2 of the Anti-Dumping Agreement and that the Community had acted in a manner incompatible with Article 2.2.2(ii) of the Anti-Dumping Agreement in calculating the amounts corresponding to administrative, selling and general costs and profits in the anti-dumping investigation. In the light of those findings, the Appellate Body recommended that the DSB request the Community to take the measures necessary to ensure the conformity of Regulation No 2398/97 with its obligations under the Anti-Dumping Agreement.

18 On 12 March 2001, the DSB adopted the Appellate Body's report and the report of the Panel, as amended by the former's report.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 Ikea is a company which carries on the business of a producer and retailer of household goods in the United Kingdom.

20 By letter of 10 June 2002, Ikea requested the Commissioners to reimburse the anti-dumping duties paid in respect of imports of cotton-type bed linen originating in Pakistan and India, in accordance with Regulation No 2398/97. Ikea sought repayment of GBP 230 301.74, corresponding to duties levied on imports of cotton-type bed linen originating in Pakistan for the period from March 2000 to 29 January 2002, and GBP 69 902.29, corresponding to a portion of the duties levied on its imports of cotton-type bed linen originating in India for the period from March 2000 to 8 August 2001. That claim was based on Articles 236 and 239 of Regulation No 2913/92.

21 Ikea contended that the sums had been unlawfully calculated under Regulation No 2398/97 and that that regulation was itself unlawful. It relied partly on the reports, observations and findings adopted by the DSB on 1 March 2001. By letter of 26 June 2002 the Commissioners rejected Ikea's claim for reimbursement.

22 Following Ikea's request for a formal departmental review of that decision, the reviewing officer, by letter of 27 November 2002, confirmed the Commissioners' decision to reject the claim for reimbursement of the anti-dumping duties.

23 Ikea accordingly brought an appeal against the Commissioners' review decision before the VAT and Duties Tribunal, London. On 8 September 2003 the VAT and Duties Tribunal dismissed Ikea's appeal, holding that Ikea could have contested the legality of Regulation No 2398/97 on the basis of the fourth paragraph of Article 230 EC, but that it had failed to do so within the period prescribed. Consequently, the VAT and Duties Tribunal held that it was not open to Ikea to avoid the time-limit laid down by challenging Regulations No 2398/97, No 1644/2001 and No 160/2002 in the course of a request for a preliminary ruling.

24 On 31 October 2003, Ikea lodged an appeal against that decision with the High Court of Justice of England and Wales, Chancery Division, under sections 14 and 15 of the Finance Act 1994. In substance, Ikea's grounds of appeal were, first, that the VAT and Duties Tribunal had erred in holding that Regulations No 2398/97, No 1644/2001 and No 160/2002 were of direct and individual concern to Ikea and, second, that those regulations were wholly or partly unlawful. On 17 February 2004 Ikea was given leave to amend its grounds of appeal so as to include a challenge to Regulation No 696/2002.

25 The High Court of Justice of England and Wales, Chancery Division, having overturned the decision of the VAT and Duties Tribunal and ruling that Ikea had no standing to challenge Regulation No 2398/97 under the fourth paragraph of Article 230 EC, decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the light of the findings of the Panel of the DSB in its report dated 30 October 2000, paragraph 7.2(g) and (h), WT/DS1412/R and of the Appellate Body ... in its decision dated 1 March 2002, paragraphs 86 and 87, WT/DS1141/AB/R, is all or part of ... Regulation No 2398/97 ... incompatible with Community law, in that it:

— applied a wrong methodology in calculating the amounts for selling, general and administrative expenses and for profits, contrary to Article 2(6)(a) of [the basic regulation], as amended, and Article 2.2.2(ii) of the Anti-Dumping Agreement;

— applied a wrong methodology incorporating the practice of "zeroing" in determining the existence of dumping margins when comparing normal value with export price, contrary to Article 2(11) of [the basic regulation] and Article 2.4.2. of the Anti-Dumping Agreement; and/or

— failed to evaluate all the relevant injury factors having a bearing on the state of the Community industry and erred in determining the injury to the Community industry by relying on evidence obtained from companies outside the Community industry, contrary to Article 3(5) of [the basic regulation] and Article 3.4 of the Anti-Dumping Agreement?

