JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
18 December 1997 *

In Joined Cases T-159/94 and T-160/94,

Ajinomoto Co., Inc., a company incorporated under Japanese law, established in Tokyo, represented by Mario Siragusa, of the Rome Bar, and Till Müller-Ibold, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant in Case T-159/94,

The NutraSweet Company, a company incorporated under the laws of the State of Illinois, established at Deerfield, Illinois (United States of America), represented initially by Otto Grolig, Peter Bogaert and Koen Vanhaerents, and subsequently by Otto Grolig, Jean-François Bellis and Fabrizio Di Gianni, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant in Case T-160/94,

v

Council of the European Union, represented by Erik Stein, Legal Adviser, and Guus Houttuin, of its Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, and members of the Brussels Bar, with an address for service in Luxembourg at the office of Alessandro

* Language of the case: English.

Morbilli, Director General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Eric L. White and Nicholas Khan, of its Legal Service, acting as Agents, assisted initially by Mark Cran QC, of Gray's Inn, and subsequently by Fergus Randolph, Barrister, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATIONS for annulment of Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1991 L 134, p. 1),

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

composed of: R. García-Valdecasas, President, V. Tiili, J. Azizi, R. M. Moura Ramos and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 17 April 1997,

gives the following

Judgment

Background to the dispute and procedure

The product

1 Aspartame, a sugar substitute, is a sweetener used mainly in foodstuffs, but also as a 'table-top' sweetener in, for example, tea or coffee. A combination of two amino acids, it was discovered in 1965 by a research scientist working at the American company G. D. Searle & Co., which subsequently became The NutraSweet Company ('NSC'). Following that discovery, NSC obtained use patents for aspartame in the United States and several Member States. Its patent was protected in Germany until 1986, in the United Kingdom until 1987 and in other countries of the Community until 1988.

The protagonists and the market

2 During the period from 1 January to 31 December 1989, NSC was the sole producer of aspartame in the United States. It also produced aspartame for sale in the Community. Except for a few direct sales by NSC to independent customers in the

Community or in the United States for export to the Community, aspartame was distributed in the Community through the Swiss company NutraSweet AG ('NSAG'), a jointly-owned subsidiary of NSC and of the applicant Ajinomoto ('Ajico') formed in 1983 to satisfy demand for aspartame in Europe.

3 Ajico was the sole producer of aspartame in Japan. It sold its aspartame on the domestic market under the brand name 'Pal' and in the Community under the brand name 'NutraSweet'.

4 The sole producer in the Community was Holland Sweetener Company VoF (hereinafter 'the Community producer' or 'HSC'). HSC, a company incorporated under Netherlands law, is a jointly-owned subsidiary of DSM Aspartaam BV, a wholly-owned subsidiary of the Netherlands chemical company DSM Chemicals BV, and of Toyo Soda Nederland BV, a wholly-owned subsidiary of Tosoh Corporation, a Japanese chemical company.

The administrative procedure

5 In December 1989 HSC filed an initial complaint concerning dumping practices. That complaint was rejected as insufficient by the Commission.

6 Following the submission by HSC of a fresh complaint on 2 February 1990, and pursuant to the regulation applicable at that time, Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation'), the Commission published on

3 March 1990 a notice of initiation of an anti-dumping proceeding concerning imports into the Community of aspartame originating in Japan and the United States of America (OJ 1990 C 52, p. 12).

7 The applicants received a copy of the notice of initiation of that proceeding, together with a non-confidential version of HSC's complaint. That non-confidential version contained figures relating to the prices charged by the American and Japanese exporters on their respective domestic markets, the export price, the dumping margin and the injury.

8 On 17 April 1990 the applicants sent their replies to the Commission's questionnaire, stating that those replies were of a confidential nature. They requested a hearing in accordance with Article 7(5) of the basic regulation. NSC further requested, pursuant to Article 7(4)(a) of the basic regulation, authorization to inspect all information made available to the Commission, especially any written submissions made by HSC or any other party. It also asked to be informed, in accordance with Article 7(4)(b) of the basic regulation, of the essential facts and considerations on the basis of which the Commission intended to recommend the imposition of provisional duties, if any.

9 NSC and NSAG lodged submissions with the Commission on 25 April 1990. Ajico sent the Commission a letter adopting the submissions made by NSAG. The annexes to those submissions included a report by the consultants McKinsey & Company, Inc. ('McKinsey'), dated 24 April 1990, which contained *inter alia* an estimate of HSC's production costs. Also annexed to the submissions was a study prepared by Landell Mills Commodities Studies in April 1990, which essentially concerned the characteristics of various sweeteners, competition between sweeteners (especially between aspartame and other sweeteners) and the development of the sweetener industry.

10 Inspections were carried out by officials of the Commission at Ajico's premises in Japan on 6 and 7 July 1990 and at NSC's premises in the United States on 9 and 10 July 1990.

11 On an unspecified date, but prior to the imposition of provisional anti-dumping duties, the applicants received a non-confidential version of the complainant's replies to the Commission's questionnaire.

12 By letter of 11 September 1990, written in response to a letter from the Commission dated 30 August 1990, NSC's legal advisers stated on behalf of their client, Ajico and the associated company NSAG, that all information contained in the confidential version of the replies to the questionnaires, the submissions and the annexes but not in the non-confidential version was strictly confidential. As regards the information concerning sale prices, the letter stated that only decreases in prices over the years and levels of price undercutting could be disclosed, subject to their being expressed in percentage terms based on weighted average prices for the Community as a whole. That letter also stated that the information relating to volumes of sales in the Community (both the total volume and the volumes of NSC, NSAG and Ajico) was confidential.

13 By Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1990 L 330, p. 16, hereinafter 'the Commission regulation'), the Commission imposed a provisional anti-dumping duty of ECU 29.95 per kilogram on imports of aspartame originating in Japan and ECU 27.55 per kilogram on those from the United States.

14 In order to improve the structure of the negotiations concerning a price undertaking, NSC requested the Commission, by letter of 14 December 1990, to state:

(a) the rate of capacity utilization used to calculate the costs taken as the basis for the calculation of that price;

(b) whether the reference price reflected the production costs of the Community producer operating at an increased capacity of, for example, 1 000 tonnes;

(c) whether the reference price included a percentage of sales costs, overheads and administrative expenses which was lower for larger customers, and whether actual overheads were allocated to actual turnover;

(d) the depreciation period of the Community producer's plant used by the Commission in its calculation;

(e) whether interest payments had been taken into account and, if so, the way in which they were calculated;

(f) the period taken into account by the Commission in determining how long the Community producer would need in order to break even;

(g) whether the subsidies received by the Community producer had been taken into account, and whether they were compatible with the EC Treaty;

(h) the percentage of the overheads reflected in the reference price which were paid to the parent company DSM;

(i) whether the Commission took account of the fact that the Community producer had been able to benefit from the efforts made by NSAG to develop the market.

15 On 18 December 1990 the Commission replied to each of those points in turn, as follows:

(a) the reference price was calculated on the basis of full capacity utilization;

(b) the suggested increase in the Community producer's capacity was not taken into account, and the Commission did not know how that capacity would evolve;

(c) the sales costs, overheads and administrative expenses used as the basis for the calculation did not reflect differences in the size of the customers to which they related;

(d) the Community producer's plant had been depreciated over a period of ten years;

(e) the reference price took account of interest actually paid;

(f) the period required to break even was directly related to the prices charged and to the quantities produced; the prices had fallen and HSC had not reached full operating capacity;

(g) the subsidies received by the Community producer had been taken into account for the purposes of determining the reference price;

(h) HSC had contributed to DSM's overheads and it was not in the interests of the other shareholder in HSC artificially to increase those costs;

(i) the question needed to be clarified.

16 By letter of 28 December 1990 the applicants requested the Commission to inform them of the essential facts and considerations on which the Commission regulation had been based, together with the essential facts and considerations on the basis of which it intended to recommend the imposition of definitive duties, if any. They asked to be provided, in particular, with information on the calculation of normal value, of the export price, of the allowances made and of the dumping margin, as well as the value of the imports taken into account in determining the Community market volume, the prices taken into account for the purposes of determining the price reductions and undercutting, and injury. They also requested the Commission to clarify the issues raised in NSC's letter of 14 December 1990 which the Commission had not dealt with and which were felt to be in need of further clarification.

