JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
30 March 2000 *

In Case T-51/96,

Miwon Co. Ltd, established in Seoul, South Korea, represented by J.F. Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Council of the European Union, represented by A. Tanca, of its Legal Service, acting as Agent, assisted by H.-J. Rabe and G. Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by N. Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 81/96 of 19 January 1996 amending Regulation (EEC) No 2455/93 imposing definitive anti-dumping duties on imports of monosodium glutamate originating in Indonesia, the Republic of Korea and Taiwan and collecting definitively the provisional duties imposed and terminating the proceeding with regard to Thailand (OJ 1996 L 15, p. 20), in so far as it concerns the applicant,

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

composed of: M. Jaeger, President, K. Lenaerts, V. Tiili, J. Azizi and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 27 April 1999,

gives the following

Judgment

The facts

1 The applicant is a Korean company producing a wide range of foods and chemical products, including monosodium glutamate (glutamic acid salts, hereinafter 'MSG').

2 On 2 March 1990 the Commission adopted Regulation (EEC) No 547/90 imposing a provisional anti-dumping duty on imports of certain glutamic acid and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, and accepting undertakings in connection with imports of certain glutamic acid and its salts originating in these countries (OJ 1990 L 56, p. 23), in particular the undertaking offered by the applicant.

3 On 27 June 1990 the Council adopted Regulation (EEC) No 1798/90 imposing a definitive anti-dumping duty on imports of MSG originating in Indonesia, the Republic of Korea, Taiwan and Thailand and definitively collecting the provisional anti-dumping duty imposed on such imports (OJ 1990 L 167, p. 1). That regulation was amended by Council Regulation (EEC) No 2966/92 of 12 October 1992 (OJ 1992 L 299, p. 1) and by Council Regulation (EEC) No 2455/93 of 2 September 1993 (OJ 1993 L 225, p. 1). MSG produced and exported by companies from which undertakings had been accepted by the Commission pursuant to Regulation No 547/90, Decision 92/493/EEC of 12 October 1992 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of MSG originating in Indonesia and terminating the investigation (OJ 1992 L 299, p. 40) and Decision

93/479/EEC of 30 July 1993 accepting undertakings offered in connection with the review of anti-dumping measures applicable to certain imports of MSG originating in Indonesia, the Republic of Korea, Taiwan and Thailand (OJ 1993 L 225, p. 35) was exempted from definitive duties. The applicant was amongst the companies benefiting from exemption.

4 On 10 May 1994 Orsan, the sole Community producer of MSG, lodged with the Commission a request for a review under Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation'), on the ground, *inter alia*, that MSG had been imported into the Community at prices lower than those required by the existing price undertakings. By notice published on 9 July 1994 the Commission initiated a review of the measures concerned (OJ 1994 C 187, p. 13).

5 On 12 July 1994 the Commission sent the applicant a questionnaire, and in October 1994 it conducted a verification at the applicant's offices in Seoul. On that occasion, the applicant filed a submission with the Commission in which it stated that Orsan imported substantial quantities of MSG from Brazil at prices significantly lower than the prevailing market prices.

6 On 8 June 1995 the Commission, considering that even if the export prices, taken at their face value, did correspond to the terms of the undertakings, the level of the resale prices of the merchandise in the Community nevertheless constituted a clear indication of non-compliance with the undertakings, sent a disclosure letter to the applicant announcing its intention to withdraw the latter's price undertaking and to replace it with a provisional anti-dumping duty based on the facts established prior to acceptance of the price undertaking.

7 On 18 July 1995 the Commission adopted, pursuant to Article 10(6) of the basic regulation, Regulation (EC) No 1754/95 imposing a provisional anti-dumping duty on imports of MSG originating in Indonesia, the Republic of Korea, Taiwan and Thailand (OJ 1995 L 170, p. 4). MSG produced and exported by the applicant was subjected to a provisional duty of ECU 0.163 per kilogram.

8 On 19 January 1996 the Council adopted Regulation (EC) No 81/96 amending Regulation (EEC) No 2455/93 imposing definitive anti-dumping duties on imports of MSG originating in Indonesia, the Republic of Korea and Taiwan and collecting definitively the provisional duties imposed and terminating the proceeding with regard to Thailand (OJ 1996 L 15, p. 20, hereinafter 'the contested regulation'). MSG produced and exported by the applicant was subjected to a definitive duty of ECU 0.286 per kilogram.

9 The recitals in the contested regulation relating to determination of the export price are worded as follows:

'(25) Export prices reported by all cooperating producers in Indonesia, Korea and Taiwan in their replies to the Commission's questionnaire corresponded to the price levels of the price undertakings. However, a verification of these export prices confirmed the allegation in the review application that the price undertakings had been violated and that the export prices reported were unreliable.

(26) The above conclusion was reached after consideration of the following facts: the Commission requested information on resale prices for the product concerned as well as information on the costs between importation and resale from all importers having purchased monosodium glutamate from those exporters which cooperated in this review.

A number of importers supplied the requested information on resale prices and costs and this information was verified at the premises of those importers which agreed to cooperate further in the investigation. It was found that these latter importers, which had sourced the product concerned from the cooperating exporters in Korea, Indonesia and Taiwan, had all sold the product concerned on the Community market at a loss during the period investigated and, in some cases, the resale price did not even cover the purchase price. This was a regular pattern of pricing behaviour, spanning the entire investigation period, for which no convincing reason could be advanced other than the existence of compensatory arrangements. In addition, clear evidence was found during the verification visits to certain importers that the undertakings accepted from Miwon Co. Ltd (Korea) and PT Indomiwon Citra Inti (Indonesia) had been violated, i.e. that the import prices were not at the level of the price undertakings as demonstrated. In the case of the Indonesian company, the violation was evidenced by the issue of credit notes relating to sales of the product concerned and, in the case of the Korean company, [by] the existence of correspondence referring to prices substantially below the undertaking price. The above facts alone show that the actual export prices for the transactions concerned were significantly lower than those reported at the undertaking price level.

In the above circumstances, which strongly support the existence of compensatory arrangements and the unreliability of export prices reported, it was concluded that the export prices reported by the cooperating exporters should be reconstructed in accordance with Article 2(8)(b) of the basic regulation, i.e. on the basis of the prices at which the imported product was first sold to independent customers, allowance being made for all costs incurred between importation and resale and for a reasonable profit margin for the importers concerned.

