JUDGMENT OF THE COURT
7 May 1991 *

In Case C-69/89,

Nakajima All Precision Co. Ltd, a company incorporated under Japanese law, whose registered office is in Tokyo, repesented by C.-E. Gudin, of the Paris Bar and also established in Brussels, with an address for service in Luxembourg at the Chambers of R. Faltz, 6 Rue Heine,

applicant,

v

Council of the European Commmunities, represented by H.-J. Lambers, Director in its Legal Department, and E. H. Stein, Legal Adviser, acting as Agents, assisted by J. Voillemot and A. Michel, of the Paris Bar, with an address for service in Luxembourg at the office of J. Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by the

Commission of the European Communities, represented by E. de March and Eric White, members of its Legal Department, acting as Agents, assisted by R. Wagner, a German civil servant on secondment to the Commission's Legal Department under the exchange scheme for national civil servants, with an address for service in Luxembourg at the office of G. Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

* Language of the case: French.

and by the

Committee of European Printer Manufacturers (Europrint), whose registered office is in Cologne (Federal Republic of Germany), represented by D. Ehle, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt & Harles, 4 Avenue Marie-Thérèse,

interveners,

Application for:

(i) a declaration, pursuant to Article 184 of the EEC Treaty, that Articles 2(3)(b)(ii) and 19 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 (Official Journal 1988 L 209, p. 1) are not applicable to the applicant, and

(ii) a declaration, pursuant to the second paragraph of Article 173 of the EEC Treaty, that Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (Official Journal 1988 L 317, p. 33) is void in so far as it concerns the applicant,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing,

after hearing the parties submit oral argument at the hearing on 5 July 1990,

after hearing the opinion of the Advocate General delivered at the sitting on 5 December 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 March 1989, Nakajima All Precision Co. Ltd (hereinafter referred to as 'Nakajima'), whose registered office is in Tokyo, brought an action seeking

(i) a declaration, pursuant to Article 184 of the EEC Treaty, that Articles 2(3)(b)(ii) and 19 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 (Official Journal 1988 L 209, p. 1) are not applicable to it, and

(ii) a declaration, pursuant to the second paragraph of Article 173 of the EEC Treaty, that Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (Official Journal 1988 L 317, p. 33) is void in so far as it concerns the applicant.

2 Nakajima, which manufactures only typewriters and printers, produces four models of bottom-of-the-range serial-impact dot-matrix printers. According to the applicant, particular features of its business are that it is engaged exclusively in production and has no distribution or sales structure. It claims that it has only a limited number of customers and that it begins production only once it has received orders, so that its production costs are very low. In addition, it claims that it is now several years since it sold printers on the Japanese market and that its production is destined exclusively for export. Most of its printers are sold as Original Equipment Manufacture (hereinafter referred to as 'OEM') to foreign manufacturers or independent distributors who market the products under their own brand names, and the remainder of its production is also marketed by independent distributors under the brand name 'All'. Nakajima points out that in 1986 the EEC market accounted for 41.7% of its printer sales.

3 In 1987, the Committee of European Printer Manufacturers (hereinafter referred to as 'Europrint') lodged with the Commission, on behalf of European manufacturers of serial-impact dot-matrix printers, a complaint in which it requested that an anti-dumping proceeding be initiated in respect of Japanese exporters of that type of printer, including Nakajima.

4 The anti-dumping proceeding was initiated by the Commission on the basis of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1, hereinafter referred to as 'the former basic regulation'). That proceeding resulted in the adoption, pursuant to the former basic regulation, of Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (Official Journal 1988 L 130, p. 12, hereinafter referred to as 'the regulation imposing the provisional duty'). That regulation imposed on Nakajima a provisional anti-dumping duty of 12.3%.

5 On 11 July 1988, the Council adopted Regulation No 2423/88, cited above (hereinafter referred to as 'the new basic regulation'), which replaced the former basic regulation. The new basic regulation entered into force on 5 August 1988 and applies, according to the second paragraph of Article 19, 'to proceedings already initiated'.

6 Pursuant to the new basic regulation, the Council, on 23 September 1988, adopted Regulation (EEC) No 2943/88 (Official Journal 1988 L 264, p. 56) extending the provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan for a period not exceeding two months.

7 Following a proposal by the Commission and pursuant to the new basic regulation, the Council, on 23 November 1988, adopted Regulation No 3651/88, cited above (hereinafter referred to as 'the regulation imposing the definitive duty'). Under that regulation, which entered into force on 25 November 1988, the definitive rate of anti-dumping duty applicable to Nakajima was fixed at 12% and the amounts secured by way of provisional anti-dumping duty under the regulation imposing the provisional duty were to be collected at the rate of duty definitively imposed.

8 By an application lodged at the Court Registry on 6 April 1989, Nakajima applied for the adoption of interim measures, seeking, in the first place, suspension of the application to it of the regulation imposing the definitive duty and, in the alternative, any other interim measures which might prove necessary until the Court had ruled on the substance of the case. That application was dismissed by order of the President of the Court of 8 June 1989.

9 By orders of the Court of 17 May and 4 October 1989 respectively, the Commission and Europrint were given leave to intervene in support of the forms of order sought by the Council.

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

I — The claim for a declaration that the new basic regulation is inapplicable to the applicant

11 In support of its claim that Articles 2(3)(b)(ii) and 19 of the new basic regulation should be declared inapplicable to it, Nakajima submits three pleas in law: infringement of essential procedural requirements, breach of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred as 'the Anti-Dumping Code'), approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (Official Journal 1980 L 71, p. 1) and, finally, breach of certain general principles of law.

1. *The plea that the new basic regulation is unlawful on account of the infringement of essential procedural requirements*

12 In support of this plea in law, Nakajima argues first of all that Article 2(3)(b)(ii) of the new basic regulation is vitiated by illegality for lack of reasoning.

13 The applicant argues in this regard that Article 2(3)(b)(ii) introduces a new method of calculating the constructed normal value, differing fundamentally from that applicable under the former basic regulation, in the case where there are no sales of like products in the ordinary course of trade on the domestic market of the exporting country or country of origin. The new method, which takes account, for the purpose of calculating the constructed normal value, of the expenses incurred and the profits realized by other producers and exporters in the exporting country or country of origin on profitable sales of the like product, is likely to lead to unreasonable and discriminatory results in a case such as this in which the structure of the reference undertakings is in no respect comparable to that of the undertaking concerned. Nakajima stresses that it does not have any marketing structure for its products as its entire production output is sold at the 'ex-factory' stage to independent distributors, whereas all of the reference undertakings have a vertically-integrated structure designed to ensure distribution of their products within Japan. From this Nakajima concludes that the Council ought to have specified in the new basic regulation the reasons why it adopted this new method of calculation and ought to have explained how the application of that method did not involve discrimination against undertakings such as Nakajima.

