JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
4 July 2002 *

In Case T-340/99,

Arne Mathisen AS, established in Værøy (Norway), represented by S. Knudtzon, lawyer, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by S. Marquardt, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by V. Kreuschitz and S. Meany, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 1895/1999 of 27 August 1999 amending Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 1999 L 233, p. 1) and compensation for damage suffered as a result of the adoption of the regulation,

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

composed of: M. Vilaras, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2002,

gives the following

Judgment

1 Arne Mathisen AS ('the applicant') is a company incorporated under Norwegian law which trades principally in farmed Atlantic salmon. Its suppliers include Ex-com AS ('Ex-com'), a company incorporated under Norwegian law, which is itself a subsidiary of Tomex Danmark AS ('Tomex'), a company incorporated under Danish law, an unrelated salmon importer on the Community market and the applicant's sole customer in the Community.

2 At the material time, the commercial relationship between the three companies referred to above was governed by a triangular trading arrangement based on a counterclaim system. The applicant obtained from Ex-com mostly farmed Atlantic salmon which it sold on to Tomex. However, the applicant did not actually pay Ex-com directly for the goods. Tomex paid Ex-com. The applicant, instead of receiving the total amount of the export invoices which it addressed to Tomex, received only the difference between that amount and the amount shown on the sales invoices drawn up by Ex-com in the applicant's name.

3 Following complaints lodged in July 1996 by the Scottish Salmon Growers' Association Ltd and by the Shetland Salmon Farmers' Association on behalf of their members, the Commission announced on 31 August 1996, by two separate notices, the initiation of an anti-dumping proceeding and an anti-subsidy proceeding concerning imports of farmed Atlantic salmon originating in Norway (OJ 1996 C 253, pp. 18 and 20).

4 Having sought and checked all the information it deemed necessary for its definitive findings, the Commission concluded that it was necessary to impose definitive anti-dumping and anti-subsidy measures in order to eliminate the damaging effects of the alleged practices of dumping and subsidisation.

5 Thereafter, on 2 June 1997 the Norwegian Government and the Commission concluded an agreement in respect of the period 1 July 1997 to 30 June 2002 ('the Salmon Agreement') which aimed to eliminate the injurious effects of the subsidies granted in connection with exports of Norwegian salmon to the Community. In the Salmon Agreement, the Norwegian authorities undertook to take a number of measures including, in particular, setting a minimum price for exports to the Community and imposing duties on exporters which did not undertake to the Commission to observe that minimum price (point 3) and a mechanism of indicative ceilings for exports to the Community (point 2).

6 In the context of point 3 of the Salmon Agreement, and in accordance with Article 8 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, 'the basic anti-dumping regulation' or

'Regulation No 384/96') and Article 10 of Council Regulation (EC) No 3284/94 of 22 December 1994 on protection against subsidised imports from countries not members of the European Community (OJ 1994 L 349, p. 22), several Norwegian salmon exporters, including the applicant, submitted a proposed undertaking to the Commission.

7 The exporters undertook in particular that the average quarterly price of their exports of farmed Atlantic salmon to their first unrelated customers in the Community would not fall below certain minimum prices, which depended on the prepared state of the salmon (hereinafter 'the minimum price' or 'the minimum export price') (Clause C.3 of the undertaking) and that the price for any individual transaction would not be less than 85% of the minimum price, except in exceptional circumstances and, in any given quarter, in respect of not more than 2% of the total of their exports to their first unrelated customers in the Community during the preceding quarter (Clause C.4). In addition, they undertook to notify the Commission each quarter, in accordance with the required technical specifications, of all their sales of farmed Atlantic salmon to their first unrelated customers in the Community and to cooperate with the Commission in providing it with any information considered necessary by the Commission for the purpose of ensuring compliance with the undertaking (Clauses E.10 and E.11).

8 Under Clause D.8 of the undertaking, each Norwegian exporter concerned also entered into an obligation not to circumvent the provisions of the undertaking:

'— by compensatory arrangements with its unrelated customers in the Community as regards sales of other products or sales of the product to territories other than the Community;

— by misleading declarations or reports regarding the nature, type or origin of products sold or the identity of the exporter;

— in any other manner'.

9 In addition, Clauses F.12 and F.14 of the undertaking provide that:

'12. The company undertakes to consult with the European Commission either on its own initiative or upon request from the European Commission regarding any difficulties which may arise with regard to the interpretation or application of this undertaking.

13. ...

14. The company is further aware that:

— circumvention of this undertaking or failure to cooperate with the European Commission in monitoring this undertaking shall be construed as a violation of this undertaking. This shall include failure to submit the quarterly report required under Clause [E.]10 within the prescribed time-limits except in cases of force majeure;

— pursuant to Article 8(10) of... Regulation... No 384/96... and Article 10(10) of... Regulation... No 3284/94, where the European Commission has reasons to believe that the undertaking is violated, provisional anti-dumping and anti-subsidy duties may, after consultation, be imposed on the basis of best information available;

— pursuant to Article 8(9) of... Regulation... No 384/96 and Article 10(9) of... Regulation... No 3284/94, where the undertaking has been violated, or withdrawn either by the European Commission or by the company, definitive anti-dumping and anti-subsidy duties may be imposed on the basis of the facts established within the context of the investigations which led to the undertaking, provided that the investigations were concluded with a final determination on dumping, subsidisation and injury and the company itself has been given an opportunity to comment.'

10 Lastly, under Clause G.17, the undertaking was to enter into force on the day following the date of publication in the *Official Journal of the European Communities* of the Commission's decision to accept the undertaking.

'However, the obligation to respect the minimum price... shall apply for all sales by the company of the product to its first unrelated customers in the Community which are invoiced from 1 July 1997. The first quarterly report to be sent by the company under Clause [E.]10 shall relate to the quarter 1 July-30 September 1997 and shall be sent to the Commission not later than 31 October 1997.'

11 By Decision 97/634/EC of 26 September 1997 accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 81), the Commission accepted the undertakings offered by a number of Norwegian exporters of those products, including that of the applicant. With regard to those exporters, the anti-dumping and anti-subsidy investigations were terminated.

12 That same day, the Council adopted Regulation (EC) No 1890/97 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 1) and Regulation (EC) No 1891/97 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 19). Pursuant to Article 1(2) of each of those regulations, imports of farmed Atlantic salmon originating in Norway which were exported by companies, including the applicant, which had provided undertakings accepted by the Commission were exempted from those duties. The form of those duties was subsequently reviewed and those two regulations were replaced by Council Regulation (EC) No 772/1999 of 30 March 1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway and repealing Regulations No 1890/97 and No 1891/97 (OJ 1999 L 101, p. 1).