(27) Accordingly, for the cooperating exporters in Korea, Taiwan and Indonesia, the export price was constructed by deducting from the weighted average resale prices of each of the cooperating importers to the first independent customer an amount which corresponded to the importers' costs between importation and resale plus an amount for profit of 5%. This amount of profit was considered reasonable as it was in line with that considered appropriate for the product concerned in previous investigations and was not contested. An additional deduction was made for customs duty and other costs, such as ocean freight and insurance, to arrive at an ex-works level in the countries of origin.

(28) For those transactions by the cooperating producers for which information on resales by importers could not be obtained, it was concluded that, in the light of the facts revealed by the verification of resale prices of monosodium glutamate exported by those producers carried out at the seven importers referred to in recital 13, the export prices submitted by exporters had to be disregarded for the above same reasons. The export price therefore had to be established, in accordance with Article 7(7)(b) of the basic regulation, on the basis of the facts available, i.e. it was considered that actual export prices in these cases were at the same level as the export prices reconstructed as described in recitals 25 to 27.'

Procedure and forms of order sought by the parties

10 The applicant brought the present action on 12 April 1996.

11 By application lodged on 28 August 1996, the Commission sought leave to intervene in support of the form of order sought by the Council. By order of the President of the Fifth Chamber, Extended Composition, of the Court of First

Instance of 16 October 1996, the Commission was granted leave to intervene. However, the Commission has not lodged any written statement in intervention.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided, first, to adopt measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, consisting of written questions to the Council, and, second, to open the oral procedure.

13 The Council replied to the written questions by letter sent by registered post on 22 April 1999. The parties presented oral argument and their replies to the Court's oral questions at the hearing on 27 April 1999.

14 The applicant claims that the Court should:

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

— order the Council to pay the costs.

15 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

16 The applicant relies on two pleas in support of its application. The first plea alleges infringement of Article 2(8) of the basic regulation. By its second plea, the applicant maintains that the Council erred in its assessment of the injury caused to the Community industry.

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

Arguments of the parties

17 The applicant maintains that the Commission and the Council wrongly determined the export price by reference to the export prices constructed on the basis of the resale prices charged by some of the applicant's independent importers, pursuant to Articles 2(8)(b) and 7(7)(b) of the basic regulation, instead of using the export prices actually charged by the applicant, as required by Article 2(8)(a) of the basic regulation.

18 The applicant observes, as a preliminary point, that the findings concerning the alleged unreliability of the export price were based on information obtained from the importers at whose premises verification visits took place in the autumn of 1995, whereas the Commission had already informed the applicant that it considered its export price to be unreliable in a letter of 8 June 1995. Thus, the documentary evidence on which the Commission purportedly relied was discovered several months after the Commission had made the findings in question.

19 The applicant also argues that there is nothing to justify a lowering of the standard of proof to which the institutions are subject in anti-dumping proceedings compared with that required in other fields, particularly competition cases. It observes in that connection, first, that Article 7(3)(a) of the basic regulation authorises the Commission to request Member States to supply it with information and to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers. The Commission has accused the applicant of having granted secret compensation, which is tantamount to an accusation of serious tax evasion, whereas it could have called on the Member States to carry out all necessary checks at the importers' premises. The Member States could have used all the investigative powers available to them under their domestic customs and tax legislation to determine whether secret compensation was indeed received by the importers concerned. Next, the applicant points out that the Court of Justice has stated that the institutions must be particularly scrupulous with regard to respect for fundamental rights in anti-dumping proceedings, in view of the fact that such proceedings do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems (judgment of the Court of Justice in Case C-49/88 *Al-Jubail Fertilizer and Saudi Arabian Fertilizer* v *Council* [1991] ECR I-3187 and point 73 of the Opinion of Advocate General Darmon in that case, at I-3205). Lastly, it recalls that one of the fundamental principles of law common to all the Member States is that guilt cannot be presumed.

20 The applicant notes that, according to Article 2(8)(a) of the basic regulation, the export price must be determined on the basis of the actual export price, that is to say, the price actually paid or payable for the product sold for export to the Community, and that recourse should be had to constructed export prices only in the three cases provided for in Article 2(8)(b), namely, where there is no export price, where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or where for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable.

21 The applicant puts forward seven arguments to show that the institutions' finding that the reported export prices were unreliable is flawed.

22 First, the applicant maintains that the institutions were wrong to assume that the only possible explanation for the relatively low resale prices charged by independent importers was the grant of compensation by the exporter. In its view, the premiss on which the institutions' reasoning rests, namely that each and every importer always resells every single item which it imports at a price covering its purchase costs, its selling, general and administrative expenses plus a reasonable profit margin, is incorrect. As explained by one of the applicant's independent exporters, Tang Frères, an importer may very well decide to realise a high profit on certain items and a lower one on others, and even to resell certain items at a loss for a variety of perfectly legitimate reasons, such as the level of market prices or competition from local producers or other importers. Moreover, it is apparent from the 1960 Second Report of the GATT Group of Experts on Anti-Dumping and Countervailing Duties that it is not uncommon for importers to resell at a loss and that there is no reason to assume automatically in such cases that the exporter is dumping. The applicant points out in that regard that its independent importers did not make a loss on their purchases since they resold MSG at a price higher than the purchase price.

23 The applicant also observes that the information on resale prices relied upon by the Commission relates to only 20.48% of all its sales of MSG within the Community. It asserts that the inadequacy of the Commission's investigation undermines the validity of its conclusions.

24 Second, the applicant points out that the independent importers investigated by the Commission explained that they had not been able to charge higher resale prices for MSG because of the low prices charged on the Community market by the complainant Orsan.

25 Having been able to consult the Commission's confidential file concerning two of its importers, namely Tang Frères and Scanchem UK Ltd, the applicant was able

to discover that resales of MSG purchased from it accounted for only 1.39% of Scanchem's turnover in 1994 and less than 0.19% of that of Tang Frères in the same year. In view of those small percentages, the profit achieved on the resales of MSG could not have perceptibly affected the overall profitability of the importers concerned. The fact that, as pointed out by the Council, Scanchem purchased four shipments of MSG from Miwon during the investigation period is not material, since those four shipments accounted for only a minuscule fraction of its turnover.

26 Tang Frères explained to the applicant that it had purchased MSG because there was a demand on the part of some of its customers for the size of crystals produced by Miwon. The applicant has produced a written statement by Tang Frères in the following terms: 'It is incorrect that our resale prices for MSG purchased from Miwon would have been abnormally low... the margin obtained by Tang Frères for Miwon MSG is of the same order as that obtained for MSG purchased from Orsan and Ajinomoto'.