14 On this point, it should be noted first of all that the Court has consistently held (see, in particular, the judgment in Case C-156/87 *Gestetner Holdings plc* v *Council and Commission* [1990] ECR I-781, at paragraph 69) that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction.

15 Next, it should be noted that Article 2(3)(b)(ii), as it appears in both the former and new basic regulations, sets out the methods of calculating the constructed normal value of the product concerned when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison. The constructed normal value is determined by adding together the cost of production and a reasonable margin of profit.

6 In the version contained in the former basic regulation, the cost of production was to be increased by a reasonable amount for selling, general and administrative expenses (hereinafter referred to as 'SGA expenses'). The profit was not to exceed the normal profit where sales of products of the same category on the domestic market of the country of origin were normally profitable; in other cases, the text provided that the profit was to be 'determined on any reasonable basis, using available information'.

7 After adopting the same method of calculating the cost of production as the former basic regulation, the new basic regulation goes on to provide that the SGA expenses and profit are to be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market (third sentence of Article 2(3)(b)(ii)) and that, if such data are unavailable or unreliable or are not suitable for use, they are to be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product (fourth sentence of Article 2(3)(b)(ii)). The new basic regulation adds that, if neither of those two methods can be applied, the expenses incurred and the profit realized are to be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.

8 It will be evident from a comparison of the two versions of Article 2(3)(b)(ii) in the former and new basic regulations that the method of calculating the constructed normal value set out in the latter regulation does not differ substantially from the earlier method, which left full discretion to the Community authorities by providing for the calculation of SGA expenses and profits on a 'reasonable' basis. The amended wording of the provision in question in the new basic regulation simply sets out more clearly the scope of the previous version by referring to the different methods of calculation designed to determine the 'reasonable amount' for SGA expenses and the 'reasonable margin of profit' in individual cases.

19 That conclusion is borne out by the fourth and thirty-third recitals in the preamble to the new basic regulation, which present the new wording of Article 2(3)(b)(ii) as a mere clarification of the version of that provision in the former basic regulation. Furthermore, the Council pointed out, without being contradicted, that the method of calculation to which Nakajima takes exception in the present case had already been applied by the Community authorities under the former basic regulation. Moreover, the Court has already ruled that there was nothing in Article 2(3)(b)(ii) of the former basic regulation which precluded the use of the profit normally realized by a company other than the one to which the anti-dumping investigation related as the reasonable margin of profit (judgment in Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraph 8).

20 So far as concerns the alleged failure to state reasons in explanation of the discriminatory effect which, in Nakajima's view, the application of Article 2(3)(b)(ii) of the new basic regulation might entail, it is sufficient to point out that Article 190 of the Treaty does not require the Community authorities to justify specifically every provision which may result in discrimination, since a breach of the principle of equal treatment constitutes an independent ground for annulment of the provision in question.

21 In those circumstances, the first part of the plea in law, alleging a lack of a statement of reasons for Article 2(3)(b)(ii) of the new basic regulation, must be rejected.

22 Nakajima submits, in the second place, that Article 19 of the new basic regulation, which provides that the regulation is to apply 'to proceedings already initiated' on the day of its entry into force, does not set out the grounds on which it is based in so far as it fails to specify the reasons which would justify the retroactive application of that regulation. In support of this argument, the applicant contends that Article 2(3)(b)(ii) of the new basic regulation, by amending fundamentally the method of calculating the constructed value, introduces new substantive rules which cannot be applied retroactively in the absence of a specific statement of reasons.

23 In this connection, it suffices to recall, as the Court found with regard to the first part of Nakajima's plea, that Article 2(3)(b)(ii) of the new basic regulation is no more than a clarification designed to codify the previous practice of the Community institutions. Thus, to the extent to which, precisely, the new wording of that provision could not be regarded as a substantial alteration of the provision previously in force, its application 'to proceedings already initiated' did not require a specific statement of reasons.

24 In those circumstances, the second part of the plea in law, based on the absence of a statement of reasons for Article 19 of the new basic regulation, is also without foundation.

25 It follows from the foregoing that the plea that the new basic regulation is unlawful on account of the infringement of essential procedural requirements must be rejected.

2. *The plea that the new basic regulation is unlawful for being in breach of the Anti-Dumping Code*

26 Nakajima submits in this regard that Article 2(3)(b)(ii) of the new basic regulation cannot be applied in the present case because it is at variance with a number of the provisions in the Anti-Dumping Code. In particular, the applicant argues that Article 2(3)(b)(ii) is incompatible with Article 2(4) and (6) of the Anti-Dumping Code.

27 The Council takes the view that, as is the case with the General Agreement, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly applicable within the Community. From this the Council concludes that Nakajima cannot place in question the validity of the new basic regulation on the ground that it may be in breach of certain provisions in the Anti-Dumping Code.

28 It should, however, be pointed out that Nakajima is not relying on the direct effect of those provisions in the present case. In making this plea in law, the applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application.

29 It ought to be noted in this regard that, in its judgment in Joined Cases 21 to 24/72 *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, the Court ruled (at paragraph 18) that the provisions of the General Agreement had the effect of binding the Community. The same conclusion must be reached in the case of the Anti-Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement and the recitals in the preamble to which specify that it is designed to 'interpret the provisions of ... the General Agreement' and to 'elaborate rules for their application in order to provide greater uniformity and certainty in their implementation'.

30 According to the second and third recitals in the preamble to the new basic regulation, it was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code.

31 It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures (see the judgments in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, at paragraph 11, and in Case 266/81 *SIOT* v *Ministero delle Finanze and Others* [1983] ECR 731, at paragraph 28).

32 In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.

33 Nakajima first of all argues in this connection that Article 2(3)(b)(ii) of the new basic regulation infringes Article 2(4) of the Anti-Dumping Code in so far as, by providing (in order to determine the constructed normal value) for account to be taken of the SGA expenses and profits of producers or exporters whose structures may be radically different from those of the undertaking in question, Article 2(3)(b)(ii) limits the discretion of the Community authorities and results in account being taken of accounting data which are not reasonable within the meaning of Article 2(4) of the Anti-Dumping Code.

34 Article 2(4) of the Anti-Dumping Code provides as follows:

'When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin'.