17 By letters of 6 and 30 December 1990 the applicants submitted their written comments on the Commission regulation.

18 In its comments of 30 December 1990, and by letter of 14 January 1991, NSC repeated its request for access to the information passed by the complainant to the Commission, especially that contained in the complainant's written submissions on the Commission regulation.

19 The Commission replied on 16 January 1991, stating that the non-confidential file had been available to all interested parties since the start of the proceeding.

20 On 18 January 1991 NSC inspected the non-confidential file and was given access to a non-confidential version of the Community producer's observations on the Commission regulation.

21 On 1 February 1991 NSC complained that it was not until 24 January 1991 that it had been given access to the non-confidential summary dated 13 December 1989 of HSC's request for the adoption of protection measures, to the non-confidential summary dated 9 April 1990 of the submissions lodged by HSC, and to the non-confidential summary dated 28 August 1990 of a letter from HSC. NSC also complained that the information contained in those summaries was inadequate.

22 The Commission replied by fax of 4 February 1991, stating that it had initiated a proceeding on the basis of a complaint which it had passed on to the applicant at the beginning of the proceeding. With regard to its findings, it referred to its regulation imposing provisional duties.

23 On 5 February 1991 NSC's representatives and the Commission met to discuss the Commission regulation.

24 On 7 February 1991 the applicants offered certain undertakings.

25 On 22 March 1991 the Commission sent its disclosure letter to the applicants. The reasons for which it intended to recommend the imposition of a definitive anti-dumping duty were set out in that letter.

26 The letter in question contained the same information as that contained in the Commission regulation. By contrast with that regulation, however, it gave figures for the calculation of the dumping margin and the losses suffered by NSAG on its sales within the Community, and also included a breakdown, under ten headings, of the production costs used in order to calculate the reference price. The items under each heading were expressed as a percentage of the total costs, within a 10% bracket.

27 The letter also stated that the Commission had determined the normal value of Japanese aspartame on the basis of the prices charged on the United States market, not because of any lack of cooperation on the part of Ajico, as indicated in the Commission regulation, but because the criteria for using Japanese market prices, as laid down in Article 2(6) of the basic regulation, were not fulfilled.

28 Lastly, the letter contained:

— a statement concerning the job losses which would result from the cessation of Community production;

— various remarks concerning the impact of the anti-dumping duties on demand;

— a statement to the effect that the production costs of HSC used in calculating the reference price had been adjusted to exclude certain costs which were not related to sales in the Community;

— the reasons for which a profit margin of 8% had been applied.

29 On 25 March 1991 the Council adopted Regulation (EEC) No 792/91 extending the provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1991 L 82, p. 1).

30 On 2 April 1991 NSC requested the Commission to consider two other possible undertakings.

31 On the same day it submitted its observations on the disclosure letter of 22 March 1991 (see paragraph 25 above), complaining that the details which it had been given concerning the information provided by HSC were inadequate. It also complained that the Commission had failed to disclose to it any meaningful facts or figures concerning the margin of injury, and that it had provided it with hardly any of the information used to determine the reference price. It stated that the percentage bracket system used in disclosing HSC's cost structure provided no indication as to how the injury threshold had been calculated. Ajico also submitted its written observations on 2 April 1991, in which it adopted those submitted by NSC and requested that its comments be treated as confidential.

32 The Commission replied to those letters on 18 April 1991, stating that it had disclosed all the information which it was permitted to disclose. It further stated that the start-up costs had been excluded from the calculation, with the exception of two items which were written off in accordance with Netherlands law, and that

legal fees had been totally excluded from the calculation. Lastly, it denied that the reference price had been artificially inflated, and emphasized the connection between, on the one hand, the costs involved and, on the other, the operating capacity and size of the plant.

33 By letter of 7 May 1991 the Commission set out the reasons for which it was unable to accept the undertakings offered.

34 On 15 May 1991 NSC sent to the Council its observations on that letter. It contested the Commission's reasoning.

35 By Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1991 L 134, p. 1, hereinafter 'the Council regulation' or 'the contested regulation'), the Council imposed a definitive anti-dumping duty of ECU 27.21 per kilogram on imports of aspartame originating in Japan and ECU 25.15 per kilogram on those originating in the United States of America. That regulation was subsequently repealed by Council Regulation (EC) No 1936/95 of 3 August 1995 (OJ 1995 L 186, p. 8).

The anti-dumping regulations in issue

1. *General remarks*

36 The anti-dumping regulations in issue in the present case impose an anti-dumping duty calculated on the basis of injury and not on the basis of the dumping margin. The Community institutions found that the United States and Japanese exporters had engaged in dumping practices. The dumping margin was calculated by comparing the price at which the United States producer sold aspartame on the United

States market with that charged by it in the Community (points 12 to 32 in the preamble to the Commission regulation and points 8 to 25 in the preamble to the Council regulation).

2. *The Commission regulation*

37 In its assessment of injury, the Commission states that the Community market for aspartame increased by 215% between 1986 and 1989 (point 34 in the preamble to the Commission regulation), and that, even though the appearance of HSC in 1988 led to a diminution in the market shares of the United States and Japanese exporters, imports from the United States and Japan nevertheless increased in absolute terms (point 37). Moreover, the Japanese and United States prices, which were already significantly below the Community producer's prices in 1988, decreased still further (point 39). The United States and Japanese prices undercut the prices of the Community producer during the investigation period (point 40), forcing the latter to sell at a loss and preventing it from increasing its capacity utilization to an adequate extent, thereby increasing its production costs and causing it, at the same time, to suffer considerable losses (point 45). The lowering of NSAG's export prices coincided with the appearance of the complainant on the Community market (point 45). Given the evolution of the Community aspartame market, which had expanded considerably, there was no obvious reason for NSAG, which even after 1987 remained by far the most important supplier of aspartame to the Community market, to drop its prices to levels which did not cover costs (point 47). The decision to drop prices to loss-making levels was clearly attributable to NSAG and the United States and Japanese exporters (point 49). The investigation revealed no other factors which might have caused significant injury (point 50).

38 The anti-dumping duty was imposed in order to cover the difference between the Japanese and United States prices and the minimum price required for the Community industry to cover its costs and to make a reasonable profit (point 63). That

profit margin was fixed at 8% of turnover before tax (point 65). That minimum price, known as the 'reference price', was compared with the weighted average price of imports into the Community (point 65).

3. *The Council regulation*

39 In its regulation imposing a definitive duty, the Council essentially confirms the considerations and findings of the Commission. As regards the calculation of the reference price used to determine injury, the Council states (in point 44 of the preamble): 'the Commission had to take account of the fact that some of the raw materials and services were purchased from a related company and that some costs did not relate to sales of aspartame in the Community. Actual research and development costs have now been included as well as direct selling costs. These adjustments lead to lower costs of production as a basis for the calculation of the reference price and thus the amount of the duty necessary to eliminate the injury.' For the assessment of a reasonable profit margin, the Council took into account the following elements: the fact that the Community producer was just getting beyond its start-up period, the uncertainty about the evolution of future sales and the possibility of the development of substitute products, which could shorten the life-cycle of the product concerned (point 45).

40 As regards the parties' right to a fair hearing, the Council observes (in point 7):

'The Commission has disregarded all studies and submissions for which no meaningful non-confidential summary was submitted, since this would have deprived the other parties of their rights of defence.'

Judicial procedure

41 By applications lodged at the Registry of the Court of Justice on 6 September 1991, each of the applicants brought an action against the Council regulation.

42 By application lodged at the Registry of the Court of Justice on 6 February 1992, the Commission sought leave to intervene in support of the form of order sought by the defendant. That application was granted by order of the President of the Court of Justice of 18 March 1992.

43 By application lodged at the Registry of the Court of Justice on 7 February 1992, HSC, Toyo Soda Nederland BV and DSM Aspartaam BV sought leave to intervene in support of the form of order sought by the defendant. That application was withdrawn on 21 January 1993.

44 By order of 18 April 1994, the Court of Justice referred the present cases to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), as amended by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29). The cases were registered in the Registry of the Court of First Instance under numbers T-159/94 (*Ajinomoto* v *Council*) and T-160/94 (*NutraSweet* v *Council*) respectively and assigned on 2 June 1994 to the First Chamber. The Judge-Rapporteur was subsequently assigned to the Second Chamber, Extended Composition, and the cases were therefore re-assigned to that Chamber.