27 As regards the Council's statement that no reasons were given for Tang Frères' pricing behaviour, the applicant observes that there is no evidence in the file that the Commission ever requested Tang Frères to explain why it was reselling MSG at the price charged by it. The applicant requests the Court to order the Council to produce the reports of the Commission's verification visits to Tang Frères' premises, in order to establish whether the Commission's investigators specifically asked Tang Frères whether, and in what form, the latter had received compensation from Miwon.

28 Similarly, Scanchem stated, in a letter signed by Mr Currie which it sent to the applicant on 15 December 1995, that its resale prices 'would be low in some cases but only to get rid of the material by meeting the prices of Orsan'. The applicant points out in its reply that the Council totally omits to comment on that statement by Scanchem. Orsan's sales at very low prices have never been denied by the Commission or by the Council.

29 This appears to confirm that the explanation for Scanchem's resale price level is to be found in the pressure exerted by the pricing behaviour of the complainant Orsan. The applicant likewise requests the Court to order the Council to produce the reports of the Commission's verification visits to Scanchem's premises, in order to establish whether the Commission ever asked Scanchem whether, and in what form, the latter had received compensation and what reply was given.

30 Third, the applicant maintains that the Scanchem correspondence referred to in recital 26 in the contested regulation does not in any way confirm that the actual export prices for the transactions concerned were significantly lower than those reported at the undertaking price level.

31 As regards the correspondence concerning an invoice dated 13 December 1992 (purchase order No 92785), the applicant points out, first, that that correspondence is outside the investigation period and cannot therefore constitute evidence that Miwon's export prices were unreliable. Next, the lower price referred to in the correspondence simply related to purchases of MSG for resale outside the European Community. Lastly, the Commission has found no evidence that Scanchem ever purchased MSG from the applicant at prices lower than the export prices reported.

32 As regards the correspondence relating to purchase order No 93088, invoiced by Miwon on 22 May 1993, the applicant notes, first, that that correspondence was not referred to in the Commission's disclosure letter of 8 December 1995, in which the applicant was informed by the Commission of the main facts and considerations on the basis of which the Commission intended to recommend the imposition of anti-dumping duties, and that it was invoked for the first time in the Council's defence. Consequently, the use of that evidence is questionable. Next, the applicant maintains that the 'support price' referred to in that correspondence

relates to purchases for resale outside the Community. The applicant asserts that, at the time of Scanchem's purchase, it was not yet known where the MSG forming the subject-matter of purchase order No 93088 would be sold. For that reason, the applicant's calculations were based on a world price for possible sales outside the Community. The difference between the undertaking price and the world price would have been transferred to Scanchem's account if the shipment had ultimately been sold outside the Community, but, since that did not happen, the support price was never paid. Moreover, during the verification visit to Scanchem's premises, the Commission found no trace whatsoever of any compensatory payments. According to the applicant, the documents in issue merely prove that there were two prices: the undertaking price for the Community and the world price for sales outside the Community. As regards the reference in certain faxes to inland freight from Felixstowe to Manchester, the applicant questions whether the Commission ever raised that point during the verification visit to Scanchem's premises, pointing out that, since Manchester is only 25 km from Scanchem's premises, that transportation did not necessarily mean that the MSG could not be subsequently transported to another destination, possibly outside the Community.

33 The applicant concludes from the foregoing that the Scanchem correspondence does not in any way confirm the existence of compensatory arrangements.

34 Fourth, the institutions' findings are vitiated by the same defect as that identified by the Court of Justice in Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16, in that it is manifest in the present case that the grant of compensation by the applicant cannot be the only plausible explanation for the importers' pattern of resale prices. First, the importers have explained that they were unable to charge higher resale prices for MSG purchased from the applicant because of the pressure exerted on prices by, *inter alia*, the Community producer Orsan. Second, since MSG purchases from the applicant accounted for only a minuscule percentage of the importers' turnover, those importers were able to resell the products with reduced profit margins without jeopardising their overall profitability.

35 Fifth, the Commission found no evidence whatsoever of payment of any compensation by the applicant to its importers, or of the receipt of any compensation by the importers from the applicant, in the course of the verification visits to the importer's premises and the applicant's premises in 1994 and 1995. The applicant adds that Scanchem and Tang Frères submitted written statements in the course of the administrative proceeding (see paragraphs 26 and 28 above) confirming that they had 'not received any compensation, in whatever form, from Miwon with respect to MSG purchased from Miwon for importation into the EEC'.

36 Sixth, the applicant asserts that, since the institutions wrongly found that the applicant had granted compensation to the independent importers who cooperated in the investigation, there was no valid basis for applying Article 7(7)(b) to the transactions which it entered into with importers who did not provide the Commission with information concerning their resales.

37 Seventh, the applicant maintains that the dumping margin calculated by the institutions is manifestly erroneous, since it is not based on the actual export prices charged by the applicant, as required by Article 2(8)(a), given that the importers are independent and there is no basis for concluding that there was a compensatory arrangement between the applicant and its exporters.

38 The Council disputes the validity of the arguments put forward by the applicant.

Findings of the Court

39 The applicant argues that the institutions were wrong to conclude that the prices actually invoiced by Miwon to the independent importers were unreliable and that it was necessary to apply a constructed export price in accordance with Articles 2(8)(b) and 7(7)(b) of the basic regulation.

40 According to Article 2(8)(b) of the basic regulation, the export price should be constructed 'where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable'. As is apparent from that list of criteria, and in particular from the use of the words 'where it appears' and 'for other reasons', the institutions have a certain latitude in deciding whether to apply Article 2(8)(b) of the basic regulation, and recourse may be had to the constructed export price not only where the institutions obtain actual evidence of the existence of a compensatory arrangement but also where such an arrangement appears to exist or the export price reported appears to be unreliable.

41 In the present case, the institutions concluded, in the third paragraph of recital 26 in the contested regulation, that the export prices should be reconstructed in accordance with Article 2(8)(b) of the basic regulation, on the ground that the circumstances of the case 'strongly support the existence of compensatory arrangements and the unreliability of export prices reported'.

42 Moreover, consideration of the question whether or not the export prices reported by the applicant were reliable necessarily entails complex economic

assessments in respect of which the institutions enjoy a wide discretion, so that the Court's power of review is restricted (Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51).

43 It is necessary, therefore, to consider whether the Council committed a manifest error of assessment in finding that, having regard to the matters referred to in the contested regulation, the export prices were not reliable.