(2) Are any or all of:

— ... Regulation No 1644/2001 ...;

— ... Regulation No 160/2002 ...; and/or

— ... Regulation No 696/2002 ...;

incompatible with Community law (including Articles 1, 7(1) and 9(4) of [the basic regulation] read in the light of Articles 1, 7.1 and 9 of the Anti-Dumping Agreement) insofar as (i) they were adopted on the basis of a reassessment of information which was collected during the original investigation period, which reassessment showed that no dumping or lower levels of dumping had taken place during the original investigation period; but (ii) the above regulations fail to provide for reimbursement of sums already paid pursuant to Regulation No 2398/97?

(3) Are Regulations No 1644/2001, No 160/2002 and 696/2002 further incompatible with Articles 7(2) and 9(4) of [the basic regulation] and the principle of proportionality, in that they allow for a level of anti-dumping duty, for the period prior to their entry into force, that is not strictly proportionate to the amount of dumping or injury the duty is intended to offset?

(4) Do the answers to the above questions differ in respect of exports originating in India as against Pakistan, given:

— the procedures followed before [the DSB]; and/or

— the findings of the Commission recorded in Regulations No 1644/2001, No 160/2002 and No 696/2002?

(5) In the light of the answers to the above questions:

— must a national customs authority repay all or part of the anti-dumping duties which it has collected pursuant to Regulation No 2398/97; and

— if so, to whom and under what conditions should repayment be made?'

The questions referred for a preliminary ruling

26 By its first question, the national court is essentially asking the Court to determine whether Regulation No 2398/97 is valid in the light of the Anti-Dumping Agreement, as subsequently interpreted by the recommendations and decisions of the DSB and also in the light of the basic regulation.

The validity of Regulation No 2398/97 in the light of the Anti-Dumping Agreement, as interpreted by the recommendations and decisions of the DSB

27 The United Kingdom of Great Britain and Northern Ireland submits that the DSB's recommendations and decisions clearly constitute the sole basis of the action, since the validity of Regulation No 2398/97 was not the subject of any independent action prior to those findings. It contends that a ruling of the Court having retroactive effect on the legality of Community legislation, in the light of the recommendations of the DSB, which have prospective effect, or on the decisions on which those recommendations are based, would be contrary to the principles which form the basis of Regulation No 1515/2001.

28 The Council and the Commission take the view that those recommendations and decisions on imports of cotton-type bed linen are not binding on the Court, and that Regulation No 2398/97 is not vitiated by invalidity with respect to Community law solely on the ground that the DSB concluded that the adoption of that regulation was contrary to the Community's obligations under the Anti-Dumping Agreement.

29 It must be recalled, as a preliminary point that, according to settled case-law, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52, and Case C-377/02 *Van Parys* [2005] ECR I-1465, paragraph 39 and the case-law cited).

30 It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the

WTO rules (Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 49; *Biret International* v *Council*, paragraph 53; and *Van Parys*, paragraph 40 and the case-law cited).

31 In accordance with Article 1 of Regulation No 1515/2001, the Council may, following a report adopted by the DSB, and depending on the circumstances, repeal or amend the disputed measure or adopt any other special measures which are deemed to be appropriate in the circumstances.

32 Regulation No 1515/2001 applies, according to its Article 4, to reports adopted after 1 January 2001 by the DSB. In the present case, the DSB adopted the report of the Appellate Body on 12 March 2001 together with that of the Panel as amended by the Appellate Body's report.

33 Pursuant to Article 3 of Regulation No 1515/2001, any measures adopted pursuant to that regulation are to take effect from the date of their entry into force and may not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for. Recital (6) in the preamble to the regulation provides in that connection that the recommendations in reports adopted by the DSB only have prospective effect. Therefore, 'any measures taken under [Regulation No 1515/2001] will take effect from the date of their entry into force, unless otherwise specified, and ... do not provide any basis for the reimbursement of the duties collected prior to that date'.