45 In consequence of the accession to the European Communities of Austria, Finland and Sweden, the cases were further re-assigned, on 23 January 1995, to the Third Chamber, Extended Composition, and a new Judge-Rapporteur was designated. Upon his being thereafter assigned to the Fifth Chamber, Extended Composition, the cases were accordingly re-assigned to that Chamber.

46 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) opened the oral procedure. On 22 January 1997 it requested the parties, pursuant to Article 64 of the Rules of Procedure, to reply in writing to various questions concerning the causal link between the dumping and the alleged injury. The applicants were also requested to provide details of their allegation that their right to a fair hearing had been infringed. Having regard to the voluminous nature of those details and the fresh light cast by them, the Court of First Instance authorized the defendant, by letter of 24 March 1997, to submit observations thereon by 9 April 1997.

47 By order of 10 March 1997 the Court of First Instance (Fifth Chamber, Extended Composition) joined the two cases, pursuant to Article 50 of the Rules of Procedure, for the purposes of the oral procedure and of the judgment.

48 The parties presented oral argument and their replies to the Court's questions at the hearing in open court on 17 April 1997.

Forms of order sought by the parties

49 The applicants claim that the Court should:

— annul the Council regulation in its entirety or, in the alternative, in so far as it applies to each of them;

— order the restitution of the provisional and definitive anti-dumping duties collected pursuant to the Commission regulation and the Council regulation, and the release of any security provided therefor;

— order the Council to pay the costs;

— order such other relief as may be lawful or equitable.

50 The defendant contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

51 The intervener contends that the Court should dismiss the applications.

Substance

I — *Summary of the pleas advanced*

52 The applicants advance six pleas in common against the contested regulation:

— infringement of essential procedural requirements and of Article 7(4)(a) and (b) of the basic regulation, in that the Community institutions did not provide them with sufficient information in good time to enable them to defend their interests;

— infringement of essential procedural requirements and of Articles 7(4)(b) and 8(4) of the basic regulation, in that the Community institutions took into

account information provided by the Community producer which was not summarized in a non-confidential version or accompanied by an adequate statement of the reasons why such information could not be provided in such summary form;

— infringement of Article 2(3) of the basic regulation, in that the Community institutions determined normal value on the basis of patent-protected prices charged in the United States;

— infringement of Articles 2(1), 4 and 13(2) of the basic regulation, in that the Community institutions ignored or misinterpreted the substantial evidence showing that the Community producer had not been materially injured;

— infringement of Articles 2(1) and 4(1) of the basic regulation, in that the Community institutions failed to take into account other factors causing the injury suffered by the Community producer;

— infringement of Article 13(3) of the basic regulation, in that the Community institutions incorrectly calculated the level of duty needed in order to remove the injury.

53 The applicant in Case T-159/94, Ajinomoto, also raises the following two pleas:

— infringement of essential procedural requirements and of Article 190 of the Treaty, in that the Community institutions failed, first, to inform the applicant in good time that it regarded the cooperation afforded by the latter as inadequate and, second, to give it an opportunity to submit its comments in that regard;

— infringement of Article 2(3) and (6) of the basic regulation, in that the Community institutions calculated the normal value of Japanese aspartame on the basis of prices in the United States.

54 The applicant in Case T-160/94, NutraSweet, raises the following two pleas in addition to the common pleas set out above:

— infringement of essential procedural requirements and of Article 190 of the Treaty, in that the defendant failed to state the reasons for its rejection of the undertakings offered by NSC;

— infringement of the patent rights held by the applicant in the United States, in that normal value was determined on the basis of the applicant's domestic market prices.

55 The Court proposes, first, to examine the pleas common to the two cases.

II — *Pleas common to the two cases*

56 The Court considers that the first two common pleas should be examined together.

The pleas alleging infringement of essential procedural requirements and infringement of Articles 7(4)(a) and (b) and 8(4) of the basic regulation

A — Arguments of the parties

57 According to the applicants, the Community institutions are under a duty to make all reasonable efforts to provide as much information as possible to undertakings against whom an anti-dumping proceeding is initiated.

58 It is not open to them, therefore, to take refuge behind the argument that the applicants did not ask sufficiently specific questions. That approach would mean that the process would involve a constant series of more and more detailed questions.

59 If Article 7(4)(a) of the basic regulation is not to be rendered meaningless in relation to Article 7(4)(b), and if the rights of defence of the undertakings concerned are not to be infringed, the obligation to provide information must cover all the evidence submitted by third parties in support of their allegations, even where that evidence has been verified by the Community institutions.

60 That obligation to provide information is incumbent on the Community institutions even before provisional duties are imposed (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 15; Article 6(7) of the Anti-Dumping Code of the General Agreement on Tariffs and Trade, hereinafter 'GATT'). In numerous cases in the past, the Community institutions have disclosed essential information prior to the imposition of such duties; they may, therefore, be bound by that practice (Case C-16/90 *Nölle* [1991] ECR I-5163).

61 In the present case, the Community institutions infringed Article 7(4)(a) and (b) of the basic regulation, and also the applicants' right to a fair hearing, since they failed to provide the applicants in due time with adequate information concerning, first, the allegations and evidence presented by the complainant and, second, the correctness and relevance of the facts alleged and the evidence relied on (paragraph 17 of the judgment in *Al-Jubail Fertilizer*, cited in paragraph 60 above).

62 The information received by the applicants prior to the imposition of provisional anti-dumping duties (consisting of notice of the initiation of the proceeding, a summary of the complaint and a non-confidential version of the Community producer's answers to the Commission's questionnaire) was insufficient to enable

them effectively to present their views on, first, the calculation of the reference price, second, the calculation of the dumping margin and, third, the nature and origin of the injury alleged, notwithstanding their efforts to draw the Commission's attention, on numerous occasions, to the insufficiency of the information provided (see the letters of 17 April 1990) and the need to organize a hearing (see the letters of 17 April, 28 June and 8 November 1990).

63 Following the adoption of the Commission regulation, the applicants received little additional information, particularly concerning the essential issues in the present case, namely the reference price and the alleged injury.

64 As regards the reference price, the applicants consider that the Community institutions could have provided a more detailed breakdown of the elements included in that price, and that they could have used narrower percentage ranges, since the reference price in question was calculated on the basis not of HSC's actual costs, but of its costs as extrapolated from the hypothetical operation of its full production capacity.

65 Although the reference price was twice revised, without any reason being given for such revision, the Community institutions failed to provide any useful explanation of the assumptions and methods used, in particular, for the purposes of:

— determining the production capacity of the Community producer and the level of utilization of that capacity;

— establishing that the Community producer, despite being heavily indebted, should have passed break-even point and made an 8% profit within less than 18 months of commencing production;

— attributing the subsidies paid to the Community producer;

— calculating the rate of depreciation of the plant, property and equipment used by the Community producer and, in particular, applying a depreciation period of ten years;

— writing off or excluding the extraordinary start-up costs (it was not until they received the letter of 18 April 1991, after the expiry of the period for lodging submissions, that the applicants were informed that the start-up costs had been excluded from the reference price, with the exception of two items which were, in any event, not specified).

66 The applicants also complain that the Community institutions failed to specify:

— the type of financing costs taken into account and their allocation;

— the ratio of debt to equity;

— the selling, general and administrative expenses and investments to which the financial costs related, notwithstanding that the composition of overheads, administrative expenses and direct selling costs depends on the accounting system used and the purposes for which the calculation is made;

— the extent to which raw materials were purchased from related companies; this information would have been helpful for the purposes of determining the extent to which the reference price was calculated on the basis of market prices;

— the extent to which the market development costs borne by NSAG, which also benefited the Community producer, were taken into account;

— the proportion of the overheads paid by the Community producer to DSM.

67 The Community institutions gave no explanation as to why a more detailed disclosure of the methods used by the Commission might have adversely affected the Community producer's business, or, in particular, why narrower percentage ranges could not have been used and why it was not possible to disclose the breakdown of the financing costs, at least in percentage terms.