44 It is apparent from recital 26 in the contested regulation (as set out in paragraph 9 above) that the institutions based their conclusions on the following three points:

— as regards the importers' pricing behaviour, it was found that those who purchased MSG from the exporters (including the applicant) who agreed to cooperate had all sold the product concerned at a loss on the Community market during the investigation period and that, in certain cases, the resale price did not even cover the purchase price;

— as regards the absence of any explanation other than that put forward by the institutions, there can be no convincing reason, other than the existence of compensatory arrangements, to explain that regular pattern of pricing behaviour, spanning the entire investigation period;

— as regards the documentary evidence supporting the institutions' findings, the verification visits to certain importers clearly proved that the undertakings accepted from Miwon (Korea) and Indomiwon (Indonesia) had been violated. The violation was evidenced, in the case of the Indonesian company, by the issue of credit notes relating to sales of the product concerned and, in the case of the Korean company, by the existence of correspondence referring to prices substantially below the undertaking price.

45 It is therefore necessary to consider, first, whether the importers' pricing behaviour was such as to permit the institutions, in the absence of any alternative explanation, to infer the existence of compensatory arrangements, next, whether or not the applicants have provided any such alternative explanation and, finally, whether the documentary evidence confirms or reinforces the conclusions reached with respect to the first two points.

The importers' pricing behaviour

46 It must be noted, first, that, although the applicant has challenged the conclusions reached by the institutions, it has not denied the findings of fact on which those conclusions were based. It has merely claimed that the independent importers suffered no losses on their purchases since they resold the MSG for more than the purchase price. That affirmation is not supported by any proof. On the contrary, in his statement of 15 December 1995, produced by the applicant itself, Mr Currie, on behalf of Scanchem, indicated that losses had been made on the sale of MSG purchased from the applicant. In any event, the applicant's assertion does not in any way disprove the institutions' finding that all the independent importers resold at a loss, since the institutions rightly considered that sales at prices which did not cover the purchase price plus a sum corresponding to selling costs, general and administrative expenses and a reasonable profit margin constituted sales at a loss.

47 The Court therefore finds it established that all of the importers who purchased MSG from the applicant resold it at a loss and that three of them even resold the product at a price lower than the purchase price.

48 Next, that pricing behaviour was adopted by all of the importers who cooperated in the investigation. The applicant's argument that it is not unusual for an importer to resell at a loss — which is, indeed, recognised by the 1960 Second Report of the GATT Group of Experts — is therefore irrelevant in the present case, since, as the defendant has asserted without being contradicted by the applicant, this was not something which happened occasionally but rather a constant, general practice followed by all the importers who cooperated in the investigation.

49 It should also be noted that, according to a further assertion by the defendant which, again, has not been contested by the applicant, that pricing behaviour relates not merely to a few isolated transactions concluded by the importers but to the overall profitability of the importation of MSG by each of them.

50 Whilst, as the defendant rightly concedes, an importer may for one reason or another decide not to make a profit on a given transaction, it would none the less be extraordinary if none of the importers who cooperated had made any profit on the imports in question and yet they all, none the less, continued to import the product throughout the investigation period.

51 Lastly, the applicant asserts that, inasmuch as the Commission's findings concerning the importers' pricing behaviour concern only 20.48% of all Miwon's sales of MSG within the Community, they are not representative, and that they

therefore lend insufficient support to the conclusion that there was a breach of the undertaking.

52 It should be noted in that regard, first, that the basic regulation contains no direct or indirect requirement that the information on which the Commission or the Council bases its view that an 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 is sufficient to justify the withdrawal by the Commission of its acceptance of the undertaking and its replacement of that undertaking by an anti-dumping duty. The Commission has a discretion to accept or refuse a price undertaking; in particular, it may refuse such an undertaking where it considers that it would be difficult to verify its application. In the same vein, Article 10(5) of the basic regulation provides 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 violation of the undertaking. *A fortiori*, therefore, where such a violation is found actually to have been committed, even if it concerns only a relatively small percentage of the turnover of the operator in question, that is sufficient to lead to a withdrawal by the Commission of the undertaking. Second, it should be noted that the Council stated in its rejoinder that the percentage of 20.48% referred to the findings giving rise to the adoption of Regulation No 1754/95, but that, in the context of the contested regulation, the Commission was able to obtain information from cooperating importers covering 30% of the applicant's total export sales during the investigation period. The determination of a value or the reaching of a finding based on sample data is normal practice and is not *per se* open to criticism, especially in the context of the anti-dumping rules, provided that the sample in question is sufficiently representative. However, it should also be noted in that regard that the closing words of Article 2(13) of the basic regulation provide that sampling techniques may be applied to establish export prices in cases involving a significant volume of transactions. In the present case, the Commission's analysis, which related to eight importers accounting for approximately 30% of the applicant's sales of MSG in the Community, must be regarded as representative. Third, the applicant has not cited any specific case casting doubt on the Commission's finding that the importers who agreed to cooperate made no profit on the imports of MSG supplied by the applicant. The fourth and final point to

note is that the applicant has not denied that the Commission attempted to obtain information concerning resale prices from as many importers as possible.

53 It follows that, subject to any valid alternative explanation, the importers' pricing behaviour must be regarded as a relevant factor for the purposes of establishing the unreliability of the export prices reported by the applicant and/or the existence of compensatory arrangements.

Alternative explanations

54 It is necessary, in accordance with the case-law concerning the indirect method of proof (see the judgments of the Court of Justice in *Compagnie Royale Asturienne des Mines and Rheinzink* v *Commission*, cited above, and in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307), to consider whether the applicant has supplied any alternative explanations which shed a different light on the facts established by the institutions by providing reasons other than compensatory arrangements to justify the importers' pricing behaviour.

55 As regards, first, the allegation that the independent importers who cooperated in the investigation were unable to charge higher resale prices for the MSG because of the pressure exerted on prices by, *inter alia*, the Community producer Orsan, it should be noted at the outset that the applicant has produced no real evidence to show that the Community producer actually charged low prices on the Community market. Next, the Court notes that the applicant's argument is based only on the statement made on 15 December 1995 by Mr Currie on behalf of Scanchem (see paragraph 26 above), according to which the prices would be low in some cases, but only in order to dispose of the product. That attempt to explain is not persuasive. Scanchem indicated in that statement that it had

suffered losses on that market and that Orsan was fixing market prices at a level which was so low that none of the parties to the undertaking could hope to match them, yet it nevertheless purchased four shipments of MSG from the applicant during the investigation period. However, any reasonable economic operator would have stopped importing the product once it realised that it could not make any profit on it whatsoever. Lastly, no argument has been put forward to the effect that it would have been difficult for Scanchem to stop purchasing MSG from the applicant, on the grounds, for example, that it was bound by long-term contracts with Miwon or that MSG formed part of a wide range of products bought by Scanchem from the applicant. It follows that, in the absence of any evidence other than that isolated statement by Scanchem, the pressure on prices allegedly exerted by Orsan has not been proven and cannot constitute an alternative explanation for the importers' pricing behaviour.