13 After the Commission formed the view that some Norwegian exporters were not complying with their undertakings accepted by its Decision 97/634 it adopted Regulation (EC) No 82/1999 of 13 January 1999 imposing provisional anti-dumping and countervailing duties on certain imports of farmed Atlantic salmon originating in Norway and amending Decision 97/634 (OJ 1999 L 8, p. 8). That regulation was adopted under Article 8(10) of Regulation No 384/96 and Article 13(10) of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1; 'the basic anti-subsidy regulation' or 'Regulation No 2026/97'), which replaced Regulation No 3284/94.

14 The Commission also found that the trading practices of some Norwegian exporters, under an agreement referred to as the 'triangular trading arrangement', had caused a steep fall in prices on the Community salmon market and thus circumvented their undertaking to observe a quarterly average price at least equal to the minimum export price fixed by Clause C.3 of the undertaking. On 28 November 1998, therefore, the Commission introduced an amendment to the third indent of Clause D.8 of the undertaking in the following terms:

'In this regard,

(a) if any sale to the exporter in Norway subject to this undertaking is obtained from a source other than

(i) farmers or farming cooperatives;

(ii) processors unrelated to any company in the Community which have bought solely from farmers, farming cooperatives or exporters subject to an undertaking; or

(iii) another exporter subject to an undertaking;

the Commission will consider the undertaking unenforceable and consequently withdraw its acceptance.

(b) If any sale of the product by a related importer in the Community is sourced from a company other than its related exporter in Norway subject to this undertaking, the minimum price shall be respected by the importer for any transaction of its total sales in the Community. Neither quarterly averaging of sales transactions nor the 85% rule will apply in this case. The Commission will therefore consider any single transaction by such importer to an independent customer in the Community below the minimum price to be a violation of the undertaking with the consequent withdrawal of its acceptance.'

15 That amendment applied to all sales by salmon exporters to their first unrelated customers in the Community which were invoiced from 1 December 1998.

16 On 29 April 1999 the Commission adopted Regulation (EC) No 929/1999 amending Regulation No 82/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, amending Decision 97/634 and amending Regulation No 772/1999 (OJ 1999 L 115, p. 13). Under Article 2(1)(a) of Regulation 929/1999, provisional countervailing and anti-dumping duties were imposed on imports of farmed Atlantic salmon originating in Norway exported by four companies, one of which was the applicant, which in the Commission's view had also breached their undertaking originally accepted by the Commission in Decision 97/634.

17 The investigation subsequently carried out by the Commission established that three of the four companies referred to in Regulation 929/1999, including the applicant, had breached their undertakings. The Commission considered, in particular, that the reports submitted by the applicant during five consecutive

reporting quarters, between July 1997 and November 1998, were misleading since they did not disclose the true nature of the counterclaim settlement procedure for its transactions with Ex-com and Tomex or the fact that those two companies were related. It also considered that the applicant had misled the Commission as to its true function as an exporter and its actual ability to comply with its undertaking on the actual minimum export price, since the flow of money between the three companies did not reflect the flow of invoices for purchase and resale.

18 On that basis, on 23 August 1999 the Commission adopted Regulation (EC) No 1826/1999 amending Regulation No 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, amending Decision 97/634 and amending Regulation No 772/1999 (OJ 1999 L 223, p. 3). The Commission also submitted a proposal to the Council for a regulation to impose definitive anti-dumping and countervailing duties on the three companies referred to above.

19 In those circumstances, the Council adopted Regulation (EC) No 1895/1999 of 27 August 1999 amending Regulation No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway (OJ 1999 L 233, p. 1; 'the contested regulation'). By virtue of Article 1 of, and Annexes I and II to, the contested regulation, the three companies, including the applicant, were deleted from the list of companies exempted from the definitive anti-dumping and anti-subsidy duties and placed on the list of companies subject to those duties. In addition, as provided in Article 2 of that regulation, the amounts secured by way of the provisional anti-dumping and countervailing duties imposed by Regulation No 929/1999 in relation to farmed Atlantic salmon originating in Norway and exported by the applicant, among others, were levied definitively.

Procedure

20 By application lodged at the Registry of the Court of First Instance on 1 December 1999, the applicant brought the present action.

21 By application lodged at the Registry of the Court of First Instance on 19 June 2000, the Commission applied for leave to intervene in these proceedings in support of the form of order sought by the Council.

22 By order of 11 September 2000, the President of the First Chamber (Extended Composition) of the Court of First Instance granted the Commission leave to intervene.

23 By letter lodged at the Registry of the Court on 5 October 2000, the intervener indicated that it would not submit a statement in intervention.

24 By decision of the Court of First Instance of 20 September 2001, the Judge-Rapporteur was assigned to the Fourth Chamber (Extended Composition) to which the present case was therefore allocated.

25 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the Council to produce certain documents and to reply to a written question. The Council complied with that request within the time allowed.

26 The parties presented oral argument and answered questions put to them by the Court at the hearing on 24 January 2002.

27 At the hearing the Council's representative lodged with the Court and communicated to the other parties four documents setting out in schematic form some examples which he used during his oral submissions to illustrate the business practice used by the applicant, Tomex and Ex-com. The applicant's representative objected to the placing of those documents on the file.

28 By letter of 28 January 2002 from the Registrar of the Court, the parties were informed of the decision of the President of the Fourth Chamber, Extended Composition, to place those documents on the file on the ground that they were not fresh evidence but merely illustrated the remarks of the Council's representative during his submissions.

Forms of order sought

29 The applicant claims that the Court should:

— annul the contested regulation in so far as it relates to the applicant;

— order the Council to pay compensation for the loss incurred as a result of the adoption of the contested regulation, with interest at a rate of 12% per annum;

— order the defendant to pay the costs.

30 The defendant contends that the Court should:

— dismiss the claim for annulment as unfounded;

— dismiss the claim for compensation as inadmissible and, in the alternative, as unfounded;

— order the applicant to pay the costs.

The claim for annulment

31 The applicant puts forward two pleas in support of its claim for annulment, alleging, first, a manifest error of assessment by the Council and, second, breach of the principle of proportionality.

First plea: manifest error of assessment

32 This plea is divided into three parts: it is alleged, first, that the triangular trading practice operated by the applicant up until 1 December 1998 did not fall within the scope of the undertaking in its initial form; second, that the applicant did not breach or circumvent its undertaking; and, third, that the applicant did not breach its obligation to cooperate with the Commission in monitoring the undertaking.

The first part: the applicant's business practice did not fall within the scope of the undertaking in its initial form

— Arguments of the parties

33 The applicant claims that until 1 December 1998, the date on which Clause D.8 of the undertaking was formally amended, its business practice did not fall within the scope of that clause. If the position had been otherwise, the Commission would have had no reason to amend the undertaking and forbid any form of circumvention with effect from 1 December 1998.