68 As regards the injury caused to the Community producer, the applicants complain that the Community institutions failed to state to the requisite legal standard the basis for their finding that the investigation revealed no factors other than dumped imports which might have contributed to the injury, despite the fact that the Community producer was a start-up company attempting a second entry into a highly competitive market where prices had been falling steadily since well before its arrival in that market, that it was heavily indebted and that its production costs were double those of the applicants.

69 Furthermore, the Community institutions failed to disclose the reasons for their finding that the fall in aspartame prices in the Community coincided with the commencement of production by the Community producer, despite having been provided with evidence that prices had been falling steadily since 1983.

70 Similarly, they failed to disclose the basis for the statement that the Community producer had gained a relatively small market share; this conflicted with the non-confidential summary of the complaint, which showed that, within 18 months of commencing production, the Community producer had gained a significant market share.

71 Moreover, the Community institutions infringed the applicants' right to a fair evaluation of the evidence, as established in the judgment in *Nölle*, cited in paragraph 60 above.

72 The applicants claim that the information provided by the Community institutions did not enable them to identify possible errors vitiating the Commission's analysis and to comment effectively on the data on which those institutions based their findings.

73 The Community institutions cannot shelter behind their duty to preserve the secrecy of confidential information to such an extent that the right of the undertakings concerned to receive information is deprived of its substance (Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 29).

74 In order to resolve the conflict between the rights of a person subject to investigation and the right of a complainant to the confidential treatment of his business secrets, and for the purposes of consistency with the principles set out in the judgments in *Timex*, cited in paragraph 73 above, and *Al-Jubail Fertilizer*, cited in paragraph 60 above, the Community institutions must require the submission of adequate non-confidential summaries in which the information withheld is kept to an absolute minimum. If information is critical to the defence of the party under investigation, the Community institutions must disregard that information unless the complainant agrees to its being made public.

75 The applicants refer to the relevant case-law establishing the principle that, in the field of competition law, the Community authority is prohibited from relying, as against the undertaking concerned, on facts, circumstances or documents which it cannot in its view disclose if such a refusal of disclosure adversely affects that undertaking's opportunity to make known effectively its views on the truth or implications of those circumstances, on those documents or on the conclusions drawn by the Commission from them (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, at 512, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, at 3192, and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, at 60). In order for the principles established in *Timex* and *Al-Jubail Fertilizer* to be meaningful, it is necessary that that prohibition should apply equally in the context of an anti-dumping proceeding.

76 The institutions are also under a duty, when invoking the argument that they are bound by the obligation to preserve confidentiality, to set out the reasons for which the information requested is confidential and cannot be disclosed in non-confidential summaries.

77 In the present case, the Community institutions necessarily relied, directly or indirectly, on some or even all of the allegations made by the Community producer, conducting the investigation on the basis of the information provided by the latter. If the obligation to maintain the confidentiality of information precluded the provision of an adequate summary of the facts and circumstances alleged by the Community producer, the Community institutions should not have used that information, or any other information based thereon, to support their decision.

78 In any event, the conflict between the right to access to the documentation and the duty of confidentiality could have been resolved by resorting to a procedure analogous to the administrative protective order system operated in the United States, or the appointment of an independent expert commissioned to draw up a non-confidential summary.

79 Since the applicants were not placed in a position in which they could effectively comment on the evidence presented by HSC, on which the Commission regulation and the Council regulation are based, those regulations were adopted in breach of essential rules of procedure laid down by Community law. Consequently, Articles 1 and 2 of the Council regulation should be annulled.

80 The defendant and the intervener contend that the pleas in question should be rejected. They maintain, in essence, that the Community institutions fulfilled their obligation to provide the applicants with information, having regard, first, to the general nature of the requests for information made by the applicants and, second, to the obligation incumbent on the Community institutions to maintain the secrecy of confidential information concerning the Community producer.

B — Findings of the Court

81 It is a fundamental principle of Community law that the right to a fair hearing must be respected. In the field of protection against dumped imports, that right is specified in Article 7(1) and (4) of the basic regulation.

82 In particular, the following provisions are laid down by Article 7(4)(a) and (b):

'(a) The complainant and the importers and exporters known to be concerned [...] may inspect all information made available to the Commission [...], provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. [...]

(b) Exporters and importers of the product subject to investigation [...] may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties [...].'

83 The right to such information must be reconciled with the Community institutions' obligation to maintain the confidentiality of business secrets. In any event, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence relied on by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (*Al-Jubail Fertilizer*, cited in paragraph 60 above, paragraph 17), not later than during the procedure for the adoption of the Council regulation (see paragraph 87 below). In proceedings for annulment of an anti-dumping regulation of the Council, the Court's powers of review may extend to the matters contained in the Commission regulation and the procedure relating to it, in so far as the Council regulation refers thereto.

84 Before considering whether the Community institutions correctly weighed the requirement of confidentiality against the need to respect the right to a fair hearing and to comply with Articles 7(4)(a) and (b) and 8 of the basic regulation, it is necessary, first, to define the context of the present case by recalling the special characteristics of the market under consideration and, second, to ascertain the consequences of those characteristics.

1. The special characteristics of the market under consideration and the consequences of those characteristics

85 During the investigation period, the aspartame market had unusual characteristics. First, there were only a few suppliers of aspartame operating on a worldwide basis, namely the two applicants, who were the largest by far, and the Community producer, HSC. The applicants cooperated very closely with each other, effecting almost all their sales in the Community through the intermediary of their jointly owned undertaking, NSAG. Second, since the aspartame produced by the different manufacturers was identical, the competition between them related essentially to the price at which it was sold.

86 As a result of those characteristics, the applicants necessarily possessed a thorough knowledge of the market, enabling them, on the basis of limited information, to draw conclusions concerning the situation of the Community producer, even to the extent that, shortly after the commencement of the investigation, they were able to obtain, through the intermediary of NSAG, a report by McKinsey containing an estimate of the elements and structure of HSC's production costs (see paragraph 9 above). In those circumstances, the Community institutions had to take particular care to avoid disclosing information which would have enabled the applicants to infer information of a commercially sensitive nature which could have jeopardized the Community producer. Moreover, both HSC and the applicants were adamant that the information provided was of a confidential nature.

2. The alleged inadequacy of the information provided prior to the imposition of definitive duties

87 Even if it is accepted, as the applicants maintain, that the principle of the right to a fair hearing requires exporters to be informed of the essential facts and considerations on the basis of which it is intended to impose provisional duties, a failure to respect that right cannot in itself have the effect of vitiating the regulation imposing definitive duties. Such a regulation is distinct from the regulation imposing provisional duties, even if it is so closely connected with the latter that it may, in certain circumstances, take its place (Case 56/85 *Brother* v *Commission* [1988] ECR 5655, paragraph 6, Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077, paragraph 12, and Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 13; order of 10 July 1996 in Case T-208/95 *Miwon* v *Commission* [1996] ECR II-635, paragraph 20); consequently, its validity must be assessed in relation to the rules applying at the time of its adoption. Where, in the course of the procedure leading to the adoption of a regulation imposing a definitive duty, steps are taken to remedy a defect vitiating the adoption of the corresponding regulation imposing a provisional duty, the illegality of the provisional regulation does not render the definitive regulation illegal. Only in so far as the defect has not been remedied, and in so far as the definitive regulation refers to the provisional regulation, will the illegality of the earlier regulation render the later one illegal.

88 Consequently, it is necessary in the present case to consider whether the right of the parties concerned to a fair hearing was respected in the course of the procedure leading to the adoption of the contested regulation imposing a definitive duty and ordering the definitive collection of the provisional duties.

3. The alleged insufficiency, in the light of Article 7(4)(a) of the basic regulation, of the information provided by HSC

89 Article 7(4)(a) of the basic regulation enables the complainant and the importers and exporters known to be concerned to inspect all information made available to

the Commission by any party to the investigation, apart from internal documents prepared by the authorities of the Community or its Member States, provided, first, that it is relevant to the defence of their interests, second, that it is not confidential within the meaning of Article 8, third, that it is used by the Commission in the investigation, and, fourth, that it is requested in writing by the person wishing to inspect it.