56 As regards, second, the argument that, because the purchases of MSG made by Tang Frères and Scanchem respectively accounted for only a tiny fraction of their turnover, the resale by them of MSG purchased from the applicant could not have had any perceptible effect on the overall profitability of the importers concerned, it must be observed that, contrary to the applicant's assertion, the institutions' reasoning is based not on the inference that the resales of MSG purchased from the applicant accounted for a significant proportion of the turnover of the various importers but on the finding that the MSG which the importers who cooperated in the investigation purchased from the applicant was invariably resold by them at a loss. It would not normally be in the interests of any importer to suffer a loss on any percentage of his turnover, however small, by concluding loss-making transactions. Yet neither the applicant nor the independent importers concerned have provided any specific, credible explanation for the fact that, despite the losses made, they continued to import MSG from the applicant throughout the investigation period.

57 Third, the argument that Tang Frères purchased MSG from the applicant because there was a specific demand for the size of crystals produced by Miwon must also

be rejected. Contrary to the applicant's assertion, a specific demand for a given product enables the vendor to escape the pressure of competition and thus to make a profit, which may be sizeable, on the resale of that product. Once again, the applicant has not even sought to claim that Tang Frères had any special reasons for purchasing the allegedly specific type of MSG from it, for example in order to meet the needs or demands of certain of its customers with whom it had a substantial turnover of business in other products and who might have withdrawn their custom if Tang Frères did not also supply them, at a favourable price, with MSG purchased from the applicant. On the contrary, it is apparent from the minutes of the meeting between the applicant's adviser and Tang Frères that the latter did not import from the applicant any product other than MSG. In the absence of any other consistent evidence, the alternative explanation alleging a specific demand for a certain type of crystals is unreliable and does not provide a reasonable explanation for that importer's pricing behaviour.

58 Fourth, the allegation that Tang Frères' profit margin was of the same order as that obtained for MSG purchased from Orsan and Ajinomoto must be rejected, since it has been found that all the independent importers — including, therefore, Tang Frères — made a loss on the resale of the MSG purchased from the applicant.

59 Fifth, as regards the statements of Tang Frères and Scanchem (see paragraphs 26 and 28 above) that they received no compensation, it will be noted that the wording of those statements, including the opening words, is completely identical, and Scanchem even appears simply to have signed the pre-drafted statement without going so far as to recopy it, as is shown by the fact that beneath the statement itself there appear the words '[signature]' and '[date]' and that Scanchem has added a handwritten remark. Those statements do not, therefore, emanate directly from the two importers in question, having been drafted by a third person, probably the applicant's adviser, whose fax number appears at the top of the letter. Moreover, the applicant maintains very good relations with those two importers, since they allowed it, in particular, to consult the Commission's confidential file relating to them. It follows that those statements, drawn up *in tempore suspecto* in order to meet the requirements of the applicant's case, lack credibility and cannot be taken into account.

60 The applicant considers that it is necessary to establish whether the Commission's investigators asked Tang Frères and Scanchem whether, and in what form, they received any compensation from Miwon. It therefore requests the Court to order the Council to produce the Commission's reports on the verification visits made to Tang Frères' premises. Since the Court already has before it written statements made in that connection by Tang Frères and Scanchem, there is no need to order the measure of inquiry applied for.

61 Sixth, the applicant is wrong in its view that the Council cannot rely on the fact that no reason has been put forward to explain Tang Frères' pricing policy, on the ground that there is no evidence on the file showing that the Commission ever requested Tang Frères to explain why it was reselling MSG at the price charged by it. Since Tang Frères remains unable to provide a cogent explanation concerning its resale pricing policy, there is nothing to be gained from establishing whether or not the officials of the Commission questioned it in that regard during the course of the investigation. In addition, the Council states in its rejoinder that the Commission officials did in fact question Tang Frères in that connection and that the latter stated, by way of justification for its purchases of MSG from the applicant, that there was a specific demand for it on the part of one of its customers. Be that as it may, that explanation is not persuasive, being based, as noted above, on the existence of a specific demand.

62 Seventh, the argument that Tang Frères suffered no loss because it resold the MSG at a price higher than the purchase price cannot constitute an alternative explanation either. As stated above (paragraph 46), the institutions rightly considered that sales at prices which did not cover the purchase price plus a sum corresponding to selling costs, general and administrative expenses and a reasonable profit margin constituted sales at a loss. In addition, the applicant has not put forward any argument showing that the proposition on which the institutions based their findings is incorrect. Lastly, it must be borne in mind that the applicant has not in any event challenged the defendant's assertion that three out of the eight independent importers who cooperated in the investigation resold MSG at a price lower than the purchase price.

63 Finally, the applicant's attempts to provide an alternative explanation for the importers' resale policy concern only two of the importers, Tang Frères and Scanchem, whereas the institutions based their findings on an analysis of the data relating to eight importers. Consequently, even if those reasons put forward by the applicant were capable of providing an explanation for the resale pricing policy of those two importers — *quod non* —, they are not enough in any event to entail the annulment of the contested regulation.

64 It follows that none of the alternative explanations put forward by the applicant to justify the independent importers' pricing behaviour is convincing.

The documentary evidence

65 According to recital 26 in the contested regulation, the verification visits clearly showed that the undertakings given by Miwon were violated. The regulation states that the violation was evidenced, in the case of the applicant, by the existence of correspondence referring to prices substantially below the undertaking price. That correspondence relates to transaction No 92785, dated 13 December 1992, and transaction No 93088, dated 22 May 1993.

— The correspondence relating to transaction No 92785

66 The applicant makes the preliminary point that that correspondence concerns a delivery made outside the investigation period, and that it cannot therefore be relied on as evidence that its export prices were unreliable.