34 The Council contends that the applicant's business practice was covered by its original undertaking. It considers that the amendment on 28 November 1998 of Clause D.8, third indent, of the undertaking was in no way an amendment of the undertaking's content and purpose as such. The aim of the amendment was simply to facilitate and ensure effective enforcement of the system of undertakings as a whole following the implementation by some exporters bound by the undertaking of business practices involving other traders who were not bound by it and were outside the Commission's powers of control.

— Findings of the Court

35 It is apparent from the original wording of Clause D.8, third indent, of the undertaking that any business practice, whatever its form, which does not comply with the said obligation to observe the minimum export price or which does not effectively ensure that the said obligation is observed constitutes a circumvention of the undertaking contrary to that provision.

36 Consequently, the fact that the initial wording of Clause D.8 of the undertaking does not refer expressly to a triangular trading arrangement such as that implemented by the applicant does not mean that such an arrangement falls outside the scope of application of the undertaking.

37 It must be pointed out that the decisive test is not whether one or other trading arrangement is expressly mentioned in the undertaking as a specific form of circumvention, but whether a practice, even if not formally specified, breaches or

circumvents the undertaking. The same business practice may, depending upon the circumstances in which it is implemented, amount to a breach or circumvention of the minimum export price undertaking or comply with that same undertaking.

38 In any event, even if the applicant had doubts as to the scope of Clause D.8, third indent, of the undertaking as initially worded, it was incumbent on it to consult the Commission, in accordance with Clause F.12 of the undertaking, in order to resolve any ambiguity in the interpretation and application of that provision.

39 Contrary to the applicant's submissions, those findings are not to be called into question by the fact that the new version of Clause D.8, third indent, of the undertaking, which applied to salmon exports invoiced with effect from 1 December 1998, sets out certain forms of circumvention, including the triangular trading arrangement implemented by the applicant in the present case, to which no formal reference was made in its initial version.

40 Such an interpretation of the new version of Clause D.8, third indent, is incompatible with the object and purpose of the undertaking as a whole and, more specifically, with the obligation, to which the applicant had agreed from the very outset, to ensure effective observance of the minimum export price.

41 The new version of Clause D.8, third indent, seeks, first, to clarify and define the scope of the initial version of the undertaking in the light of certain unlawful practices implemented by some exporters after their undertaking had been accepted by the Commission in Decision 97/634 and, second, to ensure effective

monitoring of the system of undertakings in the light of the large number of exporters involved and to maintain it in the interest of all the parties concerned rather than to abolish it because of those practices. That is why Clause D.8, third indent, as amended, states that the implementation of those practices will lead to the inapplicability of the undertaking and the immediate withdrawal of its acceptance by the Commission.

42 Nevertheless, the new version of Clause D.8, third indent, of the undertaking does not imply that a business practice such as the triangular trading arrangement at issue, implemented before the entry into force of that provision, is protected from any sanction where that practice amounts to a breach by the exporter concerned of his obligation to observe the minimum export price or where it offers no guarantee and does not permit verification of actual compliance with that obligation. Any other interpretation would be contrary to Clause D.8, third indent, which, as originally worded, was general in its scope ('in any other manner'), and would render that provision ineffective.

43 It follows that the applicant cannot establish an argument *a contrario* from the fact that the amendment of the undertaking applies to exports of salmon invoiced from 1 December 1998. In addition to the reasons already given in paragraph 41 above, the fixing of the date for the entry into force of that amendment is also explained by the fact that the average quarterly export price rule and the 85% rule in Clause C.3 and Clause C.4 respectively of the undertaking (see paragraph 7 above) cease to apply to the cases covered by the new version of Clause D.8, third indent, (b) of the undertaking.

44 Having regard to the foregoing, the first part of this plea is unfounded and must be rejected.

The second part: no breach or circumvention of the undertaking by the applicant

— Arguments of the parties

45 The applicant submits, first of all, that the trading arrangement concluded with Ex-com and Tomex had not been made to circumvent the undertaking. This is shown by the fact that its business links with Tomex date back to 1990. It is also apparent from an invoice from Ex-com to the applicant dated 30 April 1997 that the applicant started to buy salmon from Ex-com in April 1997, before the undertaking entered into force on 1 July 1997. In addition, the reasons for making such an arrangement are the same as for any other counterclaim transaction, that is to say, to reduce the need for liquidity and to reduce transaction costs. Moreover the business practice in question concerned only a limited part of the total volume of the applicant's exports, since it applied only to the trade with Tomex in the salmon which the applicant purchased from Ex-com, merely one of its secondary suppliers.

46 Next, the applicant claims that it was not acting as a pure intermediary between Tomex and Ex-com.

47 In that connection, contrary to the Commission's assertion in points 19 and 25 of Regulation No 1826/99, it is clear from a letter dated 30 July 1999 from the Norwegian audit firm, Noraudit, that sales to Tomex of salmon purchased by the applicant from Ex-com had indeed been paid for in full.

48 Similarly, the Commission's finding in point 26 of Regulation No 1826/1999 that the applicant had no control over the constitutive price elements is incorrect. The mere fact that the applicant was aware of the link between Tomex and Ex-com does not mean that it must also have known that prices and money-flows between those two companies were purely notional and that they were, in essence, merely transfer prices between related companies. The applicant had no reason to question the information supplied by Ex-com about its arrangements with Tomex, which was the basis for the auditing of the accounts and the reports which the applicant supplied to the Commission.

49 Moreover, according to the applicant, the Commission has not presented any evidence to support its assertion of notional money-flows and the absence of proper payments between Ex-com and Tomex. The applicant observes that, following the verification visit to Tomex (see point 27 of Regulation No 1826/1999), the Commission did not dispute the applicant's claim that Tomex's resale prices were above the minimum export price. That supports the applicant's submission that it had no reason to believe that Ex-com did not receive payments from Tomex for its supplies to the applicant.

50 In any event, the applicant considers that Clause C.3 of the undertaking neither explicitly nor implicitly imposes on it any obligation to monitor its business partners or to check whether its customer in the European Union was actually paying the net balance to the company outside the European Union which it controlled. It is impossible to require an exporter to monitor the actual or potential links that may exist between a supplier and a Community importer.

51 In reply the Council states that by operating the triangular trading practice in question the applicant breached and circumvented its undertaking to observe the minimum export price.

52 Consequently, it contends that neither the Commission, in withdrawing its acceptance of the undertaking and imposing provisional anti-dumping and countervailing duties, nor the Council, in imposing definitive anti-dumping and countervailing duties on the applicant, committed an error of fact or of law which could justify annulment of the contested regulation.