90 Article 8(2)(a) of that regulation provides that the Council, the Commission, the Member States and their officials are not to reveal any information received pursuant to that regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier. According to Article 8(2)(b), each request for confidential treatment must indicate why the information is confidential, and must in addition be accompanied by a non-confidential summary of the information in question, or a statement of the reasons why that information cannot be provided in summary form. The second subparagraph of Article 8(4) provides that, if the supplier of information which can be provided in the form of a non-confidential summary is unwilling to authorize its disclosure in such summary form, the Community institutions may disregard it. However, that provision does not impose on them any obligation to disregard it.

91 In the present case, the complainant provided non-confidential summaries, which the Commission passed to the applicants. Even if, as the applicants claim, the contents of those summaries were insufficient, the Community institutions were not obliged to disregard them, but were at most entitled to do so. They were obliged, however, to place the applicants, during the administrative procedure, in a position in which the latter could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence relied on by the Commission in support of its allegation concerning the existence of dumping and the resultant injury. It is necessary, therefore, to determine whether the Community institutions discharged that obligation.

4. The alleged insufficiency, in the light of Article 7(4)(b) of the basic regulation, of the information provided

(a) The criteria to be fulfilled by requests for information

92 According to Article 7(4)(c)(i) of the basic regulation, requests for information made pursuant to Article 7(4)(b) must be in writing and must specify the particular issues on which information is sought.

93 The sufficiency of the information provided by the Community institutions must be assessed in relation to how specific the request for information was.

(b) The requests for information made in the present case and the information provided by the Community institutions

(i) General requests for information

94 The applicants made numerous complaints regarding the insufficiency of the information supplied to them but merely requested, in general terms, to be informed of the essential facts and considerations on the basis of which the Commission intended to recommend the imposition of duties (see paragraphs 8, 16 and 31 above).

95 The Commission replied to those general requests for information by letter of 22 March 1991 (see paragraph 25 above). Having regard to the general nature of those requests, that letter and its annexes fulfilled the requirements of Article 7(4)(b) of the basic regulation. They contained information which was sufficiently detailed to place the applicants in a position in which the latter could effectively make known their views on the correctness and relevance of the facts

and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury.

(ii) Requests for information on particular issues

Complaints concerning the requests for information made by letter of 14 December 1990

96 By letter of 14 December 1990 NSC also asked specific questions concerning the reference price. Thereafter, reference was made to that letter not only by NSC but also by Ajico, even thought the latter had not expressly joined NSC in asking those questions; they requested the Commission to clarify a number of its answers to that letter. However, the applicants did not state during the administrative procedure in what respects the information provided by the Community institutions was insufficient, nor did they indicate the specific issues on which they wished to receive additional information.

97 The Commission replied to those requests for information by letter of 18 December 1990 (see paragraph 15 above). It is necessary to consider the replies given by the Commission in order to determine whether they were sufficient to enable the applicants effectively to defend themselves. The Court proposes to limit its examination of those replies to the issues concerning which the applicants have raised criticisms.

— Level of capacity utilization (see the first indent in paragraph 65 above)

98 The applicants cannot criticize the Community institutions for failure to explain the assumptions and methods used to determine the production capacity of the Community producer, since they did not request any information in that respect.

The information which they requested related to the level of capacity utilization used to determine the reference price. In that regard, the applicants cannot complain of any failure by the Community institutions to state whether that level reflected the actual level observed at the end of the investigation period or the average level of utilization. In its letter of 14 December 1990, NSC requested that information only in the event that it was impossible, for reasons of confidentiality, to indicate a percentage. Since the Commission stated that it had assumed full capacity utilization, that is to say, a level of 100%, it was not obliged to answer the question posed in the alternative. Since the applicants did not request any additional information in that regard during the administrative procedure, the Commission must be considered to have provided a complete answer to the question asked by NSC. Moreover, since it is not denied that the Commission based its findings on the assumption of maximum utilization of production capacity determined at the end of the investigation period, that is to say, on the assumption which was most favourable to the applicants, any additional observations which the latter might have made would have had no bearing on the level taken by the Commission as the basis for its findings.

— The period chosen for the purposes of reaching break-even and achieving a profit margin of 8% (see the second indent in paragraph 65 above)

99 In addition to the answer given by it in its letter of 18 December 1990 (see paragraph 15 above), the Commission stated in its disclosure letter of 22 March 1991 (see paragraph 25 above) that it was essential that the duties to be imposed covered the difference between the export price and the reference price, being the minimum price required to enable the Community industry to cover its costs and to make a reasonable profit. In order to assess that profit margin, the Commission stated that it had taken into account, first, the fact that the Community producer had only just got beyond its start-up period, second, the uncertainty about the evolution of

future sales, which could be as favourable as in the United States but could also show a negative trend, and, third, the possibility of the development of substitute products which could shorten the life-cycle of aspartame.

100 That information provides sufficient details regarding the essential facts and considerations in response to the request for information under consideration.

101 Moreover, in its letter of 2 April 1991 NSC put forward its views on the issue, and was therefore fully in a position to exercise its rights of defence (see paragraph 31 above).

— The extent to which the subsidies paid to the Community producer were taken into account, and their compatibility with the Treaty (see the third indent in paragraph 65 above)

102 The Commission stated in its letter of 18 December 1990 that in determining the reference price it had taken into account the subsidies paid to the Community producer, but did not give its view as to their compatibility with the Treaty.

103 The applicants have not indicated how, if the subsidies paid to the Community producer were incompatible with the Treaty, that could have resulted in a lower anti-dumping duty.

104 Consequently, the fact that the Commission did not provide explicit information on that issue does not constitute an infringement of Article 7(4) of the basic regulation, and cannot therefore give rise to annulment of the contested regulation.

— The proportion of the overheads included in the reference price which were paid to the associated company, DSM (see the sixth indent in paragraph 66 above)

105 In its reply of 18 December 1990, the Commission merely confirmed that HSC had contributed to DSM's overheads, and that it was not in the interests of the other shareholder in HSC to inflate those costs artificially.

106 Although the Commission's response does not provide a clear answer to the question posed, the fact remains that disclosure of the proportion contributed would not have enabled NSC better to defend its interests. Only if there had also been disclosure of the details of the overheads would that information have enabled it to express a view as to whether or not those overheads were reasonable. The Community producer's overheads, which are a component of its production costs, are confidential and could not have been communicated to NSC in their existing form (Case 250/85 *Brother* v *Council* [1988] ECR 5683, paragraph 34).

— Efforts by NSAG to develop the market (see the fifth indent in paragraph 66 above)

107 In response to the question whether it had taken account of the fact that HSC had been able to benefit from the market development undertaken by NSAG, the Commission stated, in its letter of 18 December 1990, that it found that question unclear, and it requested clarification from NSC. Since NSC did not provide such clarification, the Community institutions cannot be criticized for not having replied to that question in greater detail.

Complaints made in relation to other specific issues

— Detailed breakdown of the reference price

108 It must be stated, as a preliminary point, that the reference price used to determine the amount of the duty was calculated largely on the basis of the Community producer's production costs. The data relating to those costs are confidential, however (paragraph 34 of the judgment in *Brother* v *Council*, cited in paragraph 106 above).

109 During the administrative procedure, the applicants merely complained that the structure of the costs included in the reference price, as shown by Annex 3 to the Commission's letter of 22 March 1991 (see paragraph 25 above), did not contain sufficient information regarding the composition of the reference price. That general complaint, and the observation that the Commission had not disclosed any meaningful figures or facts concerning the margin of injury (see paragraph 31 above), did not enable the Community institutions to identify the nature of the non-confidential information which would have made it possible for the applicants better to defend their interests. Having regard to the special characteristics of the market, and taking into consideration the knowledge of that market and of their European competitor which the applicants possessed (see paragraphs 85 and 86 above), as well as the extremely sensitive nature of the components of the reference price from the point of view of confidentiality, the Community institutions had to take care not to disclose information which would have enabled the applicants to work out with relative accuracy the elements, the structure and, ultimately, the amount of the Community producer's costs. Since those data are confidential (see paragraph 34 of the judgment in *Brother* v *Council*, cited in paragraph 106 above), it was only with knowledge as to the precise matters on which the applicants wished to receive more detailed information, or, at the very least, the purpose for which they wished to obtain and use such additional information, that the Community institutions could have been in a position to assess whether they could disclose further information concerning the reference price whilst at the same time complying with the confidentiality requirements applying in the present case.