35 It follows clearly from the wording of Article 2(3)(b)(ii) of the new basic regulation that each of the methods of calculating the constructed normal value there listed must be applied in such a way as to keep the calculation reasonable, an idea which is also expressly mentioned in the first two sentences and the final sentence of that provision.

36 According to Article 2(3)(b)(ii), it is thus necessary to set aside the first method of calculation, referred to in the new basic regulation, in favour of the second method, at issue in the present case, if data on the expenses incurred and the profit realized by the producer or exporter on the sales of like products on the domestic

market 'is unavailable or unreliable or is not suitable for use', which means, in essence, that the taking of such accounting data into consideration would not be reasonable — a word which is expressly used in the German version of the provision in question. The search for reasonableness in the method of calculation also governs the application of the third method of calculation set out in the provision in question, which may be implemented only 'if neither of these two [previous] methods can be applied'. Finally, apart from the application of this third method, the Community authorities may always determine expenses and profits 'on any other reasonable basis' pursuant to the final sentence of the provision; the use of the word 'other' in this context confirms that, in any event, the calculation of the constructed value may be made only if it is reasonable in nature.

37 It thus follows that Article 2(3)(b)(ii) of the new basic regulation is in conformity with Article 2(4) of the Anti-Dumping Code inasmuch as, without going against the spirit of the latter provision, it confines itself to setting out, for the various situations which might arise in practice, reasonable methods of calculating the constructed normal value.

38 Secondly, Nakajima argues that Article 2(3)(b)(ii) of the new basic regulation is incompatible with Article 2(6) of the Anti-Dumping Code in so far as the application to a simple economic production unit of the SGA expenses incurred and the profit realized by other undertakings with vertically-integrated distribution structures fails to comply with the obligation to establish the comparison between the normal value and the export price at the same level of trade.

39 In order to examine whether that argument is well founded, it should be recalled that Article 2(6) of the Anti-Dumping Code provides as follows:

'In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI(1)(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the

same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparabilty. . . . '.

40 It suffices to point out in this regard that Nakajima's argument alleging incompatibility of Article 2(3)(b)(ii) of the new basic regulation with Article 2(6) of the Anti-Dumping Code lacks any relevance in view of the fact that the objectives of the two provisions cited by the applicant are fundamentally different.

41 The objective of Article 2(3)(b)(ii) of the new basic regulation is to determine the constructed normal value of the product in question, whereas Article 2(6) of the Anti-Dumping Code lays down the rules to be complied with when a comparison is made between the normal value and the export price. That comparison is dealt with in Article 2(9) and (10) of the new basic regulation; however, the applicant has not in any way called in question the validity of those provisions on the ground that they fail to comply with Article 2(6) of the Anti-Dumping Code.

42 For those reasons, the plea in law alleging that the new basic regulation is unlawful for being in breach of the Anti-Dumping Code must also be rejected.

3. *The plea that the new basic regulation is unlawful on the ground that it is in breach of certain general principles of law*

43 In support of this plea in law, the applicant contends first of all that the Commission infringed the rights of the defence in several respects during the course of this anti-dumping proceeding. It then goes on to argue that the principle of legal certainty was infringed in the present case through the application of the second method of calculating the constructed normal value set out in Article 2(3)(b)(ii) of the new basic regulation, whereas in an earlier case the Community authorities had recognized the applicant's special economic structure and had for

that reason closed the anti-dumping proceeding initiated against it. Finally, Nakajima alleges infringement of the principle of equal treatment inasmuch as the application of the method of calculating the constructed normal value chosen in this case discriminated against it in view of the fact that account was taken of accounting data relating to undertakings with structures different from its own.

44 It is sufficient to note in this regard that the applicant, by this plea in law, is in fact criticizing the application by the Community authorities of Article 2(3)(b)(ii) of the new basic regulation in the anti-dumping proceeding which resulted in the adoption of the regulations imposing the provisional and definitive duties. Such arguments, however, cannot be relied on to call in question the validity of a regulation under Article 184 of the Treaty.

45 In those circumstances, the plea that the new basic regulation is illegal for infringement of certain general principles of law must be rejected.

46 Since none of the pleas in law submitted in support of the claim for a declaration that the new basic regulation is inapplicable has proved capable of being upheld, that claim must be dismissed as being unfounded.

II — The claim for the annulment of the regulation imposing the definitive duty

47 Nakajima bases its claim for the annulment of the regulation imposing the definitive duty on ten pleas in law: infringement of essential procedural requirements, incorrect definition of the like products taken into consideration, irregularities vitiating the calculation of the constructed normal value, errors in the comparison between the normal value and the export price, errors in the evaluation of the Community production of printers, errors relating to the injury suffered by the Community industry, errors relating to the Community's interest in putting an end to the injury caused by dumping practices, errors relating to the amount of the anti-dumping duty, infringements of a number of general principles of law and misuse of powers.

1. *The plea alleging infringement of essential procedural requirements*

48 Nakajima contends first of all that the Council acted in breach of Articles 2 and 8 of its Rules of Procedure (Official Journal 1979 L 268, p. 1) because the Commission proposal for the adoption of the regulation imposing the definitive duty was communicated to the Council outside the period laid down for the drawing-up of the provisional agenda for the meeting and because not all the language versions of the document in question were available on the day when the regulation was adopted.

49 With regard to this point, it should be noted that the purpose of the rules of procedure of a Community institution is to organize the internal functioning of its services in the interests of good administration. The rules laid down, particularly with regard to the organization of deliberations and the adoption of decisions, have therefore as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution.

50 It follows that natural or legal persons may not rely on an alleged breach of those rules since they are not intended to ensure protection for individuals.

51 Nakajima's argument that the Council failed to comply with its Rules of Procedure must therefore be rejected.

52 Nakajima then submits that Article 2(3)(b)(ii) of the new basic regulation and recitals 21 and 22 of the regulation imposing the definitive duty do not provide reasons to explain why the former method of calculating the constructed normal value was abandoned and how the Community authorities intended to avoid discrimination between undertakings by applying to the applicant a method of calculating the constructed normal value which was based on the expenses and profits of other producers whose structures differed radically from its own.