— Findings of the Court

53 It should first be observed that in the sphere of measures to protect trade the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 72; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 32).

54 It follows that review of assessments of the institutions by the Community judicature must be limited to verifying whether the 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 of assessment of the facts or a misuse of power (Case 240/84 *NTN Toyo Bearing* v *Council* [1987] ECR 1809, paragraph 19; *Thai Bicycle* v *Council*, paragraph 33, and the case-law cited).

55 In the present case, it must be noted, first, that according to Clause F.14, first indent, of the undertaking, 'the circumvention of this undertaking... shall be construed as a violation of this undertaking...'. In those circumstances the

distinction drawn by the applicant in its pleadings between 'violation' and 'circumvention' of the undertaking, a distinction to which it does not, however, attach any specific consequence, is irrelevant to the assessment of this part of the first plea.

56 It follows that, in the event of circumvention of an undertaking offered by an exporter, definitive anti-dumping and countervailing duties may be imposed pursuant to Articles 8(9) and 9(4) of the basic anti-dumping regulation and Articles 13(9) and 15(1) of the basic anti-subsidy regulation in the same way as if there had been a direct breach of the undertaking offered.

57 Next, it should be pointed out that the Commission has a discretion whether to accept or refuse a price undertaking and may, in particular, refuse a price undertaking if it considers that it will be difficult to monitor its application. *A fortiori*, a finding that such a breach has actually been committed is sufficient to allow the Commission to withdraw acceptance of the undertaking and to replace it with an anti-dumping duty (Case T-51/96 *Miwon* v *Council* [2000] ECR II-1841, paragraph 52). The position is the same where an exporter whose price undertaking has been accepted does not directly breach the provisions of the undertaking but circumvents them by implementing a business practice which makes it difficult, if not impossible, to verify his actual compliance. That is the case in particular where the implementation of such a practice involves the participation of other traders over whom the exporter involved has no control and who, not being bound by a parallel undertaking, are not subject to monitoring by the Commission either.

58 Finally, it must be noted that, in accordance with those principles, Clause F.14, third indent, of the undertaking states that, pursuant to Article 8(9) of Regulation No 384/96 and Article 10(9) of Regulation No 3284/94, in the event of a

breach — a circumvention being treated by virtue of the first indent in the same way as a breach — of the undertaking, definitive anti-dumping and anti-subsidy duties may be imposed on the basis of the facts established within the context of the investigations which led to the undertaking, provided that the investigations were concluded with a final determination on dumping, subsidisation and injury and that the company itself has been given an opportunity to comment.

59 In the present case, the applicant exported the product concerned exclusively to one independent importer in the Community (Tomex). The applicant obtained most of the salmon thus exported from a Norwegian supplier (Ex-com) from which no undertaking had been accepted and which was a company linked to the applicant's sole customer in the Community. However, the applicant did not in fact pay the value of the goods to Ex-com. As regards exports of goods supplied by Ex-com, where the price on the export invoices drawn up by the applicant complied with the minimum export price, payment for the goods was made directly by Tomex to Ex-com and not to the applicant. The applicant, instead of receiving the total amount invoiced, received only the difference between the amount on the purchase invoice and that on the export invoice. In its pleadings, the applicant confirms both the arrangements for that business agreement with its abovementioned trading partners and the fact that the monetary flow did not reflect the flow of purchase invoices and resale invoices.

60 In its provisional and definitive findings set out in Regulation No 929/1999 (points 34 and 36) and in Regulation No 1826/1999 (point 19 et seq.), to which point 8 of the contested regulation refers, the Commission found that this type of business practice was incompatible with the obligations imposed by the applicant's undertaking, because the applicant was unable to ensure that the invoice amount was actually paid by its customer in the Community and thus that the real sales price was not below the minimum export price. For those reasons,

the Commission found that the applicant could not be considered to be an exporter within the meaning of the undertaking (point 35 of Regulation No 929/1999 and point 19 of Regulation No 1826/1999 read in conjunction with point 25 of the same regulation).

61 In points 21 and 26 of Regulation No 1826/1999 the Commission explains that for an undertaking to be considered acceptable the Commission must be satisfied that it can be effectively monitored, which is clearly impossible, when as was the case for the applicant, a company has no control over the final price paid by the customer in the Community directly to the supplier in Norway. As the applicant acknowledged that it was aware of the link between the Norwegian supplier (Ex-com) and its sole client in the Community (Tomex), and as it exercised no control over the components making up the actual final price, it ought also to have known that prices and money-flows between those two companies were purely notional, as they were in essence merely transfer prices between related parties.

62 The Commission, for its part, could not monitor the final export price as it had no power to supervise Tomex and Ex-com, which were not bound by an undertaking to it. The Commission was not therefore in a position to establish the true nature and the effects of the counterclaim mechanism operating between those companies.

63 It must be pointed out in that regard, first, that when the Commission carried out an inspection at the premises of Tomex, with the latter's agreement, in November 1998 it was not shown data or documents which could have clarified the real nature of the counterclaim settlements which took place between Tomex and its subsidiary Ex-com.

64 Next, the abovementioned detailed rules for implementing the counterclaim settlements procedure between Tomex and Ex-com explain why the applicant bought salmon from Ex-com only in so far as it had previously been 'ordered' by Tomex. The applicant could thereby obtain its profit margin without running the business risk of potential losses which might result from difficulties in selling the product in question. That finding, which the Commission set out in the final disclosure sent to the applicant by letter of 28 July 1999 pursuant to Article 20 of the basic anti-dumping regulation and Article 30 of the basic anti-subsidy regulation was not disputed by the applicant in its observations of 9 August 1999 on that final disclosure.

65 Moreover, the finding, made on the basis of the summary table produced by the Council in reply to the Court's questions concerning the total salmon purchased by the applicant from all its suppliers in 1998, according to which the applicant purchased from Ex-com at an average annual price which was 11.8% higher than the average annual purchase price from its other suppliers, sheds light on the possibilities which might be offered to parties participating in the opaque counterclaim settlements procedure in operation. As the Council observes in its pleadings, by using the triangular trading arrangement at issue it was possible, first, for the applicant to obtain its profit margin, which was paid to it directly by Tomex; second, for Tomex to purchase, through the counterclaim settlements procedure, salmon from its subsidiary Ex-com without paying the anti-dumping duties which it would have had to pay if it had purchased directly from Ex-com, and thus to perform the transactions at the market price in Norway, which was lower than the price charged by the applicant to Ex-com; and, third, for Ex-com to sell its salmon at the Norwegian market price without incurring a loss.