110 Having failed to place the institutions in a position which would enable them to make that assessment, the applicants cannot complain of any failure by the institutions to provide them with a breakdown of the reference price which was more

detailed than that appearing in Annex 3 to the Commission's letter of 22 March 1991 (see paragraph 25 above). In particular, since they did not request specific information as to the type of financing costs taken into account or their allocation, or as to the ratio of debt to equity, they cannot complain that the Community institutions failed to provide details regarding those points.

111 In the case of *Timex*, cited in paragraph 73 above, on which the applicants rely, the Community institutions merely disclosed the items included in the calculation of the reference price, without providing any figures in relation to those items. In the present case, by contrast, the Community institutions disclosed the cost elements taken into account in the calculation of the reference price, by providing figures indicating, within a range of 10%, the percentage of the total cost which each of those elements represented. Having regard to the requests for confidential treatment made by the Community producer, the information communicated to the applicants in the present case concerning the composition of the reference price must be regarded as sufficient.

112 In the case of *Al-Jubail Fertilizer*, cited in paragraph 60 above, on which the applicants also rely, the defendant did not deny that the Community institutions had been in a position to communicate to the applicant company the information which it needed in order to exercise its rights of defence, since it stated that the Commission had sent that information to the applicant by letter. However, the regulation contested in that case had been annulled because the defendant had not proved that the applicant had received that letter. In the present case, by contrast, the defendant states that it was precluded by the obligation of confidentiality incumbent on the Community institutions from communicating some of the information at issue.

113 Lastly, in the judgment in *Nölle*, cited in paragraph 60 above, the Court of Justice held the regulation at issue to be invalid, not because of any breach of the rights of the defence but on the ground that the normal value had not been determined 'in

an appropriate and not unreasonable manner' within the meaning of Article 2(5)(a) of the basic regulation. The question whether or not, within the framework of the provisions applicable in the present case, the Community institutions exceeded their power of assessment in the determination of the normal value will be considered in the context of the next plea, alleging infringement of Article 2(3) of the basic regulation.

— Inclusion of the Community producer's start-up costs in the calculation of the reference price and depreciation (see the fourth and fifth indents in paragraph 65 above)

114 In their submissions of 2 April 1991 (see paragraph 31 above), NSC and NSAG stated that HSC had incurred considerable expense and faced many difficulties in starting up, and that the costs relating to the start-up of the plant could not be taken into account in the calculation of the reference price. They also considered that the legal costs incurred by HSC in bringing proceedings against them could not be regarded as production costs, and that, at the very least, they should be spread out over time. On the other hand, they did not request any detailed information concerning the assumptions and methods used for the purposes of including the start-up costs in the calculation of the reference price (particularly as regards the depreciation methods used and the reasons for the application by the Community institutions of a depreciation period of ten years), or any details concerning the two items of start-up costs which were taken into account.

115 In its letter of 18 April 1991 (see paragraph 32 above), the Commission stated that, with the exception of two items which were written off in accordance with Netherlands law, the start-up costs, including the legal fees, had been excluded from the calculation.

116 Thus, even assuming that the submissions of NSC and NSAG of 2 April 1991 constituted a valid request for information within the meaning of Article 7(4)(b) of the basic regulation, the Commission's letter of 18 April 1991 answered that request in full.

— Raw materials purchased from associated undertakings (see the fourth indent in paragraph 66 above)

117 The applicants cannot complain that the Community institutions failed to provide them with information concerning the proportion of the raw materials purchased by the Community producer from associated suppliers, since they did not request any information regarding that particular point.

(c) Conclusion

118 It follows from the foregoing, having regard in particular to the special characteristics of the market (see paragraphs 85 and 86 above), the extensive knowledge of that market which the applicants possessed and their ability, on the basis of that knowledge, to request such relevant details as they might require, that the Community institutions fulfilled their obligations to provide information arising from Article 7(4)(a) and (b) of the basic regulation.

119 Consequently, the plea must be rejected.

The plea alleging infringement of Article 2(3) of the basic regulation

Arguments of the parties

120 The applicants maintain that, by comparing the prices charged in the domestic market of the United States with the prices prevailing in the Community market in order to determine the normal value, the defendant committed a manifest error of assessment, failed to take essential factors into consideration and infringed the Treaty and the basic regulation.

121 According to the applicants, the prices on the United States market did not permit a valid comparison to be made within the meaning of Article 2(3)(a) and (b) of the basic regulation, and did not result from operations in the ordinary course of trade. Unlike the Community market, which is fully competitive, the United States market is monopolistic, on account of the patent protecting aspartame. In a non-competitive market, the Community institutions are required to calculate the dumping on the basis of a constructed value. Comparison of the prices charged in two structurally different markets is not permissible, as the Court of Justice acknowledged in its judgment in *Brother* v *Council*, cited in paragraph 106 above. It is also apparent from the Commission's decision in the 'Pears in syrup from Australia' case that competition must exist. United States law also recognizes that it is inappropriate to make price comparisons which ignore the effect of intellectual property protection (decisions in the cases of *Lightweight Polyester Filament Fabric from Japan*, 49 Fed. Reg. 472 (1984), and *Generic Cephalexin Capsules from Canada*, 53 Fed. Reg. 47562 (1988)).

122 A patent confers on its holder the right to increase prices by a premium, constituting a reward for the invention. Determination of the normal value on the basis of prices charged in the context of protection under a patent penalizes the inventor exercising his rights in the patent, whereas neither Community law nor the GATT requires a patent holder to give up those rights in order to export. To require patent holders to sell in the Community at prices higher than the market price would constitute discrimination against foreign patent holders and give Community producers an unfair advantage.

123 Lastly, by failing to state the reasons for finding that the patent-protected prices were comparable to prices for export to the Community, the defendant has committed a breach of its obligation to provide a statement of reasons (Article 190 of the Treaty).

124 The defendant contends that this plea should be rejected. It denies that normal value was determined in an unlawful manner, since it was calculated on the basis of prices resulting from normal market forces and enabling a valid comparison to be made.

125 The intervener adds that there is no reason why normal value should not be based on patent-protected prices if those prices reflect the actual market situation in the exporting country.

Findings of the Court

126 There is nothing in the wording of the basic regulation which indicates that the imposition of anti-dumping duties is dependent on any factor other than an injurious price differentiation as between the prices charged in the domestic market (in this instance, the United States market) and those charged in the export market (in this case, the Community market).

127 The criteria of the market structure or the level of competition are not in themselves decisive for the purposes of applying a constructed normal value rather than a normal value based on actual prices, where the latter are the result of market forces. As the Commission found in its regulation (point 16 in the preamble, confirmed by point 8 in the preamble to the Council regulation), a 'difference in price elasticity between the US and Community markets' is 'a prerequisite for price differentiation' and, if it had to be taken into account, 'dumping could never be sanctioned'. Since the applicants have not shown that the prices used to determine the normal value did not result from market forces or did not reflect the actual situation in the United States market, there was no reason to apply a constructed normal value rather than the prices actually paid on the United States market.

128 Lastly, the contested regulation has not in any way deprived the applicant NSC of its United States patent, since it has not prejudiced its right to prevent any third party from producing and marketing aspartame until that patent expires, nor its right to maximize its prices in that market. In that regard, the production and marketing monopoly conferred by the patent enables its holder to recover research and development costs incurred not only for successful projects but also for

unsuccessful ones. That factor constitutes an additional economic reason for relying, for the purposes of determining normal value, on prices charged in the context of a patent.

129 Consequently, the applicants have not shown that, by determining the normal value of imported aspartame on the basis of the patent-protected prices charged in the United States, the Community institutions committed an error of law or a manifest error of assessment of the facts.

130 As regards the complaint that insufficient reasons were given for basing the normal value on those prices, it must be recalled that, as has been consistently held in the relevant case-law, the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to exercise its power of review (Case 203/85 *Nicolet Instrument* v *Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049, paragraph 10, Case 240/84 *Toyo* v *Council* [1987] ECR 1809, paragraph 31, and Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39).

131 In the present case, the contested regulation confirms (in point 8 of its preamble) points 12 to 19 of the preamble to the Commission regulation.