67 That objection must be rejected. Whilst it is clear that a finding by the institutions of a breach of an undertaking can be based only on facts occurring after that undertaking was given, the basic regulation contains no provision indicating, either expressly or by implication, that, for the purposes of establishing a breach of a price undertaking, only transactions relating to the investigation period may be taken into consideration. On the contrary, Article 10(6) of the basic regulation provides that where the Commission has reason to believe that an undertaking has been violated, it may apply provisional anti-dumping duties forthwith on the basis of the facts established before the acceptance of the undertaking. Since the Commission is not even bound to initiate a fresh investigation, it cannot be required to consider only the documents relating to the investigation period. Moreover, the Commission generally refuses to accept undertakings offered by producers who have previously committed a breach of their undertaking.

68 The fact that the contested regulation was adopted in the context of a review under Article 14 of the basic regulation — and not merely on the basis of Article 10(6) — which provides, where the circumstances so require, for the reopening of an investigation in accordance with Article 7, is not such as to limit the investigation, for the purposes of verifying whether the undertaking has been violated, solely to matters arising during the investigation period. Quite apart from the reasons mentioned above, it must be borne in mind, first, that the request for a review was based, in particular, on the allegation that the price undertakings had been violated and, second, that the documents in question were not used to calculate the export price but only to determine the method to be used to calculate the export price, which was then calculated on the basis of the data relating to the investigation period, in accordance with Article 7 of the basic regulation. For the purposes of determining whether reported prices are reliable, the institutions must be able to take all the relevant circumstances into account.

69 It follows that it was legitimate for the institutions to take the correspondence in question into consideration for the purposes of determining whether the prices reported by the applicant were reliable.

70 As regards the conclusions drawn from the correspondence relating to transaction No 92785, that correspondence clearly shows a breach of the price undertaking given by the applicant. Although the official price appearing on the invoice indicates, in accordance with the undertaking, a rate of 1 515 United States dollars (USD) per tonne, a fax sent to Scanchem by its agent in Korea, Kiyu, states: 'Mr S H Lee asking help that although MWTS [Miwon Trading and Shipping Co.] agreed price net USD 1 290/MT CIF Manchester per MWTS fax 27.11.92, now, MWTS to do price adjust as net USD 1 310/MT, actual invoice USD 1 515 due to arised high inland charge GBP 264.' Another fax from MWTS to Scanchem refers to the same shipment in the following terms: 'As we informed you through Mr Yung Chul Kim, the net price for this order shall be USD 1 320.-/MT due to inland freight from Felixstowe to Manchester'.

71 The applicant asserts that the lower price referred to in that correspondence related to MSG purchased for resale outside the Community, which was not covered by the price undertaking. That explanation is not credible. The first fax refers to 'arised high inland charge', whereas the second mentions inland freight from Felixstowe to Manchester. Similarly, the invoice addressed by the applicant to Scanchem states that the product was sold for direct export to the Community market. In addition, the defendant has stated, without being contradicted by the applicant, that Scanchem's internal calculation in respect of that shipment showed that Community customs duty was in fact paid at Felixstowe following delivery. Lastly, the applicant itself has expressly confirmed in its reply that Scanchem did not sell any shipment of MSG outside the Community during the investigation period.

72 The Court finds that the documents relating to transaction No 92785 clearly mention an agreed price lower than the undertaking price and that they do not in any way contemplate a possible sale outside the Community. The explanations which the applicant attempts to provide in its reply, to the effect that the lower price referred to is that which would have been applied if the shipment had ultimately been sold outside the Community, cannot be regarded as credible.

— The correspondence relating to invoice No 93088

73 It is common ground that the documents relating to this transaction were not annexed to the Commission's disclosure letter of 8 December 1995. Nevertheless, the Council considers that it is entitled to rely on them, on the grounds that the behaviour which they demonstrate does not differ from that shown by the correspondence relating to transaction No 92785 and that they merely confirm what has already been proven. The Council adds that the 'essential facts and findings' contained in the disclosure letter of 8 December 1995 are not the documents as such but the fact that compensatory payments were agreed between Scanchem and the applicant.

74 The Council's argument cannot be accepted. Documents to which the applicant has not been given access during the administrative proceeding and which are not referred to in the contested regulation cannot be accepted as documentary evidence of the applicant's breach of its price undertaking. If the concept of the right to a fair hearing is not to be rendered meaningless, it is not enough to communicate to the operator concerned the nature of the complaints made against him; he must also be given sight of the documents which allegedly substantiate those complaints.

75 However, as is apparent from the case-file, and as the applicant confirmed at the hearing in response to a question put by the Court, the applicant, having submitted an authorisation emanating from Scanchem, was ultimately able to take copies of all the documents relating to Scanchem, at a time when it was duly able to make observations on the disclosure letter. In those circumstances, the applicant's objection concerning the use of those documents must be rejected, since it was given a proper opportunity to put forward its comments on those documents and therefore to exercise in good time its right to a fair hearing.

76 As regards the analysis of the documents relating to transaction No 93088, the Court notes, first, that those documents refer, once again, to an official invoiced price of USD 1 515 and to a 'support price' of USD 1 260. Second, Kiyu's fax of 28 June 1993 mentions a compensation mechanism in the following terms: 'Your P/O No MSG 93088. Total amount of support is USD 3 226.50. Wish to do this way: MWTS wish to give you total commission USD 1 350 against your P/O No 93121. In this case, 3 226.50 minus 1 350.00 = USD 1 876.50. If you acceptable commee [*sic*] USD 1 350.00 against P/O No 93121, your balance total support will be USD 1 876.50 against your P/O No 93088. If you accept above, they will remit USD 1 876.50 to your account at National Westminster Bank'.

77 Those documents constitute direct evidence which clearly establishes, first, a sale price lower than the undertaking price and, second, the existence of a mechanism aimed at compensating for the difference between the official price and the real price.

78 The applicant's attempts to explain and Scanchem's statement (see paragraph 28 above) are totally lacking in credibility and cannot cast any doubt on the conclusions drawn from the analysis of that direct evidence. Thus, the term 'support price' cannot, as the applicant maintains, be interpreted as meaning 'price for sales outside the Community'. The documents make no reference to any sale outside the Community. On the contrary, the invoices state that the product was sold for direct export to the Community market; furthermore, the customs duties were paid immediately after delivery. The allegation that the commission referred to in the document corresponds to the difference between the undertaking price and the world price which would have been paid to Scanchem if the shipment had ultimately been sold outside the Community is scarcely any more credible, and is inconsistent with the unconditional offer to pay that commission. Similarly, as the defendant points out, the calculations made by the applicant are incorrect, and the commission of USD 1 350 is not calculated by reference to transaction No 93088; instead, it relates to transaction No 93121, which concerns another of the applicant's products. Lastly, the fact that the Commission found no trace of that commission having actually been paid does not alter the

fact that the applicant and Scanchem agreed compensatory arrangements. Moreover, since the documents at issue were not discovered until the end of the visit, the Commission did not have an opportunity of checking all of Scanchem's bank accounts.