66 In any event, as has been pointed out in paragraphs 60 to 62 above, the practice in question offered no guarantee whatsoever to the Commission that the applicant's undertaking regarding the minimum export price was actually observed.

67 Contrary to the applicant's claims during the administrative procedure and in the application, the 11.8% price difference referred to in paragraph 65 above is not explained by seasonal variations which caused the applicant to obtain supplies during the summer months from Ex-com, a company established in the south of Norway. As the Council correctly submits in its defence and as is clear from the table annexed to the final disclosure to the applicant on 28 July 1999, the analysis of the accounting data obtained during the on-site visit to the applicant on 27 January 1999 showed that the applicant's purchases of salmon from Ex-com during the period from January to November 1998 were at their height not during the summer but during winter and early spring 1998.

68 It follows from the foregoing that the triangular trading arrangement implemented by the applicant and its trading partners, Tomex and Ex-com, in no way ensured an effective control by the applicant of the actual price of its exports and, therefore, effective compliance by it with the undertaking not to export below the minimum price which it had agreed to observe.

69 Consequently, the Commission rightly withdrew its acceptance of the applicant's undertaking and proposed the imposition of definitive anti-dumping and countervailing duties and the Council rightly imposed those duties on the applicant in the contested regulation.

70 The various arguments submitted by the applicant in order to challenge that assessment cannot be upheld.

71 First, the assertion that the counterclaim settlements procedure is a standard business practice in Norway which aims, according to the applicant, 'to reduce the need for liquidity and to reduce transaction costs' is not supported by any evidence. Moreover, the applicant has not explained why the 'standard' practice in question was confined exclusively to its business relationship with Ex-com and Tomex and did not apply to its transactions with other salmon suppliers. Furthermore, the claim that this practice is standard, at least in the salmon marketing sector, is disproved by the fact, pointed out by the Council and not disputed by the applicant, that the Commission, after carrying out on-site visits at 38 different Norwegian exporters and importers, found no evidence to support it. According to points 17 to 30 of Regulation No 1826/1999, the business practice in question was observed only on the part of the applicant and one other company (Brødrene Eilertsen A/S), whose undertaking was also terminated.

72 In any event, even if, as the applicant asserts, the practice in question is a standard business practice in Norway, that cannot relieve the applicant of its obligation to ensure actual compliance with the minimum export price and to avoid any circumvention of the undertaking given to that effect.

73 Second, it is also necessary to reject the argument that the first invoice, dated 30 April 1997, sent by Ex-com to the applicant shows that the business practice at issue began in reality before the entry into force of the Salmon Agreement and that this practice was therefore not implemented in order to circumvent the applicant's undertaking.

74 First of all, that assertion is invalidated by the applicant's own statement in the application that this business practice was maintained for a limited period from

1 July 1997, the date of the entry into force of the Salmon Agreement, until the end of November 1998. Next, nothing in the invoice of 30 April 1997 indicates that the counterclaim settlements procedure was already being applied at that date. Finally, even if that were the case, that cannot affect the conclusion that the arrangements for implementing that practice with effect from 1 July 1997 were intended to invalidate the applicant's undertaking to observe the minimum price for sales to its first unrelated customers in the Community which it invoiced after that date.

75 Third, it is necessary to reject as unfounded the argument that the Commission wrongly found in points 19 and 25 of Regulation No 1826/1999 that the applicant issued export invoices to Tomex without ever receiving payment for them. The letter of 30 July 1999 from the Norwegian audit company, Noraudit, on which the applicant relies in order to dispute that finding, in no way demonstrates that Tomex actually paid to the applicant the total amount shown on the export invoices in question. That letter summarises the result of an examination of the applicant's accounts with Tomex and Ex-com over the period 1 January 1998 to 30 April 1999 and states as follows:

'...

Based on our examinations of the said accounts we hereby confirm that you have received full settlement of all your sales invoices to Tomex. The amount of NOK 85 115 586.86 has been settled by the purchase value of fresh salmon purchased from [Ex-com] AS, and the rest has been settled by cash payments.

In business this is not an unusual way of settling the trade accounts in cases where two companies belong to the same group of companies and one of them acts as a supplier and the other acts [as] customer of a third company outside the group. For the supplier company in the group, in this case [Ex-com] AS, this is a safer way of getting settlement for their deliveries of fresh salmon to Arne Mathisen AS, because the risk of losing settlement by the bankruptcy of Arne Mathisen AS is avoided.'

76 It is apparent from that letter that the payments made by Tomex to the applicant were not in accordance with the export invoices and that the payments actually received and recorded by the applicant corresponded to the amounts on those invoices after deduction of the amounts due by Tomex to Ex-com. The latter amounts were covered by the counterclaim settlements procedure operating between Tomex and Ex-com, which were linked companies and not subject to monitoring by the Commission.

77 Consequently, that letter from Noraudit not only fails to invalidate the Commission's findings in points 19 and 25 of Regulation No 1826/1999 but in fact confirms them.

78 Fourth, the argument that the applicant ceased to obtain supplies of salmon from Ex-com once that type of supply was prohibited at the end of November 1998 by the amendment to Clause D.8, third indent, of the undertaking (see paragraphs 14 and 15 above) is irrelevant and must be rejected. As the Commission maintains in point 28 of Regulation No 1826/1999, at that time the applicant had already breached its undertaking for more than five consecutive reporting quarters.

79 Fifth, the applicant's claim that Ex-com is a secondary supplier to it and that the business practice in respect of which the Commission had expressed doubts related to a limited part of the applicant's total sales to Tomex is unfounded and must be rejected.

80 It is settled case-law that none of the provisions of the basic anti-dumping and anti -subsidy regulations contain a direct or indirect requirement that the information on which the Commission or the Council bases its assessment of whether an economic operator has committed a breach of his undertaking must relate to a minimum percentage of his sales. On the contrary, any breach of an undertaking suffices to allow the Commission to withdraw its acceptance of the undertaking and replace it with an anti-dumping duty (see *Miwon* v *Council*, paragraph 52).

81 In any event, that claim is factually incorrect. On the one hand, in the application the applicant accepts that '[t]he share of supply from Ex-com to Arne Mathisen varied with market conditions between approximately 45% and 70% of the total export from Arne Mathisen to Tomex' and that 'Arne Mathisen only bought part of its salmon from Ex-com, the proportion varying between 40% and 70% during the period July 1997 until November 1998'. On the other hand, as may be seen from the table produced by the Council in reply to written questions from the Court and mentioned in paragraph 65 above, in 1998 out of a total of 30 suppliers Ex-com alone supplied to the applicant approximately 42% of the total quantity of salmon purchased by it for export. That finding, confirmed by point 22 of Regulation No 1826/1999, which states that '[s]ales sourced in this way constituted a significant proportion of the total exports [of the applicant]', means that Ex-com cannot be regarded as a secondary supplier of the applicant.