34 In this case, having regard to the provisions of Regulation No 1515/2001 and to the DSB's recommendations, the Council first of all adopted Regulation No 1644/2001 on 7 August 2001. Next, on 28 January 2002, it adopted Regulation No 160/2002, and finally, on 22 April 2002, Regulation No 696/2002 confirming the definitive anti-dumping duty imposed by Regulation No 2398/97, as amended and suspended by Regulation No 1644/2001.

35 It follows from all of the foregoing that, in circumstances such as those in the main proceedings, the legality of Regulation No 2398/97 cannot be reviewed in the light of the Anti-dumping Agreement, as subsequently interpreted by the DSB's recommendations, since it is clear from the subsequent regulations that the Community, by excluding repayment of rights paid under Regulation No 2398/97, did not in any way intend to give effect to a specific obligation assumed in the context of the WTO.

The validity of Regulation No 2398/97 in the light of the basic regulation

36 The national court is also unsure as to the validity of Regulation No 2398/97 in the light of the basic regulation. It asks, essentially, whether the Commission committed a manifest error of assessment in determining the normal 'constructed' value of the goods concerned, the dumping margin, and the existence of injury caused to the Community industry.

37 The applicant in the main proceedings relies on Article 2(6) of the basic regulation, relating to the determination of the normal value of a product, Article 2(11) of the basic regulation relating to determination of the dumping margin, and Article 3(5) of that regulation relating to determination of injury caused to a Community industry.

38 In that connection, Ikea submits that, as the DSB's interpretations of the articles of the Anti-Dumping Agreement in its decisions confirm the fact that the methods used by the relevant Community institutions to determine the dumping margin and injury are incorrect, those methods are also contrary to the basic regulation.

39 The Commission and the Council consider, by contrast, that Regulation No 2398/97 remains valid from the Community-law stand point. The Commission, supported by the Council, takes the view that the provisions of Regulation No 2398/97, disputed in the light of the basic regulation, constitute practices in force for many years which have not up to now been declared invalid by the Community Courts.

40 It must be recalled in that connection that, as the Advocate General observed in point 102 of his Opinion, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (see, to that effect, Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 26, and Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 21).

41 Furthermore, it is settled case-law that the choice between the different methods of calculating the dumping margin, such as those set out in Article 2(11) of the basic regulation, together with the assessment of the normal value of a product or the determination of the existence of harm require an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see, to that effect, Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 19; Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63; and Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 54).

42 It is thus necessary to examine whether the Community institutions have committed a manifest error of assessment with regard to Community law in determining the normal 'constructed' value of the product concerned, the dumping margin and the existence of injury caused to the Community industry.

The calculation of the normal 'constructed' value of the product concerned

43 The normal value is calculated for all types of goods exported to the Community by all companies, in accordance with Article 2(3) of the basic regulation. The normal value is determined by adding to the production costs of the types of goods exported by each company a reasonable amount corresponding to selling, general and administrative costs and to profits.

44 As regards the imports from India, since only one company had representative global domestic sales and profitable domestic sales represented less than 80% but more than 10% of total domestic sales, those sales were regarded as having been made in the course of normal trade. Therefore, the amounts corresponding to selling, administration and general costs and profits which were used in order to determine the normal value for all of the companies under investigation, correspond to the costs incurred and the profits made by each respective company, in accordance with Article 2(6) of the basic regulation. The same finding was made in regard to imports from Pakistan.

45 With regard to the use of the profit margin of only one company, Regulation No 2398/97 states, in recital (18) in its preamble, that the investigation was restricted to a sample of exporting producers in accordance with Article 17 of the basic regulation, and that the vast majority of the cooperating Indian companies are export-oriented companies with no domestic sales of the like product. The Commission selected for that sample five Indian exporting producers, two of which had declared at the time of the selection that they had made domestic sales of the like product.

46 However, recital (23) in the preamble to the provisional regulation states that the investigation revealed that only one of those exporting producers had made representative domestic sales of the like product during the investigation period. Moreover, the reference in Article 2(6)(a) of the basic regulation to a weighted average amount for profits determined for other exporters or producers does not rule out such amount being determined by reference to a weighted average of transactions and/or product types of a single exporter or producer.