53 That argument is not well founded. So far as Article 2(3)(b)(ii) of the new basic regulation is concerned, the complaint made by Nakajima has already been rejected at paragraphs 14 to 21 of this judgment. With regard to recitals 21 and 22 of the regulation imposing the definitive duty, it is clear from their wording that the Council was referring expressly to Article 2(3)(b)(ii) of the new basic regulation, which lays down the method of calculating the constructed normal value applied in the present case and indicates that in this instance this is the method normally applied by the Commission. It might be added that, as the Court has stated at paragraphs 18 and 19 of this judgment, that provision simply clarifies the previous practice of the Community institutions and is for that reason likely to increase legal certainty for the undertakings concerned. Finally, the Council set out its views, in the recitals referred to by the applicant, on the question of discrimination raised by Nakajima by pointing out that the fact that a particular exporter does not sell the product concerned on the domestic market and consequently does not have a domestic sales organization should not alter the basis for calculating the SGA expenses and profit in the construction of that exporter's normal value. In those circumstances, the grounds given by the Council point clearly to the reasoning of the Community institution and allow the Court fully to exercise its supervisory jurisdiction.

54 Nakajima argues finally that recital 60 of the regulation imposing the definitive duty lacks an adequate statement of reasons inasmuch as the Council, notwithstanding the existence of imports of cheap printers from third countries other than Japan, failed to assess the extent of the injury which those imports caused to Community producers.

55 That argument cannot be accepted either. In the recital in question, the Council made it quite clear that the absence of injury to the Community market arising from imports of printers from other third countries was attributable to the fact that such imports became significant only after the end of the period covered by the investigation in the present case and that they had been restricted to one Member State. Consequently, recital 60 must be regarded as being sufficiently reasoned.

56 The plea alleging an infringement of essential procedural requirements must therefore be rejected.

2. The plea alleging that the like products taken into consideration were incorrectly defined

17 Nakajima claims that the Council committed a manifest error of assessment by treating bottom-of-the-range and top-of-the-range printers as like products. According to the applicant, the lower and upper segments of the market in printers can be distinguished according to the destination of the machines, the target customers and the market structure.

18 This plea in law is not well founded. In its statement of defence, the Council pointed out that there were no generally accepted criteria by which printers could be grouped in distinct categories, a fact which Nakajima, in any event, recognized in its reply. Consequently, all serial-impact dot-matrix printers, which possess the same characteristics and are intended for the same use, could validly be treated as like products.

3. The plea in law alleging irregularities vitiating the calculation of the constructed normal value

19 The applicant submits that the Council wrongly applied to it the second method of calculating the constructed normal value set out in the fourth sentence of Article 2(3)(b)(ii) of the new basic regulation. In support of this plea in law, Nakajima argues that the application of that method was unreasonable in the present case and was consequently at variance with both the basic regulation and the Anti-Dumping Code. Nakajima claims that it has special structural characteristics and that the Council failed to take account of these when it calculated the constructed normal value of the printers covered by the proceeding in the present case in so far as in determining the expenses and profit of Nakajima it used the accounting data of undertakings with structures radically different from its own.

20 For the purpose of determining whether this plea in law is well founded, it should be noted at the outset that the Council correctly calculated the normal value pursuant to Article 2(3)(b)(ii) of the new basic regulation, since it is accepted that the applicant does not sell printers on the Japanese market, which excludes the possibility of applying Article 2(3)(a) of the new basic regulation, and since in cases where there are no sales of the like product in the ordinary course of trade

on the domestic market of the exporting country or country of origin the Community authorities may choose between the solutions set out in indents (i) and (ii) of Article 2(3)(b) of the new basic regulation.

61 Moreover, it follows from the wording of Article 2(3)(b)(ii) of the new basic regulation that the three methods of calculating the constructed normal value there set out must be considered in the order in which they are presented. It is only in the case where none of those methods can be applied that recourse must be had to the general provision set out at the end of Article 2(3)(b)(ii), according to which expenses and profit may be calculated 'on any other reasonable basis'.

62 In this regard, it should first be pointed out that in this case the Council rightly did not apply the first method of calculation set out in Article 2(3)(b)(ii) of the new basic regulation, since the applicant does not sell on the Japanese market products similar to those covered by these proceedings.

63 Next, so far as the application to Nakajima of the second method of calculation is concerned, it should be pointed out first of all that the Court has consistently held that Article 2(3)(b)(ii) of the former basic regulation, according to which a reasonable amount for SGA expenses had to be included in the constructed normal value, allowed the Community institutions a wide margin of discretion in evaluating that amount (see in particular the judgment in Joined Cases 260/85 and 106/86 *TEC and Others* v *Council* [1988] ECR 5855, at paragraph 33). That conclusion applies with equal validity to Article 2(3)(b)(ii) of the new basic regulation, the wording of which is identical, and applies in like manner to the taking of profits into account by the Community institutions for the purpose of constructing the normal value.

64 Secondly, it is necessary to point out that the Court has already ruled that, according to the scheme of Regulation No 2176/84, cited above, 'the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or in the exporting country' and that 'consequently, it is the expenses relating to sales on the domestic

market which must be taken into account' (judgment in Case 250/85 *Brother Industries Ltd* v *Council* [1988] ECR 5683, at paragraph 18; judgment in Joined Cases 277/85 and 300/85 *Canon Inc. and Others* v *Council* [1988] ECR 5731, at paragraph 26; judgment in *TEC*, cited above, at paragraph 24; and judgment in Joined Cases 273/85 and 107/86 *Silver Seiko Ltd and Others* v *Council* [1988] ECR 5927, at paragraph 16). Since those principles have remained unchanged under the new basic regulation, that conclusion is equally valid for that regulation.

5 From this it follows that the normal value of a product must in all cases be constructed as if the product was intended for distribution and sale within the domestic market, regardless of whether or not the producer has, or has access to, a distribution structure. Undertakings which sell only for the purposes of exportation and those which market a product — if only similar — on the domestic market must be treated in the same way. If the producer for whom a normal price is constructed sold his products on the domestic market, he would inevitably have to adapt to the conditions imposed on other undertakings operating on that market. There would therefore be discrimination between undertakings if the normal value for a producer operating on the domestic market were to be calculated on the basis of all the expenses and profits included in the price of the product in question whilst in the case of an OEM exporter the normal value were to be calculated without having regard to those accounting data.

6 With regard, finally, to the Community institutions' assertion that it is impossible to be present on the Japanese market in finished electrical products without having an integrated sales structure, which in the present case meant that the expenses and profits of similar undertakings with such a structure were taken into account for the purpose of constructing the normal value of the applicant's printers, it must be pointed out that Nakajima has failed to establish that such a finding was incorrect.

7 It follows from the foregoing that it is consistent with the scheme of both the Anti-Dumping Code and the new basic regulation to calculate the constructed normal value of the products of an undertaking, which sells exclusively for the purposes of exportation and does not engage in the marketing of its own products, by reference to the expenses and profits of other undertakings, similar in nature, which sell their products on the domestic market.