82 Nor, sixth, is there any foundation for the claim that Clause C.3 of the undertaking does not impose on the applicant any express or implied obligation to monitor its business partners or to verify whether its customer in the Community, Tomex, in fact paid to its subsidiary, Ex-com, the amount set out in the export invoices after deduction of the sum paid by Tomex to the applicant.

83 The key element of the breach of the undertaking by the applicant is the fact that it did not comply with the obligation to ensure that the minimum export price was in fact observed, having undertaken to do so. Moreover, even if the wording of the undertaking does not refer expressly to such an obligation of control, it is clear, when Clauses C.3 and D.8 of the undertaking are read together, that they impose on each exporter a positive obligation to monitor the real price of salmon exported to the Community. If that were not the case, the undertaking concerning the minimum export price would be meaningless.

84 Lastly, the applicant's argument that the resale prices of Tomex on the Community market are above the minimum export price and thus do not cause any injury must also be rejected as irrelevant.

85 As is pointed out in Clause F.14 of the undertaking, pursuant to Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation, where the undertaking has been breached or circumvented, definitive duties 'may be imposed on the basis of the facts established within the context of the investigations which led to the undertaking', provided that the investigation was concluded with a final determination on dumping, subsidy and injury and the exporter concerned has been given an opportunity to comment.

86 It follows that the breach or circumvention of an undertaking suffices for the imposition of definitive duties and that it is not necessary to prove once more the dumping and injury already determined in the course of the investigation which culminated in the undertaking in accordance with the conditions laid down in the above provisions of the basic anti-dumping and anti-subsidy regulations. The applicant does not dispute that those conditions were fulfilled in the present case. Moreover, an exporter who has offered a price undertaking which has been accepted by the Commission can avoid the imposition of definitive duties by complying scrupulously with that undertaking and in refraining from any violation or circumvention of it, thus avoiding any breach in the relationship of trust established with the institutions and which is the basis for acceptance of the undertaking.

87 In those circumstances, as is stated in point 27 of Regulation No 1826/1999, the resale of salmon by Tomex on the Community market at a price equal to or above the minimum export price 'is... a completely different issue to the one of whether Arne Mathisen AS had respected its undertaking or not'. Furthermore, as is stated in point 28 of that regulation, 'to establish... that these resale prices had no negative effects, it would also be necessary to extend the investigation to the related parties of that importer in Norway and the Community'. Neither the basic anti-dumping regulation nor the basic anti-subsidy regulation require such a result, whether in order to establish a violation of an undertaking or to withdraw acceptance of it.

88 Finally, inasmuch as, because of its opaque nature, the triangular trading arrangement could allow Tomex to import onto the Community market the salmon exported by the applicant at a price below the minimum price, that arrangement could confer on Tomex a competitive advantage over its competitors when it resold that product in the Community at a price above the minimum export price. Tomex could obtain a bigger profit margin than that of its

competitors on the Community market which obtained supplies of salmon at a real price at least equal to the minimum export price.

89 It follows that the second part of the first plea must be rejected.

Third part: no failure by the applicant to cooperate in monitoring the undertaking

— Arguments of the parties

90 The applicant claims that it always acted in good faith and at no stage intended to mislead the Commission. Moreover, it had no reason to believe that the Commission was misled by reports from Ex-com. The applicant therefore did not breach or circumvent the undertaking by wilfully misleading the Commission through the making of incorrect reports.

91 The Council contends that on several occasions the applicant made misleading statements in breach of Clause D.8, second indent, of the undertaking.

— Findings of the Court

92 Pursuant to Article 8(7) of the basic anti-dumping regulation and Article 13(7) of the basic anti-subsidy regulation, the Commission is to require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertaking and to permit verification of pertinent data. Non-compliance with those requirements is to be construed as a violation of the undertaking.

93 According to the case-law, it follows from those provisions that the mere failure by a party from whom an undertaking has been accepted periodically to provide information permitting verification of pertinent data is to be regarded as a breach of the undertaking (*Miwon* v *Council*, paragraph 52).

94 In accordance with the abovementioned provisions of the basic anti-dumping and anti-subsidy regulations, Clauses D.8, second indent, E.10, E.11 and G.17 of the undertaking provide that each exporter is to undertake, first, not to circumvent the undertaking by misleading statements or reports regarding the nature, type or origin of products sold or the identity of the exporter, and, second, to cooperate with the Commission by supplying it with whatever information is considered necessary by the Commission for the purpose of ensuring compliance with the undertaking.

95 Furthermore, according to Clause F.14, first indent, of the undertaking failure to cooperate with the Commission in monitoring the undertaking is to be construed as a breach of it.

96 As regards the applicant's compliance with its obligation to cooperate with the Commission, it should first be noted that point 36 of Regulation No 929/1999 and points 20 and 25 of Regulation No 1826/1999 state that the applicant's reports of quarterly sales in the Community presented to the Commission were considered to be unreliable as they reflected only the amounts invoiced and not, as the undertaking requires, the real value of the financial transactions.

97 In reply to a written question from the Court, the Council produced a copy of the sales report drawn up by the applicant for the fourth quarter of 1998 and sent to the Commission. In its reply the Council also explained, without contradiction, that the applicant's sales reports covering the other periods are similar and may, if necessary, be placed at the disposal of the Court. It is apparent from the document in question that the sales reports sent by the applicant to the Commission reflect only the amounts on the export invoices issued by the applicant to Tomex. They do not show what are the underlying financial transactions, that is to say, the amounts actually paid by Tomex to the applicant in respect of any given invoice. On the contrary, those reports suggest that the export invoices issued in the name of Tomex (columns 5 and 6 of the report sent) were paid in full (columns 9, 101 and 102 of the same report) by it. Nowhere is it mentioned that the applicant received from Tomex only the amounts corresponding to the difference between the price on the invoices for the purchase of salmon and the price on the export invoices.

98 Furthermore, it was not made clear that the amount not paid by Tomex to the applicant was paid by means of a counterclaim settlement procedure between the applicant, Ex-com and Tomex, nor stated that on the occasion of that counterclaim, the real export price was at least equal to the minimum price.

99 Next, it must be observed that the applicant did not draw the Commission's attention to the real nature of the counterclaim settlement procedure or to the fact

that it knew of the relationship between Tomex and Ex-com from the very outset, that is to say, from the time when the triangular trading arrangement at issue was implemented.

100 Lastly, the applicant has not explained or provided evidence in its reports as to why it obtained supplies from Ex-com at an average price that was 11.8% above that charged by all its other suppliers.