47 In that connection, as the Advocate General stated in points 132 to 142 of his Opinion, the Council had not committed a manifest error of assessment in taking the view, when determining the amounts corresponding to selling, administrative and other general costs and to profits, that Article 2(6)(a) of the basic regulation may be applied where the information available concerns a single producer and permits the exclusion of information relating to sales which were not made in the normal course of trade.

48 First, the use in Article 2(6)(a) of the basic regulation of the plural in the expression 'other exporters or producers' does not exclude from consideration data from a single enterprise which, as one of the undertakings subject to investigation, engaged, on the domestic market of the State of origin, in representative sales of the like product during the investigation period. Second, the fact of excluding from the assessment of the profit margin the sales of other exporters or producers which were not made in the normal course of trade constitutes an appropriate method of constructing the normal value, in accordance with the principle established in Articles 1(2) and 2(1) of the basic regulation, according to which the normal value must in principle be based on data relating to sales made in the ordinary course of trade.

49 It follows that the Council did not commit a manifest error of assessment in calculating the normal 'constructed' value of the product concerned.

Determination of the dumping margin

50 As regards the final determination of the dumping margin, the national court seeks to ascertain whether the practice of 'zeroing' used in establishing the overall dumping margins, as it was applied in the anti-dumping investigation at issue in the main proceedings, is compatible with Article 2(11) of the basic regulation.

51 It must be recalled, as a preliminary point, that the errors supposedly committed in the calculation of selling, administrative and other costs and profits, and the practice of 'zeroing', concern the determination of the dumping margins. However, the unlawfulness of an adjustment made in the course of the determination as to whether dumping has taken place affects the legality of the imposition of an anti-dumping duty only in so far as the anti-dumping duty imposed exceeds the duty which would be applicable were it not for that adjustment.

52 Under Article 2(12) of the basic regulation the dumping margin is the amount by which the normal value exceeds the export price. That margin is thus determined by the authorities responsible for the investigation, in accordance with Article 2(10), which make a fair comparison between the normal value of the like product and the export price to the Community.

53 In the main proceedings, it is not disputed that the dumping margin was calculated by comparing the average normal 'constructed' weighted value by types of product type with a weighted average of prices by product type. Therefore, the institutions concerned first identified a number of different models of the product under investigation. For each of those they calculated a weighted average normal value and an average weighted export price and then compared them for each model. Since for some models the normal value was higher than the export price, dumping was established. However, for other models, as the normal value was lower than the export price, a negative dumping margin was established.

54 In order to calculate the overall amount of dumping for the product subject to the investigation, those institutions then added up the dumping amounts for all the models in respect of which dumping had been established. By contrast, those institutions treated all the negative dumping margins as zero. The total dumping amount was then expressed as a percentage of the cumulative value of all the export transactions of all the models, irrespective of whether they had or had not been the subject of dumping.

55 In that connection, it must be observed that the wording of Article 2 of the basic regulation makes no reference to the practice of 'zeroing'. To the contrary, that regulation expressly requires the Community institutions to make a fair comparison between the export price and the normal value, in accordance with the provisions of Article 2(10) and (11).

56 Article 2(11) of the basic regulation states that the weighted average normal value is to be compared with 'a weighted average of prices of all export transactions to the Community'. In this case, in making that comparison, the use of the practice of 'zeroing' negative dumping margins was in fact made by modifying the price of the export transactions. Therefore, by using that method the Council did not calculate

the overall dumping margin by basing its calculation on comparisons which fully reflect all the comparable export prices and, therefore, in calculating the margin in that way, it committed a manifest error of assessment with regard to Community law.

57 It follows that the Community institutions acted in a manner incompatible with Article 2(11) of the basic regulation by applying, in the calculation of the dumping margin for the product under investigation, the practice of 'zeroing' to negative dumping margins for each of the relevant product types.

The determination of the existence of injury

58 The national court asks the Court to determine the validity of Regulation No 2398/97 insofar as, for the purposes of the examination of injury, that regulation failed to evaluate all the relevant injury factors having a bearing on the state of the Community industry and erred in determining the injury to the Community industry by relying on evidence obtained from companies outside the Community industry, contrary to Article 3(5) of the basic regulation.