68 In those circumstances, the plea in law alleging the existence of irregularities vitiating the calculation of the constructed normal value of Nakajima's printers must be rejected.

4. *The plea in law alleging the existence of errors in the comparison between the normal value and the export price*

69 According to Nakajima, the application of the new basic regulation to the present case resulted in a breach of Article 2(6) of the Anti-Dumping Code in so far as the Council did not compare the normal value and the export price at the same level of trade. Nakajkima claims, in effect, that the Council established the export price at the 'ex-factory' level, whereas the normal value would have been constructed on the basis of the distribution or resale price, taking into account the SGA expenses and profits of other undertakings whose sales are made at a stage later than the 'ex-factory' stage. Nakajima adds that the subtraction only of sales expenditure represented by commission and salaries paid to sales staff, to the exclusion of all other general and sales expenditure and the portion of profit contained in sales made at a stage later than the 'ex-factory' stage, represents an adjustment which is too incomplete and for that reason cannot satisfy the requirement of a comparison at the same level of trade.

70 In this connection, it must be pointed out that, with regard to a producer which does not sell on the Japanese market the product which is the subject of the anti-dumping proceeding, the Court has ruled that the correct comparison between the normal value and the export price at the 'ex-factory' level presupposes that those two values are compared at the level of the first sale to an independent purchaser (see, in particular, the judgment in *TEC*, cited above, at paragraph 30). This view, developed by the Court in the context of the former basic regulation, also holds good for the interpretation of Article 2(6) of the Anti-Dumping Code, the content of which is identical to that of Article 2(9) of the former basic regulation on which the Court ruled in its judgment in *TEC*.

71 In the present case, the normal value of Nakajima's printers was constructed on the basis of the SGA expenses and profits of other undertakings which sell like products on the Japanese market. In addition, since all of Nakajima's printers destined for the Community had been sold to independent distributors, the export price was calculated according to the price when the goods left those companies.

72 Thus, in the present case, both the constructed normal value and the export price were determined at the 'distributor' level, as recital 34 of the regulation imposing the definitive duty also makes quite clear. It is therefore incorrect to claim that the Community institutions compared the normal value and the export price at two different levels of trade.

73 Furthermore, it is an established and undisputed fact that at no stage in the administrative proceedings did the applicant ask for adjustments to be made to compensate for the alleged difference in the level of trade in the comparison made between the normal value and the export price or, consequently, prove that such a claim could be justified, as required by Article 2(9)(b) of the new basic regulation. Furthermore, during the procedure before the Court, Nakajima likewise did not produce any evidence to suggest that the Council ought in this case to have made more adjustments to its calculations than it actually did.

74 In those circumstances, the first part of this plea in law is unfounded.

75 The applicant then goes on to argue that the Council committed a manifest factual error by drawing a distinction, for the purpose of calculating the normal value, between OEM and non-OEM products. Since all of Nakajima's products are sold at the 'ex-factory' stage, the imputation to them of distribution costs amounts to a factual error of such a kind as to distort the comparison and consequently the determination of the dumping margin. With particular regard to OEM sales, the fact that marketing expenses of vertically-integrated undertakings are taken into consideration results in an over-estimation of Nakajima's SGA expenses. According to the applicant, those expenses are below 5%, whereas the Council applied to it a figure in excess of 15%.

76 It is sufficient to note in this regard, as the Council pointed out during the written procedure, that the normal value must be constructed with reference to the conduct of other producers present on the market and upon the basis of a distinction between OEM and non-OEM sales, since marketing under a company's own brand name involves appreciably higher costs than the sale of printers as OEM products. So far as concerns the account taken, for OEM sales,

of the SGA expenses of vertically-integrated undertakings, the Council, in exercising the power of appraisal which it is recognized as having when evaluating complex economic situations (see, for example, the Court's judgment in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, at paragraph 21), was quite entitled to take the view that it was necessary to take account of the costs which a presence on the Japanese market would involve.

77 The second part of the plea in law is therefore unfounded as well.

78 It follows that the plea alleging the existence of errors in the comparison between the normal value and the export price must be rejected.

5. *The plea in law alleging the existence of errors in the evaluation of the Community production of printers*

79 Nakajima complains that the Council wrongly stated in the regulation imposing the definitive duty that the four Community producers and members of Europrint represented 65% of Community production of serial-impact dot-matrix printers. According to the applicant, it appears from the study carried out by the firm of Ernst & Whinney at the request of the Committee of Japanese Printers in connection with the anti-dumping proceeding in the present case that two members of Europrint, Mannesmann-Tally and Philips, imported a large number of Japanese printers into the Community, so that they could no longer be regarded as Community producers. In addition, contrary to what is set out in recital 45 of the regulation imposing the definitive duty, the Ernst & Whinney study demonstrates that the imports by Mannesmann-Tally and Philips do not belong exclusively to the lower market segment but also belong in part to the middle market segment. Furthermore, the Council made an error in asserting that the lower market segment is the one which is expanding most rapidly, when, according to the Ernst & Whinney study, it is experiencing a slower progression than the upper segment and the market as a whole.

80 In this regard, it should be borne in mind first of all that the Court has consistently held, in particular in its judgment in *Gestetner*, cited above, at paragraph 43, that it is for the Commission and the Council, in the exercise of their discretion, to

determine whether they should exclude from the Community industry producers who are themselves importers of the dumped product. That discretion must be exercised on a case-by-case basis, by reference to all the relevant facts.

81 Next, it must be pointed out that Nakajima has in this case failed to prove that the Community authorities committed a manifest error in the exercise of that discretion. According to the statements made by the Community authorities, which have not seriously been contested by the applicant, the European undertakings which imported Japanese printers must be included in the Community production, since, as is made clear in the preambles to the regulations imposing the provisional and definitive duties, those imports were measures of self-defence designed to fill gaps in the range of products of the undertakings concerned brought about by the abandonment of their own production in certain sectors which was forced on them by the dumping practices of Japanese exporters.

82 In those circumstances, the Community producers who imported Japanese printers did not intend to inflict injury on themselves by causing, through those imports, a reduction in the use of their own capacity, price falls or the abandonment of projects designed to increase their own production or the development of new products. For those reasons, imports by Community producers could not have contributed to the injury incurred by the Community industry and there was consequently no reason to exclude those undertakings from the group of Community producers.

83 With regard to the arguments concerning the determination of the market segment to which imported products belong as well as the size and growth of the various segments, it must be recalled, as paragraph 58 of this judgment makes clear, that the division of the market into segments is aleatory because there is no precise definition in this regard, so that such arguments cannot cast doubt on the justification for the position taken by the Community institutions on this point.