132 In point 18 of the preamble to the Commission regulation, the Commission states as follows in relation to the argument that, because of the patent protection afforded to aspartame in the United States, the United States prices were not really comparable:

'The Commission cannot accept this claim as justified. Injurious price discrimination is condemned by Community and international law irrespective of the reasons and motives underlying such discrimination. The patent in the US does not as

such determine the domestic price level. If the exporter uses its position as patent holder to practise higher prices domestically than for export sales, such a practice results from his free commercial decision. There is no reason why this price differentiation, to the extent that it leads to material injury to the Community industry, should escape from the application of anti-dumping rules.'

133 Those explanations were sufficient to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to exercise its power of review. Consequently, the regulation is adequately reasoned as regards the point under consideration.

134 It follows that the plea must be rejected.

The pleas alleging infringement of the Treaty and of Articles 2(1), 4 and 13 of the basic regulation and miscalculation of the anti-dumping duty

Arguments of the parties

135 The applicants consider, first, that the Community institutions committed a manifest error of assessment in their appraisal of the evidence produced by the applicants, and that they infringed the provisions of the GATT Anti-Dumping Code and of the basic regulation concerning the establishment of injury.

136 According to the applicants, that evidence showed that the Community producer did not suffer serious injury and that its results were as good as could reasonably be expected. HSC could not reasonably have expected to be making a profit, much less a profit of 8%, within one year of commencing production.

137 At the beginning of the investigation period, the Community producer had been in production for less than six months and was therefore still at the start-up stage. As a newcomer in the market, it was faced with numerous obstacles, such as the technological leadership of the applicants, the absence of economies of scale during the start-up phase and inexperience. Even taking into account relatively low capacity utilization, it was inefficient. Its costs were extremely high (see point 49 in the preamble to the Commission regulation, which shows that the start-up costs were considerable). In particular, its financial expenses represented between 5% and 15% of its costs, suggesting that it was highly indebted.

138 The applicants point out that the Community producer was operating in a market in which aspartame prices were being driven down by market forces. The competition existing on the Community market from many other low-priced intense sweeteners, due to the absence of effective regulatory restrictions and the fact that consumers in the Community are less concerned about the effects on health of those products than their counterparts in the United States and Japan, had resulted in a considerable fall in prices since 1983, five years before HSC commenced production.

139 Despite those circumstances, the Community producer achieved a significant share of aspartame sales. There is no evidence to show that, if prices had been higher, the resulting fall in demand would not have wiped out any increased income, nor, *a fortiori*, that the problem of the under-utilization of HSC's production capacity would have been solved. Moreover, in the light of the imminent expiry of NSC's patent, the Community producer's prospects of extending its sales to the particularly lucrative United States market and of benefitting from greater economies of scale were favourable.

140 As is apparent from the evidence submitted by the applicants, in particular the McKinsey report (see paragraph 9 above), a newcomer in a developing market cannot expect to break even in the first few years after commencing its operations. It is an illusion to imagine that customers can be drawn away from established producers without significant price undercutting. Moreover, a second entrant seeking

to increase its market share by undercutting prices would run the risk of increasing the downward pressure on prices without gaining more than a token market share, especially where prices were already low as a result of competition from substitute products.

141 In their replies, the applicants complain that the Community institutions failed to state the reasons for which HSC could have expected to reach a higher level of capacity utilization or why it should have been able immediately to sell all the aspartame which it could produce.

142 Second, the applicants add that the Commission was wrong in stating that the imports at issue caused the alleged injury and, in particular, that 'the lowering of the export prices by NSAG coincided with the appearance of the complainant on the Community market' (paragraph 45 in the preamble to the Commission regulation).

143 In addition, the finding (contained in point 54 of the preamble to the Commission regulation) that competition intensified following the expiry of the patents in the Community between 1986 and 1988 cannot be reconciled with the conclusion that the imports in issue caused the decline in price levels. On the United States market, by contrast, the growth in demand, the banning of cyclamates, the health warnings on saccharine products and NSC's patent all prompted higher prices.

144 In the past, the Community institutions have taken into account factors similar to those existing in the present case, in particular intra-Community competition and the very substantial costs of Community producers, and have found no causal link

between the imports in question and the injury suffered by the Community industry (Commission Decision 86/344/EEC of 17 July 1986 terminating the anti-dumping proceeding concerning imports of Portland cement originating in the German Democratic Republic, Poland and Yugoslavia (OJ 1986 L 202, p. 43, point 24 of the recitals in the preamble)).

145 Third, the applicants complain that, by overestimating the level of anti-dumping duty necessary in order to remove the alleged injury, the Community institutions infringed Article 13(3) of the basic regulation. That duty was determined on the basis of a reference price which the Community institutions calculated with reference to the costs of the Community producer. In view of the excessive amount of those costs, the reference price should have been calculated on the basis of the costs of one of the exporters or of a producer in a similar industry; alternatively, it should have been set at the level of the Community price or, if price undercutting were established, it should have been equivalent to the Community price plus the undercutting found to have taken place, in accordance with the procedure followed by the Community institutions in other cases (see, for example, Commission Regulation (EEC) No 3232/89 of 24 October 1989 imposing a provisional anti-dumping duty on imports of small screen colour television receivers originating in the Republic of Korea (OJ 1989 L 314, p. 1); Commission Regulation (EEC) No 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China (OJ 1991 L 14, p. 31)). In some cases, the Community institutions have even used the costs of the most efficient producer.

146 Even assuming that the alleged injury was caused solely by the imports, the reference price is still incorrect. The production costs used by the Community institutions were so high that they can only have resulted from a miscalculation.

147 The defendant and the intervener contend that those pleas should be rejected. They maintain, in essence, that the determination of the injury, the establishment of a causal link between that injury and the dumped imports and the calculation of the anti-dumping duty took due account of the fact that the Community producer

was a newcomer in the market and that it was therefore bound to be less efficient than the applicants. Furthermore, they deny that there was intense price competition from other sweeteners and that that factor could have given rise to the injury.

Findings of the Court

148 The determination of injury and of the existence of a causal link between that injury and dumped imports involves the assessment of complex economic matters in respect of which the Community institutions enjoy a wide margin of appreciation (see, for example, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86, and Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraphs 111 and 131).

149 In point 26 of the preamble to the contested regulation, the defendant stated:

'[...] to determine whether the Community industry concerned suffered material injury account has been taken of the following factors:

The Community producer began selling in 1988 and obtained a relatively small part of the Community market which is still largely held by the US and Japanese producers/exporters. This market penetration was countered by the American competitors by a dramatic price drop which resulted in considerable losses for the Community industry and prevented it from increasing its utilization of production capacity which would have allowed it to benefit from economies of scale. At the end of the investigation period the losses had reached a dimension which was directly threatening the viability of the industry.'

150 As regards the alleged inefficiency of the Community producer, it must be recalled that the fact that a Community producer is facing difficulties, whether or not attributable in part to causes other than dumping, is not a reason for depriving that producer of all protection against the injury caused by the dumping (*Brother* v *Council*, cited in paragraph 106 above, paragraph 42, and Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 63).

151 Furthermore, during the investigation period, the Community producer was still at the start-up stage. It is apparent from a document provided by the applicants in response to the Court's questions of 22 January 1997 that their production costs during their first two years of production were over twice as high as their production costs during the investigation period. Consequently, even assuming that, as the applicants maintain, their production costs were approximately twice as low as those of the Community producer during the investigation period, the Community institutions did not exceed their discretion by relying on the latter's costs in order to determine the reference price below which the Community producer must be regarded as having suffered injury.

152 As regards competition from other low-priced artificial sweeteners, it is apparent from point 31 in the preamble to the contested regulation that the defendant took the view that the presence on the market of other intense sweeteners did not significantly influence the price of aspartame, and that it did not cause the fall in prices which occurred from the time when the Community producer decided to enter the market. In its replies to the Court's questions of 22 January 1997 and at the hearing, the defendant stated that competition from other sweeteners was reduced on account of the special qualities of aspartame, particularly its taste.

153 In view of the taste advantages of aspartame, the defendant's finding that demand for aspartame was not significantly influenced by the presence on the market of other low-priced intense sweeteners is plausible, having regard to the following

factors which emerge from the documents before the Court, in particular the tables contained in the report drawn up at the applicants' request in March 1997 by the consultancy firm LMC International with a view to answering the Court's questions of 22 January 1997. First, aspartame has succeeded in establishing itself in the market despite being more expensive than other sweeteners. Second, those who use sweeteners do not merely purchase the cheapest varieties; indeed, demand for aspartame in the Community increased after the imposition of the anti-dumping duties. Third, the proportion of the total cost of the finished product which the cost of an intense sweetener represents is marginal.