101 The applicant does not really contest the above matters but merely invokes its good faith and the fact that it had no reason to believe that the Commission would be deceived by the reports supplied.

102 On the basis of those considerations, it must be concluded that the applicant did not comply with its obligation to cooperate with the Commission in monitoring the undertaking pursuant to Clause D.8, second indent, E.10, and E.11 of the undertaking, since the quarterly reports of the applicant's sales in the Community and the information presented to the Commission over more than five consecutive quarters (see points 25 and 28 of Regulation No 1826/1999) was not reliable as regards, first, the nature and real price of those sales and, second, the true identity of the exporter and the applicant's real capacity to comply with the undertaking. As has already been stated, the failure to comply with that obligation suffices in itself to establish the breach of the applicant's undertaking.

103 It follows that the third part of the first plea must be rejected.

104 In the light of all the above considerations, the whole of the first plea must be rejected as unfounded.

The second plea: breach of the principle of proportionality

Arguments of the parties

105 The applicant claims, first of all, that in view of the objective pursued, which is apparently to protect the Community market in salmon, the contested regulation is manifestly inappropriate and in breach of the principle of proportionality, because the business practice in question was discontinued by the applicant as soon as the Commission had amended the undertaking. The contested regulation is therefore not necessary in order to ensure the administrative efficiency of the Commission's monitoring system in this case and has the effect of permanently excluding the applicant from an important part of its business activities, namely the export of salmon to the Community. Such exclusion, although not formal, is comparable to a 'sanction' or 'penalty' for the alleged breach of its undertaking, which conflicts with the principle of proportionality (see Case 122/78 *Buitoni* [1979] ECR 677, paragraph 20).

106 Moreover, the contested measure is a disproportionate sanction, as the Commission has not alleged that the applicant did not observe the minimum export price, its primary obligation in this case (Case 181/84 *Man (Sugar)* [1985] ECR 2889, paragraph 20).

107 The applicant does not deny that Community institutions have a broad discretion in the field of anti-dumping action (*NMB France and Others* v *Commission*, paragraphs 69 to 71). However, such discretion does not mean that anti-dumping measures fall outside the scope of the judicial review, albeit limited, exercised by the Community judicature and of compliance with the general principles of Community law, such as the principle of proportionality. That principle, contrary

to what the Council appears to contend, does not apply merely to the question whether the amount of duties imposed is adequate in light of the injury suffered by the Community industry pursuant to Articles 7(2) and 9(4) of the basic anti-dumping regulation, but also to the question whether the Community institutions are entitled to impose anti-dumping measures at all.

108 In the present case, in the light of the principle of proportionality and the more limited discretion enjoyed by the Council, as opposed to the Commission, in this regard, the adoption of the contested regulation was not necessary in order to attain the objective pursued. The only sanction proportionate to the breach of the applicant's undertaking alleged by the Commission is its exclusion from the Community salmon market for the period of four months (from 4 May until 3 September 1999) during which time it was subject to provisional anti-dumping and countervailing duties.

109 The applicant submits, moreover, that the Council exceeded the limits of its discretion in the present case for the following reasons. First, the applicant's total volume of exports in 1997 and 1998 was less than 1% and 2.5%, respectively, of combined exports under the Salmon Agreement. Permanent exclusion of the applicant from the market cannot therefore be necessary in order to protect the Community salmon market. Second, the Council did not take into account the fact that the applicant bought only part of its salmon from Ex-com during the relevant period, the proportion varying between 40% and 70% of its exports, and that it had terminated the triangular trading practice following the amendment to the undertaking on 1 December 1998. In those circumstances, particularly in view of the negligible amounts of salmon involved, the Community salmon market did not suffer injury as a result of the applicant's business practices. Any other contention would amount to 'zero tolerance' or, indeed, a 'no-mercy policy' by the Community institutions towards the applicant.

Lastly, the Council failed to take into account the ambiguity of the wording of the undertaking with regard to triangular trading arrangements; it was neither explicit nor clear and the Commission therefore amended it. It is unreasonable for a Community institution to require a private individual to carry the full risk of a legislative ambiguity.

110 The Council states, first, that under the legal system established by the basic anti-dumping regulation and the basic anti-subsidy regulation the decision to impose anti-dumping and countervailing duties is generally considered appropriate when certain conditions are fulfilled. Thus the imposition *per se* of definitive anti-dumping measures cannot be affected by the principle of proportionality.

111 Second, the Council contends that it did not exceed the limits of its discretion in this case.

Findings of the Court

112 It must be borne in mind that by virtue of the principle of proportionality, as expressed in the third paragraph of Article 5 EC, the legality of Community rules is subject to the condition that the means employed must be appropriate to attainment of the legitimate objective pursued and must not go further than is necessary to attain it, and, where there is a choice of appropriate measures, it is necessary, in principle, to choose the least onerous (see, *NMB France and Others* v *Commission*, paragraph 69; Case T-87/98 *International Potash Company* v *Council* [2000] ECR II-3179, paragraph 39).

113 However, in an area such as the common commercial policy in which the Community legislature has a broad discretion which accords with the political responsibilities given to it by the Treaty, only if a measure is 'manifestly inappropriate' having regard to the objective which the competent institution is required to pursue, can its lawfulness be affected (*NMB France and Others* v *Commission*, paragraphs 70 and 71).

114 The broad discretion enjoyed by the Community legislature in this area corresponds to the broad discretion which, according to settled case-law, the Community institutions have when adopting specific anti-dumping measures pursuant to the basic regulations (see, for example, Case 191/82 *FEDIOL* v *Commission* [1983] ECR 2913, paragraph 30; Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraphs 70 and 113; and *NMB France and Others* v *Commission*, paragraph 72).

115 It follows that review by the Community judicature must be limited, in the sphere of anti-dumping action, to determining whether the measures adopted by the Community legislature are manifestly inappropriate having regard to the objective pursued (*NMB France and Others* v *Commission*, paragraph 73).

116 In the present case, the applicant submits in essence that the imposition by the contested regulation of definitive anti-dumping and countervailing duties is in itself a manifestly inappropriate measure which infringes the principle of proportionality. Given the small volume of its exports in comparison with the total volume of exports made in the context of the Salmon Agreement during 1997 and 1998, and given that the business practice in question was abandoned after the undertaking was amended in November 1998, the only proportionate

sanction in this case is, according to the applicant, the imposition on it of the provisional anti-dumping and countervailing duties in respect of the four-month period from 4 May 1999 (date of publication of Regulation No 929/1999) to 3 September 1999 (date of publication of the contested regulation).