84 It follows that the plea alleging the existence of errors in the evaluation of Community production of printers is unfounded.

6. The pleas in law alleging the existence of errors relating to the injury suffered by the Community industry and the Community's interest in bringing it to an end

85 In support of the plea alleging errors of fact and manifest errors of appraisal in the determination of the injury incurred by the Community industry, the applicant argues in the first place that the Council wrongly took account of the year 1983 in its finding that there had been injury, whereas the investigation carried out in the administrative proceeding did not relate to that year.

86 On this point it ought to be recalled, as has been stressed above at paragraph 76, that the institutions have a wide discretion when evaluating complex economic situations. This is so in particular when the period to be taken into consideration for the purposes of determining injury in an anti-dumping proceeding is determined (see in particular the judgment in Case C-121/86 *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE and Others* v *Council* [1989] ECR 3919, at paragraph 20).

87 That discretion was not exceeded in the present case. Thus, the Council demonstrated convincingly that the injury suffered by the Community industry had to be determined over a period longer than that covered by the investigation into the existence of dumping practices. According to Article 4(2)(c) of the new basic regulation, an examination of injury presupposes a study of 'actual or potential trends in the relevant economic factors' which must, therefore, be carried out over a sufficiently long period. The Council also demonstrated that it was justified in taking account of data for the year 1983 in view of the fact that the exclusive rights of Seiko Epson to manufacture printers compatible with IBM personal computers were phased out in 1984, as is expressly stated in recital 104 of the regulation imposing the provisional duty. The year 1983 therefore typifies the situation which existed prior to the opening of a substantial share of the printer market in the wake of the expiry of Seiko Epson's exclusive rights, with the result that the Community authorities did not commit any error of appraisal in selecting that year as their starting point for an evaluation of subsequent developments within the market in question.

88 Nakajima's argument must therefore be rejected.

89 Nakajima goes on to cast doubt on the accuracy of the figures concerning the trends in market shares which are set out in recital 47 of the regulation imposing the definitive duty. It takes the view that the members of Europrint did not in fact suffer any reduction in their market share but that, on the contrary, they experienced a slight increase in production. Furthermore, in view of the fact that they had ceased activity prior to the investigation period, the European undertakings ought to have been excluded from the evaluation of injury.

90 That argument is unfounded. It must be pointed out that the figures given in recital 47 of the regulation imposing the definitive duty agree in full with those set out in the Ernst & Whinney study relied on by Nakajima. That study refers to a substantial loss of market share by Community manufacturers between 1983 and 1986 while, over the same period, there was a sizeable increase in the market share of Japanese exporters. It would also appear from the figures supplied by the applicant itself that the Community producers lost market share, even without taking account of the figures for the two undertakings Triumph-Adler and Logabax, which had ceased activity prior to the investigation period.

91 Nakajima also argues that the points made by the Council on price trends are incorrect in so far as the decline in the prices of printers on the Community market, which was smaller than the figures given in the regulation imposing the definitive duty would indicate, was due to an appreciable fall in production costs rather than to an increase in the market shares of the Japanese exporters. Nakajima also emphasizes that the prices of its printers increased between 1984 and 1986. In addition, it claims that the Council committed an error of appraisal with regard to price-undercutting, mentioned in recitals 51 and 53 of the regulation imposing the definitive duty, by comparing a price at the 'ex-factory' level with a price at the distributor level.

92 In this connection it must be pointed out first of all that Nakajima's conclusion that the decline in prices was not so great as that calculated by the Council can be explained by the fact that the applicant's calculations do not take the year 1983 into account. Secondly, Nakajima's contention that the decline in prices on the Community market was due to an appreciable fall in production costs and not to an increase in the market share of Japanese exporters remained a bare assertion. Furthermore, even if it were proved that Nakajima's prices did increase between 1984 and 1986, the Council correctly pointed out that the applicant's price-undercutting was still 41%. Finally, so far as concerns the argument alleging the

existence of discrimination in the comparison of prices, that argument must be rejected on the same grounds as those which underlie the reasoning developed in paragraphs 70 to 74 of this judgment.

93 For those reasons, the argument alleging the existence of errors in the appraisal of price trends must be rejected.

94 Nakajima also alleges that errors were made in the appraisal of the other important economic factors mentioned in recitals 54 and 55 of the regulation imposing the definitive duty. It argues that the Community producers increased their production capacity between 1984 and 1986 and did not suffer any damage since they had sufficient resources for investment and had even engaged in over-investment.

95 On this point, it suffices to note that the applicant has neither cited the source of the figures submitted in support of its arguments nor provided any serious justification for those figures.

96 In those circumstances, the argument alleging the existence of a manifest error in the appraisal of the economic facts must be rejected.

97 Finally, Nakajima calls in question the finding that the injury alleged by Europrint was caused by Japanese imports of serial-impact dot-matrix printers and argues that that injury resulted from imports of printers from third countries other than Japan. Referring to recital 60 of the regulation imposing the definitive duty, Nakajima complains in particular that the Council failed to examine the injury caused by imports of printers from third countries other than Japan and takes the view that the Council overestimated the injury caused by Japanese producers.

98 That argument cannot be accepted. The Council has demonstrated convincingly that imports of printers from third countries other than Japan could not have

caused any injury on the Community market, since they were restricted to one Member State and did not become significant until after the conclusion of the period covered by the investigation in the proceeding in this case.

99 Furthermore, Nakajima did not adduce any evidence of dumping over the period in question in connection with the importation of printers from third countries other than Japan. The applicant has thus failed to prove that the factors alleged actually contributed to the injury found to have occurred.

100 In support of the plea alleging the existence of errors concerning the Community's interest in having the injury caused by dumping brought to an end, Nakajima claims that, contrary to the views expressed by the Council in recitals 63 to 66 of the regulation imposing the definitive duty, the loss of profitability by Community producers was attributable to their own mismanagement and not to any dumping by Japanese exporters.

101 It is sufficient to point out in this regard that the Court has already found, at paragraph 90 of this judgment, that the Council did not exceed the bounds of its discretion by reaching the conclusion in this case that the loss of market share incurred by the Community industry was attributable to dumping by Japanese exporters. Moreover, the applicant has failed to substantiate in any way its allegation of mismanagement on the part of Community producers.

102 It follows from all the above considerations that the pleas in law alleging the existence of errors concerning the injury suffered by the Community industry and the Community's interest in seeing it brought to an end are unfounded and must therefore be rejected.