79 Furthermore, the Commission also discovered certain credit notes relating to exports by Indomiwon, an Indonesian producer of MSG owned as to 50% by the applicant, which clearly show that compensatory payments were made.

80 It follows that the documents relating to transaction No 93088 in fact show that the applicant and Scanchem agreed that compensatory payments were to be made or that the prices to be charged were to be lower than the undertaking price.

81 As is apparent from the foregoing, the arguments put forward by the applicant do not provide an alternative explanation for the importers' pricing behaviour; nor do they weaken the probative value of the documents relating to transactions Nos 92785 and 93088 confirming the institutions' findings. Consequently, the contested regulation is correct in concluding that the circumstances of the case strongly support the existence of compensatory arrangements and the unreliability of export prices reported and that it was therefore appropriate to reconstruct the export prices in accordance with Article 2(8)(b) of the basic regulation.

82 In the light of that finding, it is necessary to reject the last three arguments relied on by the applicant. First, the argument based on the judgments of the Court of Justice in *Compagnie Royale Asturienne des Mines and Rheinzink* and in *Ahlström Osakeyhtiö and Others*, cited above, is unfounded, since, in contrast to those cases, neither the applicant nor its importers have succeeded, in the present case, in proving any circumstances which shed a different light on the facts established by the Commission and which thus provide a plausible explanation of the facts capable of displacing that given in the contested regulation.

83 Second, since the arguments concerning the alleged misapplication of Article 7(7)(b) of the basic regulation are founded solely on the assertion that the institutions erred in concluding that the reported export price was unreliable, they must also be rejected, for the same reasons.

84 Third, the applicant's allegation that the institutions wrongly failed to establish the export price in accordance with Article 2(8)(a) of the basic regulation, and that they therefore established an excessively high dumping margin, is likewise unfounded, since the institutions were right to reject the export price reported by the applicant as unreliable and to construct the export price in accordance with Article 2(8)(b) of the basic regulation.

85 Moreover, the applicant is wrong to state that the Commission had already concluded, before it had even obtained all the evidence, that the export price reported by the applicant was unreliable. Regulation No 1754/95, which was adopted in the context of a review of the anti-dumping measures in force, is based on Article 10(6) of the basic regulation, which expressly provides that the Commission may apply provisional anti-dumping duties forthwith where it has reason to believe that a price undertaking has been violated. The Commission's disclosure letter of 8 June 1995 dealt only with the question whether there was any reason to believe that the price undertaking had been violated. When Regulation No 1754/95 was adopted, the Commission had not yet carried out its investigations at the importers' premises, which could have revealed, by way of justification for the importers' pricing behaviour, reasons other than the existence of compensatory arrangements. However, no other reason of that kind emerged. On the contrary, the Commission discovered documentary evidence which confirmed its initial doubts and clearly proved the existence of such compensatory arrangements.

86 It follows that the first plea must be rejected.

2. The second plea, alleging that the injury was wrongly determined

Arguments of the parties

87 The applicant maintains that the Council's finding that the dumped imports from the countries concerned had, taken in isolation, continued to cause material injury to the Community industry is vitiated by fundamental contradictions.

88 First, the applicant claims that the relevant factors analysed by the Council are inconsistent with a finding of injury as they indicate the existence of a positive trend as far as the Community producer is concerned. Production by the Community producer increased from an index figure of 97.58 in 1992 to 101.08 during the investigation period. In addition, the Community producer's sales volume and market share increased, rising from an index figure of 100 in 1991 to 106.12 and 102.28 respectively during the investigation period. That analysis is confirmed by the Council itself, which even observes that the Community producer's market share remained at all times substantial. Lastly, the applicant asserts that, although the Community producer's prices and profitability showed a negative trend, the Council has not proved that that trend could be attributable to the imports under investigation, since those imports declined considerably, in terms of both volume and market share, during the relevant period, decreasing from 11 228 tonnes (or 21.8%) in 1991 to 7 478 tonnes (or 14.07%) in the investigation period.

89 The applicant denies having undercut the prices charged by the Community industry, as the Council asserts. If the Council had compared the applicant's actual export prices with the Community industry's prices, rather than using

constructed prices, it would have found that it was solely the Community producer, Orsan, that engaged in price undercutting. It refers in that regard to the statement made on 15 December 1995 by Mr Currie, on behalf of Scanchem, that 'we made losses overall on the deals. Main reason was that the competition from Orsan and Ajinomoto were too low to make any money. I remember the calculation we had to consider was delivered cost to customers of USD 1 775. This price was laughed at by buyers who were paying Orsan USD 1 625 and below. In fact to get rid of the last container 17/18 tonnes at around USD 1 550 to match the Orsan price, we were told.... Orsan in our opinion were not content to compete but to create an exclusive market by making prices so low that no party to the undertaking could hope to match'.

90 Lastly, the applicant considers that the Council's argument that, because of the anti-dumping measures already in place, some improvement of the unfavourable situation of the Community producer could be expected contradicts the Council's own allegations that the undertaking was violated.

91 Second, the applicant maintains that the Council failed to consider whether the injury resulted from the importation by the Community producer of MSG from Brazil. Imports from Brazil increased from 1 076 tonnes in 1991 to 4 376 tonnes during the investigation period. In addition, as shown by the applicant during the administrative proceeding, the prices concerned were very low. The Council's assertion that the Community producer imported MSG from Brazil during the investigation period in order to meet a surge in demand and to counteract the effects of industrial action (recital 50 in the contested regulation) cannot be correct, since the Community producer has imported MSG from Brazil since at least 1989.

92 The applicant notes that the Council does not dispute the substantial increase in imports from Brazil during the relevant period, and observes that that increase roughly corresponds to the decrease in imports from the countries concerned by

the anti-dumping measures. The applicant denies that the imports were resold at normal market prices, and claims to have shown that the average price of imports from Brazil was almost 11% below the undertaking price between 1991 and 1993. Whilst it is true that those average prices relate to imports from Brazil in general, and not solely to those made by Orsan, nevertheless, in view of Mr Currie's statement (referred to above), the Council should have submitted some evidence to show that the Community producer did not sell MSG below normal market prices.