117 That argument cannot be upheld.

118 First, according to Article 8(7) and (9) of the basic anti-dumping regulation and Article 13(7) and (9) of the basic anti-subsidy regulation, any breach of an undertaking or obligation to cooperate in the implementation and monitoring of that undertaking suffices to allow the Commission to withdraw its acceptance of the undertaking and to replace it by a definitive anti-dumping duty and countervailing duty on the basis of the facts established within the context of the investigation which led to the undertaking, provided that the investigation was concluded with a final determination as to dumping, subsidisation and injury and that the exporter concerned has been given an opportunity to comment. As has already been pointed out (paragraph 86 above), the applicant does not dispute that those conditions are fulfilled in this case. Consequently, the adoption of the contested regulation cannot be regarded as being in itself inadequate or manifestly inappropriate.

119 Second, under the system implemented by the basic anti-dumping and anti-subsidy regulations (see Article 10(2) of Regulation No 384/96 and Article 16(2) of Regulation No 2026/97), the definitive collection of provisional duties imposed by the Commission takes place pursuant to a decision adopted by the Council.

120 It is only in exceptional circumstances that the Council may decide not to collect definitive duties after breach of an undertaking, for example where it considers, in the exercise of its discretion, that the Community interest does not require such action by virtue of Articles 9(4) and 21 of Regulation No 384/96 and Articles 15(1) and 31 of Regulation No 2026/97. In the present case, the Council did not exceed the limits of its discretion by imposing definitive duties on the applicant where the conditions for doing so were fulfilled.

121 Third, whilst the principle of proportionality applies to the question whether the amount of anti-dumping and countervailing duties imposed is appropriate in the light of the injury suffered by the Community industry (Case C-136/91 *Findling Wälzlager* [1993] ECR I-1793, paragraph 13), it does not, however, apply to the question of the imposition *per se* of those duties.

122 It follows that the lawfulness of the imposition *per se* by the contested regulation of the definitive anti-dumping and countervailing duties on the applicant cannot be called in question by reference to the principle of proportionality.

123 That conclusion is not weakened by the claim that the applicant's exports during 1997 and 1998 were 'negligible' in comparison with the total volume of exports of salmon to the Community in the context of the Salmon Agreement over the same period. According to the case-law, the existence of injury to the Community industry caused by dumped imports must be assessed as a whole and it is not necessary (or, indeed, possible) to define separately the share in such injury attributable to each of the companies responsible (Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 46, and Case T-171/97 *Swedish Match Philippines* v *Council* [1999] ECR II-3241, paragraphs 65 and 66).

124 Furthermore, contrary to the applicant's claims, the appropriateness and reasonableness of the contested regulation cannot be affected by the fact that the applicant ceased the business practice in question as soon as Clause D.8, third indent, of the undertaking was amended. By then the applicant had already been in breach of its undertaking for more than five consecutive quarters (see point 28 of Regulation No 1826/1999 and paragraph 102 above); moreover, the breach of undertaking by the applicant broke the relationship of trust on which the acceptance of undertakings by the Commission is based and justified the imposition of definitive duties.

125 In addition, the applicant's argument that the contested regulation in effect excluded a large part of its business activity and thus imposes on it a 'sanction' that is disproportionate in the light of the judgment in *Buitoni* is irrelevant and must be rejected. As the Council has rightly stated, the basic anti-dumping regulation does not impose any obligation other than the avoidance of dumping or any 'sanction' other than the imposition of anti-dumping duties. Consequently, unlike in *Buitoni*, there is no reason in the present case to carry out an assessment of other obligations and sanctions in the course of a review of observance of the principle of proportionality.

126 Lastly, the argument based on paragraph 20 of the judgment in *Man (Sugar)*, namely that 'where Community legislation makes a distinction between a primary obligation... and a secondary obligation... it cannot, without breaching the principle of proportionality, penalise failure to comply with the secondary obligation as severely as failure to comply with the primary obligation', is also irrelevant. First, no such distinction follows from the terms of the applicant's undertaking. Second, even if that were the case, the applicant has not complied with the 'primary' obligation to ensure that the real export price is not below the minimum price. Finally, as has already been stated, any breach of an undertaking by an economic operator, including breach of its obligation to cooperate with the Commission in the monitoring of the undertaking, suffices to allow the Commission to withdraw its acceptance and to impose an anti-dumping duty.

127 The second plea must therefore be rejected.

128 It follows from all the foregoing that the claim for annulment of the contested regulation is unfounded and must be dismissed.

The claim for compensation

Arguments of the parties

129 The applicant claims that it suffered damage as a result of the contested regulation and seeks compensation for it. The main damage to the applicant is the loss of business opportunities and the consequential damage suffered as a result of its exclusion from taking part, under the Salmon Agreement, in the salmon export trade with the Community.

130 It states that, in view of the nature of such loss, it is difficult to assess the extent of it, but an assessment could be based on actual experience in that business. It is prepared to propose a specific amount of damages and to substantiate it 'at a later stage' if so requested by the defendant. The applicant is in any case prepared to negotiate with the defendant in order to establish the extent of the economic loss it has suffered, once the Court has given its ruling.

131 The applicant refers to its average net income per quarter (NOK 900 000) over the period from 1 July 1997 to 4 May 1999, when it was trading under the terms of the Salmon Agreement, and considers that the amount of damages to be paid to it should be increased by NOK 1 200 000. This corresponds to its income for the period from 4 May 1999 to 3 September 1999, during which it was subject to provisional anti-dumping measures.

132 The Council denies the admissibility of the claim for compensation on the ground that the application does not comply with Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

133 In the alternative, the Council considers that the claim for compensation is unfounded.

Findings of the Court

134 It is settled case-law that an application for compensation for damage must be dismissed where there is a close connection between it and an application for annulment which has itself been dismissed (Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera auto service and Others* v *Commission* [1999] ECR II-93, paragraph 90; Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission*

[1999] ECR II-3587, paragraph 72; and Joined Cases T-9/96 and T-211/96 *Européenne automobile* v *Commission* [1999] ECR II-3639, paragraph 61).

135 In the present case there is a close connection between the application for compensation and the application for annulment. Consequently, the claim for compensation must be rejected since the pleas in support of the application for annulment have not revealed any illegality committed by the Council and thus no fault of such a nature as to render it liable.

136 In those circumstances, the claim for compensation must be rejected and it is not necessary to consider whether the applicant's submissions on the nature and scope of the damage and the causal link between the Council's alleged conduct and that damage are sufficient for the purposes of Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance (see, in particular, *SGA* v *Commission*, paragraph 73, and *Européenne automobile* v *Commission*, paragraph 62).

Costs

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

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay the costs of the Council;**

3. **Orders the Commission to bear its own costs.**

Vilaras Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 4 July 2002.

H. Jung
Registrar

M. Vilaras
President