7. The plea in law alleging the existence of errors concerning the amount of the anti-dumping duty

103 Nakajima complains that for the purpose of determining the level of duties necessary to eliminate the injury the Council attributed the decline in the price of printers on the Community market to dumping, as is clear from recital 68 of the regulation imposing the definitive duty, and failed to carry out a detailed study of the real reasons for this fall in prices. Nakajima also criticizes the method set out in recital 72 of the regulation imposing the definitive duty for the calculation of the injury threshold of each exporter by means of a comparison between the weighted average selling price to the first buyer and the average c. i. f. value of the sales in question. Nakajima believes that if this method had been applied correctly, its injury threshold should have been zero.

104 The first part of this plea in law must be rejected in view of the reasoning developed during the examination of Nakajima's plea alleging the existence of errors relating to the injury suffered by the Community industry. Furthermore, the preambles to the regulations imposing the provisional and definitive duties explain clearly and in detail the connection in this case between the increase in the market shares of Japanese products and the decline in the prices of printers.

105 With regard to the injury threshold, the Council pointed out, without being contradicted, that the applicant's arguments were based on a misunderstanding of the method of calculation set out in recital 72 of the regulation imposing the definitive duty. The injury threshold represents the increase which Japanese products within the Community must undergo in order to offset the amount by which they undercut the prices of Community products. This injury threshold, which was calculated during the investigation, cannot be used as such to express the rate of duty because it is obtained by reference, not to the free-at-Community-frontier price ('the c. i. f. price'), but to the price to the first independent buyer in the Community, which will necessarily be higher than the c. i. f. price because it includes customs duties and charges. Anti-dumping duties, on the other hand, are imposed on the net free-at-Community-frontier price before duty, that is to say, on the customs value (c. i. f. price) of the imports. It follows that, in order to determine the rate of anti-dumping duty, the injury threshold must be converted arithmetically into a percentage of the price of each exporter at c. i. f. level.

106 The plea alleging the existence of errors concerning the amount of the anti-dumping duty is therefore unfounded.

8. *The plea alleging infringements of a number of general principles of law*

107 In the first part of this plea in law Nakajima argues that in this case the Community authorities infringed the applicant's rights of defence in several respects. Thus, it claims that the authorities in this case did not let it know in due time that they were abandoning the method of calculating the constructed normal value applied in an earlier anti-dumping proceeding concerning electronic typewriters which led to the judgment in *TEC*, cited above. Account had been taken in that proceeding of Nakajima's particular structure and this had resulted in the termination of the investigation into that undertaking (see Commission Decision 86/34/EEC of 12 February 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters manufactured by Nakajima All Precision Co. Ltd and originating in Japan, Official Journal 1986 L 40, p. 29). Nakajima also criticizes the institutions for having failed to inform it in good time of the names of the undertakings whose accounting data were taken into consideration for the purpose of constructing the normal value in the proceeding in the present case. In addition, Nakajima did not have an opportunity effectively to put forward its views on the special nature of its structure and the Commission adopted delaying tactics, in particular by leading the applicant to believe that it would still be able to set out its arguments at the disclosure conference, which was not held until after the date of the Commission proposal for the new basic regulation. Finally, with regard to the determination of the injury, the Commission used data other than those included in the Ernst & Whinney study and based itself in particular on information obtained during an investigation carried out on the premises of the producers concerned.

108 In this connection, it should be recalled at the outset that, according to established case-law, the rights of the defence are respected if the undertaking concerned has been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and, if necessary, on the documents used (see, for example, the judgment in Case 85/76 *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 461, at paragraph 11).

109 It would appear in this case from the minutes of the meetings between Nakajima and the Community institutions, as well as from the correspondence between the parties, that the applicant was involved at every stage of the proceeding and was therefore in a position to make its point of view known.

110 Furthermore, Nakajima had all the information which it required to defend itself effectively and in good time. The applicant acknowledged at the hearing that it had been informed of the method of calculating the constructed value by 15 March 1988 at the latest. In addition, the Commission supplied all the details of this calculation in recitals 36, 38 and 40 of the regulation imposing the provisional duty. Finally, Nakajima had already set out, in a letter of 21 June 1988, all the arguments which it repeated in the procedure before the Court.

111 It should be added that the method of calculating the constructed normal value applied to the applicant is expressly provided for by Article 2(3)(b)(ii) of the new basic regulation, which was published more than three months before the regulation imposing the definitive duty was adopted. Nakajima was therefore able to make known in good time its views on that issue.

112 It must also be stressed that Nakajima cannot complain that the Community authorities failed to provide it with all the information which it requested, except, of course, information of a confidential nature. It must be pointed out in that regard that the applicant did not request information on the method used to determine the SGA expenses and profit until 2 September 1988, which was therefore after the expiry of the period of one month following imposition of the provisional duty laid down in Article 7(4)(c)(i)(cc) of the new basic regulation. Furthermore, details relating to the costs and profits of Nakajima's competitors had to be treated as confidential, within the meaning of Article 8(3) of the new basic regulation, and for that reason could not be divulged to the applicant (see, in particular, paragraph 20 of the judgment in *TEC*, cited above).

113 In any event, the fact that a different method of calculating the constructed normal value may have been applied under the previous legislation is irrelevant in

this case since economic agents may not claim a right to have rules applied to them which may be altered by decisions taken by the Community institutions in the exercise of their powers (see, for example, the judgment in Case 256/84 *Koyo Seiko Company Limited* v *Council* [1987] ECR 1899, at paragraph 20).

114 Finally, with regard to the use of accounting data other than those included in the Ernst & Whinney study, it is clear from the Commission's letter of 28 September 1988 to Nakajima that the Community authorities at no time had the intention of relying exclusively on the contents of that study. However, it is not disputed that the file opened by the Commission, to which the applicant had access pursuant to Article 7(4)(a) of the new basic regulation, contained non-confidential summaries of information on the various European manufacturers. The applicant thus had access to all the material on which the finding of injury was based.

115 In those circumstances, the first part of this plea in law is unfounded.

116 In support of the second part of its plea in law, Nakajima argues that there was a failure to comply with the principle of legal certainty in this case, on the ground that in the anti-dumping proceeding on which the Court had to rule in the *TEC* case the Council and Commission had taken into account the applicant's particular structure and had for that reason terminated the proceeding in so far as it concerned Nakajima. Since Nakajima's structure had not changed since the time of that case, it had acquired a right in the present case to have its special character recognized and was entitled to entertain a legitimate expectation that decisions reached under the former basic regulation would continue to be applied. Moreover, the principle of non-retroactivity had been infringed by the application, after 15 March 1988, of a new method of calculating the constructed normal value which did not feature in the basic regulation then in force and which was completely at variance with the previous interpretation by the Community institutions.