93 The Council disputes the validity of the arguments put forward by the applicant.

Findings of the Court

94 It must be recalled, as a preliminary point, that, according to settled case-law, the question whether the Community industry has suffered injury and, if so, whether that injury is attributable to dumped imports (Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 56) and the question whether imports from other countries contributed to the injury suffered by the Community industry (Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131) involve the assessment of complex economic matters in respect of which the Community institutions enjoy a wide discretion. Consequently, judicial review of such an assessment must be limited to verifying whether the 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 appraisal of those facts or a misuse of powers (Case T-155/94 *Climax Paper Converters* v *Council* [1996] ECR II-873, paragraph 98).

95 The plea alleging wrong assessment of the injury is in two parts. The applicant maintains, first, that the factors analysed in the contested regulation are

inconsistent with a finding of injury and, second, that the Community producer's imports from Brazil have not been taken into account.

The existence of injury

96 It must be borne in mind that the contested regulation was adopted following a review initiated under Article 14 of the basic regulation.

97 In the context of a review initiated under Article 14 of the basic regulation, no specific provisions are laid down with regard to the determination of injury; consequently, where a regulation modifies existing anti-dumping duties upon the conclusion of such a procedure, the existence of injury within the meaning of Article 4(1) of the basic regulation must be established (Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraph 59).

98 According to Article 4(2) of the basic regulation, an examination of injury must involve the following factors, no one or several of which can necessarily give decisive guidance: (a) the volume of the dumped imports, (b) the prices of the dumped imports and (c) the consequent impact on the industry concerned.

99 It is apparent from the contested regulation, in particular recitals 35 to 45, that the institutions carried out a detailed examination of all those factors.

100 However, the applicant claims that several factors considered in the examination of injury, namely the increase in the Community industry's production, its sales volume and its market shares, indicate the existence of a positive trend as far as the Community industry is concerned and are therefore inconsistent with a finding of injury, whereas there was a parallel decrease in the imports at issue in the present case.

101 It should be noted, first, that, save as regards the allegation of price undercutting, which is considered below, the applicant has not challenged any of the findings of fact or the figures contained in the contested regulation. As to the alleged price undercutting, it is sufficient to note that the applicant does not deny that, on the basis of the export price established by the Council, it engaged in substantial price undercutting. Since it has been found with regard to the first plea that the export price was correctly established, the applicant must be regarded as having sought to undercut the prices charged by the Community industry.

102 Second, the factors indicating, according to the applicant, a slight positive trend were taken into account in the contested regulation. However, as the Council points out, the applicant's analysis of the contested regulation is selective, since that regulation mentions a series of other factors — including, in particular, the continuing low profitability of the Community industry and the low price levels — which show, by contrast, a negative trend.

103 The applicant merely proposes that a different assessment should be applied to the data relating to the various factors, without stating the reasons for which it should be concluded that the Community industry has not suffered injury. The mere fact that the Community producer increased its sales, which rose from an index figure of 100 in 1991 to a figure of 106.12 during the investigation period, and its market share, which rose from an index figure of 100 in 1991 to 102.28 during the investigation period, does not mean that it ceased to suffer injury. The

Court notes in that regard that the applicant has not disputed the assertion contained in recital 41 in the contested regulation; nor, *a fortiori*, has it shown that the Council committed a manifest error of assessment in finding that the Community industry's sales never reached a satisfactory level of profitability during the period under consideration despite its having reduced its production costs. In the circumstances, the applicant has not shown that the finding in recital 42 in the contested regulation that material injury persisted despite certain positive effects of the anti-dumping measures already in force is vitiated by a manifest error of assessment.

104 The applicant further denies that the negative factors established, relating to prices and lack of profitability, are attributable to the imports at issue, since those imports decreased considerably, falling, in market share terms, from 21.8% in 1991 to 14.07% during the investigation period.

105 That argument must also be rejected. It is settled case-law that a reduction in the market share of the dumped imports does not preclude a finding that significant injury has been caused by them, provided that that finding is based on various factors which Article 4(2) of the basic regulation requires to be taken into consideration (*Sinochem*, cited above, paragraph 108).

106 In the present case, it is apparent from the contested regulation, in particular recitals 45 to 48, that, although the market penetration of imports from the countries concerned decreased considerably, their market share remained substantial, and the institutions found that there had been price undercutting of between 9% and 26%. Given that — as stated in recital 57 in the contested regulation — MSG is a commodity the price of which is the key factor in customer choice, all customers being industrial users, the persisting low profitability of the Community industry results from the exporters' pricing

behaviour. Taking those matters into consideration, the Community institutions were able to conclude, without committing a manifest error of assessment, that, despite a fall in imports from the countries concerned, those imports, which occurred at dumping price levels and which remained substantial in terms of volume, had a decisive effect on the persistently poor financial situation of the Community industry, thus causing it injury.

The imports from Brazil

107 The applicant maintains that the Council failed to take into account the possibility that the very substantial imports of MSG from Brazil, at low prices, which the Community producer allegedly made may have contributed to its own injury.

108 It must be observed, first, that the applicant's complaint relates solely to the Community producer's imports from Brazil, and not to imports from Brazil generally.

109 Second, recitals 50 and 51 in the contested regulation show that, contrary to what is alleged by the applicant, the Council did in fact take account of the Community producer's imports from Brazil; however, it considered that, since they reflected only a small proportion of that producer's output, the purpose of those imports was merely to defend its competitive position and to maintain its market share. It was also found that those products were resold at normal market prices.

110 In response to written questions put by the Court, the Council stated that the Community producer's imports of MSG from Brazil represented, during the period covered by the investigation into injury, between 1.5% and 7% of its total production of MSG. It also stated that the Community producer had resold 90% of the MSG imported from Brazil at the same price as its own product, and the remaining 10% at a discount of less than 2.5%.

111 In those circumstances, the Council cannot be regarded as having committed a manifest error of assessment in finding that those imports by the Community producer were not the cause of the injury suffered by the Community industry (see, to that effect, Joined Cases 260/85 and 106/86 *TEC and Others* v *Council* [1988] ECR 5855, paragraph 47, and Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 57).

112 It follows that the second plea must be rejected and that the action must be dismissed in its entirety.

Costs

113 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has applied for an order that it pay the costs, the applicant must be ordered to pay, in addition to its own costs, the costs incurred by the Council. In accordance with Article 87(4) of the Rules of Procedure, the Commission, as intervener, shall bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the action;

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.

Jaeger Lenaerts Tiili

Azizi Mengozzi

Delivered in open court in Luxembourg on 30 March 2000.

H. Jung
Registrar

K. Lenaerts
President