59 It must be recalled that, under Article 1(1) of the basic regulation, an anti-dumping duty may be applied to a product which is the subject of dumping only if its release for free circulation in the Community causes injury, the term 'injury' being taken to mean, in accordance with Article 3(1), material injury to the Community industry, a threat of material injury to the Community industry or material retardation of the establishment of such an industry.

60 It must be held in that connection that, according to the recital (34) in the preamble to Regulation No 2398/97, the 35 complainant companies represent a major proportion of total Community production within the meaning of Article 5(4) of the basic regulation and that they therefore constitute the Community industry within the meaning of Article 4(1) of the basic regulation. However, it is clear from recital (41) in the preamble to Regulation No 2398/97 that the assessment of injury to the Community industry covered data relating to the Community as a whole and was not analysed solely at the level of the Community industry, as defined in Article 4(1).

61 With regard to the question whether the Community authorities committed a manifest error of assessment by failing to evaluate all the relevant injury factors having a bearing on the state of the Community industry, as set out in Article 3(5) of the basic regulation, it must be stated that that provision gives those authorities discretion in the examination and evaluation of the various items of evidence.

62 As the Advocate General observed in points 193 and 194 of his Opinion, that provision merely requires an evaluation of the 'relevant economic factors and indices having a bearing on the state of the [Community industry]' and it is clear from the wording of the last sentence of Article 3(5) of the basic regulation that the list of economic factors and indices 'is not exhaustive'.

63 Therefore, it must be held that, in evaluating, for the purpose of the examination of the impact of the dumped imports, only the relevant factors having a bearing on the state of the Community industry, the Community institutions did not exceed the margin of assessment which they are acknowledged to have in the evaluation of complex economic situations. Furthermore, in a fresh evaluation carried out under Regulation No 1644/2001, the errors allegedly committed in the evaluation of injury had no impact on the determination of the existence of injury to the Community industry.

64 In those circumstances, it must be held that the Community institutions did not commit a manifest error of assessment in the evaluation of the existence and extent of that injury.

65 In the light of the foregoing considerations, the answer to the first question must be that Article 1 of Regulation No 2398/97 is invalid in so far as the Council applied, for the purpose of determining the dumping margin for the product subject to the investigation, the practice of 'zeroing' negative dumping margins for each of the product types concerned.

66 Therefore it is appropriate, without there being any need to answer the other questions relating to the validity of subsequent regulations, to examine the fifth question, which concerns the consequences to be drawn from the finding of invalidity of Article 1 of Regulation No 2398/97, regarding the right of the importer involved in the main proceedings to repayment of anti-dumping duties which it paid under that regulation.

67 It is for the national authorities to draw the consequences, in their legal system, of a declaration of invalidity made in the context of an assessment of validity in a reference for a preliminary ruling (Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 51), which has the consequence that anti-dumping duties, paid under Regulation No 2398/97 are not legally owed within the meaning of Article 236(1) of Regulation No 2913/92 and should, in principle, be repaid by the customs authorities in accordance with that provision, provided that the conditions to which such repayment is subject, including that set out in Article 236(2), are satisfied, this being a matter for the national court to verify.

68 Next, it must be observed that the national courts alone have jurisdiction to entertain actions for recovery of amounts unduly received by a national body on the basis of Community legislation declared subsequently to be invalid (see, to that effect, Case 20/88 *Roquette* v *Commission* [1989] ECR 1553, paragraph 14, and Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 12).

69 In those circumstances, the answer to the fifth question must be that an importer, such as that at issue in the main proceedings, which has brought an action before a national court against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2398/97, declared invalid by this judgment, is, in principle, entitled to rely on that invalidity in the dispute in the main proceedings in order to obtain repayment of those duties in accordance with Article 236(1) of Regulation No 2913/92.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 1 of Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan is invalid in so far as the Council of the European Union applied, for the purpose of determining the dumping margin for the product subject to the investigation, the practice of 'zeroing' negative dumping margins for each of the product types concerned.**

2. **An importer, such as that at issue in the main proceedings, which has brought an action before a national court against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2398/97, declared invalid by this judgment, is, in principle, entitled to rely on that invalidity in the dispute in the main proceedings in order to obtain repayment of those duties in accordance with Article 236(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.**

[Signatures]