117 Those arguments cannot be accepted. It must be stressed first of all that, contrary to the applicant's contentions, the Court, in its judgment in the *TEC* case, to which Nakajima was not a party, ruled exclusively on Council Regulation (EEC)

No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1986 L 163, p. 1) and expressly left open the question whether there were grounds for terminating the proceeding in respect of Nakajima (paragraph 18 of the judgment in *TEC*).

118 In any event, the procedure followed in that case with regard to Nakajima cannot constitute a precedent capable of binding the institutions, since the Court has ruled that the basic regulation on dumping allows the Community institutions a margin of discretion, particularly in calculating the amount of SGA expenses to be included in the constructed normal value (see paragraph 33 of the judgment in *TEC*) and that the fact that an institution exercises that discretion without explaining in detail and in advance the criteria which it intends to apply in every specific situation does not constitute a breach of the principle of legal certainty (see the judgment in *Brother*, cited above, at paragraph 29).

119 Next, with regard to the alleged breach of vested rights, it is sufficient to point out that the Court has consistently held that in cases where the Community authorities have a wide margin of discretion economic agents cannot claim a vested right to the maintenance of an advantage which they obtained from the Community legislation in question in the form in which it existed at a given point in time (see, in particular, the judgment in Joined Cases 133 to 136/85 *Walter Rau Lebensmittelwerke and Others* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289, at paragraph 18). In those circumstances, the method of calculating the constructed normal value applied in an earlier anti-dumping proceeding cannot create for Nakajima a vested right to the application of the same method in the present case.

120 Likewise, according to the consistent case-law of the Court referred to in paragraph 113 of this judgment, economic agents are not entitled to hold a legitimate expectation in the maintenance of an existing situation which may be altered by decisions taken by the Community institutions in the exercise of their discretion.

121 Finally, it follows from paragraphs 23 and 24 of this judgment that the argument based on an alleged breach of the principle of non-retroactivity is unfounded.

122 The second part of Nakajima's plea in law must therefore be rejected.

123 Thirdly, Nakajima contends that the principle of equal treatment has been infringed because the method of calculating the constructed normal value adopted in this case discriminates against it in view of the fact that under that method accounting data derived from undertakings with structures different from its own were used and the comparison between the normal value and the export price was made at two different levels of trade.

124 That argument is unfounded. It is clear from paragraphs 60 to 67 of this judgment that the method of calculating the constructed normal value applied in this case is not discriminatory since, in accordance with the case-law, it is designed to place Nakajima in the position in which it would have been if it had sold printers in Japan, and the Community institutions were entitled to take the view that it was impossible to have a presence on the Japanese market in electrical products without having an integrated sales structure. The Court has also already ruled at paragraphs 70 to 72 of this judgment that the comparison between the normal value and the export price in this case was not made at two different levels of trade.

125 In those circumstances, no breach of the principle of equal treatment was committed in this case.

126 Fourthly, Nakajima submits that the definitive regulation failed to comply with the principle of proportionality in so far as an anti-dumping duty of 12% was imposed on it without any account being taken of its particular structure, whereas if account had been taken of its own expenses and a reasonable profit margin this would at least have resulted in a negligible dumping margin and the exclusion of Nakajima from the proceeding in the present case.

127 That argument, however, cannot be accepted for the reasons more fully explained in paragraphs 60 to 67 of this judgment.

128 Fifthly, Nakajima contends that the principle requiring Community law to be applied fairly and equitably was infringed because the application to it of a new method of calculating the constructed value was inappropriate and grossly unfair in this case.

129 As will be clear from paragraphs 60 to 67 of this judgment, however, that argument, which is based on false premisses, must be rejected.

130 In conclusion, Nakajima contends that the principle of estoppel was infringed because it was misled by the treatment accorded to it during the anti-dumping proceeding concerning electronic typewriters.

131 That argument, which overlaps with the argument alleging infringement of the principle of legal certainty, must also be rejected for the reasons more fully explained in paragraphs 117 to 121 of this judgment.

132 Since none of the arguments relied on by Nakajima has been upheld, the plea alleging the infringement of a number of general principles of law must be rejected.

9. *The plea alleging misuse of powers*

133 In this plea in law Nakajima complains that the Community authorities showed a serious lack of caution in its regard tantamount to a failure to have due regard to the purpose of the legislation in question. In particular, the applicant claims that the Commission failed to examine fairly and in good faith the need to impose an anti-dumping duty on it and that, through lack of care or gross negligence, it instituted a proceeding with the purpose of imposing such a duty on it, contrary to previous practice. The Community authorities therefore deliberately harmed the applicant's interests and sought to avoid being in the same situation in which they found themselves in the proceeding which resulted in the *TEC* judgment.

134 The applicant's contentions, however, lack any foundation. It is sufficient to note that in this case Nakajima has been unable to satisfy the requirements laid down in the Court's case-law (see in particular the judgment in Case C-323/88 *SA Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027, at paragraph 33) with regard to proof of the existence of a misuse of powers, for it has failed to indicate, on the basis of objective, relevant and conclusive evidence, the circumstances and reasons for presuming that the measure in question was adopted in order to achieve purposes other than those for which it was intended.

135 In alleging the existence of a misuse of powers, Nakajima merely makes assertions without substantiating them. Moreover, the fact that the Community authorities refused to accept Nakajima's arguments, which they considered to be unfounded, cannot constitute a misuse of powers.

136 In any event, it follows from the Court's findings in this case that the Community legislation was applied correctly and in accordance with the purpose for which it was adopted. In the preambles to the regulations imposing the provisional and definitive duties, the institutions set out the reasons which led them to take the view that the Community's interests in this case necessitated the adoption, under the basic legislation, of measures capable of protecting Community producers against the dumping of imported products.

137 It follows that the plea in law alleging the existence of misuse of powers must be rejected.

138 Since none of Nakajima's pleas in law has been upheld, the action must be dismissed in its entirety.

Costs

139 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including those of the proceedings for the adoption of interim measures and those of the intervener, the Commission. Europrint, which also intervened but did not apply for costs, must bear its own costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs, including those relating to the proceedings for the adoption of interim measures and those of the intervener, the Commission;

(3) Orders the intervener, Europrint, to bear its own costs.

Due Mancini O'Higgins Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Kakouris Schockweiler Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 7 May 1991.

J.-G. Giraud
Registrar

O. Due
President