154 In those circumstances, it is also plausible that a producer of aspartame should be able, even as a newcomer in the market, to achieve a profit of 8% within a period of 18 months, *a fortiori* since that percentage was assessed on the basis of fictitious production costs determined on the assumption of total utilization of production capacity. The plausibility of that finding is borne out by the consideration that a newcomer in a monopolistic market could expect to receive a favourable reception from consumers.

155 As regards the fall in aspartame prices in the Community, the applicants have not rebutted the explanation given by the defendant in its answers to the Court's questions of 22 January 1997 that the decrease in costs could account for the fall in prices between 1983 and 1987 but not for the subsequent fall. Nor have they refuted the defendant's assertion that the gap between the fall in prices and the fall in their production costs widened from 1986 onwards, with prices falling more rapidly than costs.

156 Although the statement that 'the lowering of the export prices by NSAG coincided with the appearance of the complainant on the Community market' (point 45 in the preamble to the Commission regulation and point 30 in the preamble to the Council regulation) is perhaps somewhat vague, the argument that 'the decision to drop prices to loss-making levels clearly lies in the sphere of responsibility of NSAG and the US and Japanese exporters, and the effects of such pricing

policy cannot be attributed to difficulties in HSC's production process' (point 49 in the preamble to the Commission regulation and point 33 in the preamble to the Council regulation) is, by contrast, entirely plausible.

157 The applicants do not deny that the chief executive of NSC stated as follows in 1989 (see the article published in the Netherlands newspaper *De Financiële Telegraaf* of 2 September 1989, annexed to the defence): 'Maar de prijs is geen punt. Wij zullen zonodig onder de prijs van iedere concurrent duiken. Dat kunnen we ons veroorloven omdat wij meer dan ieder ander hebben kunnen investeren in efficiency, daartoe in staat gesteld door de ruime middelen waarover wij dank zij ons patent konden beschikken.' ('Prices are not a problem. If necessary, we can undercut any price charged by any competitor, since we can invest more than anyone else in efficiency, thanks to the substantial resources generated by our patent.') They do not deny having indeed undercut prices (point 40 in the preamble to the Commission regulation and point 26 in the preamble to the Council regulation), increased exports to the Community in absolute terms (point 37 in the preamble to the Commission regulation and point 26 in the preamble to the Council regulation) and lowered their prices substantially (point 39 in the preamble to the Commission regulation and points 26 and 31 in the preamble to the Council regulation).

158 It follows that the applicants have not shown that in finding that the Community producer had suffered injury caused by the dumped imports the defendant exceeded its margin of appreciation.

159 The amount of the duty imposed in the present case is equivalent to the difference between the reference price, that is to say, the minimum price at which aspartame must be imported into the Community if the Community industry is not to suffer injury, and the export price. It follows from the Court's findings in paragraphs 150 to 158 that the applicants have not established that the Community institutions used the wrong basis to calculate the amount of duty needed to remove the injury. As regards a possible error of calculation, the applicants infer that such an error has been committed from the fact that the costs taken into account in order to determine the reference price are twice as high as their own costs. As is apparent

from paragraph 151, it is conceivable that the production costs of an aspartame producer at the start-up stage may be twice as high as those of an experienced producer. The fact that they are does not constitute adequate proof of an error in the calculation of the reference price, however, or even circumstantial evidence of such an error.

160 Lastly, the claim that insufficient reasons were given for the finding that HSC should have been able to achieve a higher level of production capacity utilization was raised for the first time in the reply. It is thus out of time and, as such, inadmissible. There is therefore no need to consider it.

161 It follows from the foregoing that the pleas thus examined must be rejected.

III — *Pleas advanced solely in Case T-159/94*

The plea alleging infringement of essential procedural requirements and of Article 190 of the Treaty

Arguments of the parties

162 Ajico complains that the Community institutions breached its right to a fair hearing (Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 15) and infringed the GATT Recommendation Concerning Best Information Available in Terms of Article 6: 8, adopted by the GATT Committee on Anti-Dumping Practices on 8 May 1984 (GATT, BISD, 31st Supplement, p. 283). The Commission considered that Ajico had not been sufficiently cooperative and thus refused to base its findings on the information provided by that undertaking and to regard the prices charged on the United States market as constituting normal value, with the result that excessive duties were imposed. That assessment and the

decision flowing from it therefore appreciably affected the applicant's interests. However, it was not until the Commission regulation was published that it received any notice to that effect; consequently, it was given no opportunity to comment in that regard.

163 In any event, the applicant did its best to cooperate in the verification procedures and the investigation. The Commission wished to verify the quantities sold on the Japanese market and the production costs. As regards its sales on the Japanese market, the applicant supplied, first, the factory shipment statistics, second, the invoices relating to all its sales (2.4 million invoices), including those relating to aspartame, and, third, microfilm copies of all monthly and periodic customer sales invoices, including those relating to sales of aspartame. As regards its production costs, Ajico provided complete documentation relating to production costs for its two semi-annual accounting periods from 1 October 1988 to 30 September 1989, covering three quarters of the investigation period. At the time when the on-the-spot inspection took place, information was also available relating to its production costs during the last quarter of 1989, but this was not broken down between the different products since Ajico did not have sufficient time to carry out a specific calculation of the production cost of aspartame. Nevertheless, it is normal practice, where there is a time-lag between the investigation period and the accounting year of the undertaking concerned, to determine the figures by means of extrapolation from the data that is available (Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty (OJ 1990 L 13, p. 21); Commission Regulation (EEC) No 2054/91 of 11 July 1991 imposing a provisional anti-dumping duty on imports of dihydrostreptomycin originating in the People's Republic of China (OJ 1991 L 187, p. 23); Council Regulation (EEC) No 729/92 of 16 March 1992 imposing a definitive anti-dumping duty on imports of certain thermal paper originating in Japan and definitively collecting the provisional anti-dumping duty (OJ 1992 L 81, p. 1)).

164 The defendant and the intervener contend that this plea should be rejected. They consider, in essence, that it is irrelevant, since the legal basis used in the contested

regulation to establish the normal value is not Article 7(7)(b) of the basic regulation, which permits the Community institutions to rely on the data available where there is insufficient cooperation on the part of the party concerned, but Article 2(6) of that regulation.

Findings of the Court

165 This plea alleges breach of the right to a fair hearing, on the ground that the applicant was not given the opportunity to put forward its views on the Commission's assessment that it had not been sufficiently cooperative.

166 In the contested regulation, the normal value was established not in accordance with Article 7(7)(b) of the basic regulation, which authorizes the Community institutions to rely on the data available in the event of insufficient cooperation on the part of the party concerned, but on the basis of Article 2(6) of that regulation.

167 The question whether the applicant was given an opportunity to comment on the assessment in issue therefore has no bearing on the contested regulation. It follows that, even assuming that the Community institutions failed to afford the applicant that opportunity, on which point there is no need for the Court to rule, that conduct did not in any way alter the findings of the Council as set out in the contested regulation.

168 Consequently, the plea must be rejected.

The plea alleging infringement of Article 2(6) of the basic regulation

Arguments of the parties

169 Ajico points out that, under Article 2(6) of the basic regulation and GATT, the Community institutions must determine the normal value on the basis of a comparable price.

170 In the present case, the price at which aspartame was sold in the United States was not comparable, on account of the patent held by NSC in that market. Furthermore, since the patent prohibited the applicant from selling aspartame to third parties in the United States, its prices could not affect, or be affected by, the prices charged by NSC in that country; they resulted from Japanese market forces. It was unreasonable, therefore, to make the applicant bear the consequences of the particular economic and regulatory situation in the United States.

171 Since the price payable on the United States market was not comparable, the normal value should have been determined on the basis of the price in the country of origin.

172 That solution was all the more ineluctable given that the aspartame shipped from Japan was merely transhipped through the United States. Transhipment, in the context of Article 2(6) of the basic regulation, covers situations in which the shipments to an intermediate country do not influence, and are not influenced by, market conditions in the intermediate country.

173 That was the position in the present case, since the aspartame shipped from Japan was not intended for resale in the United States but was imported into that country solely in order to enable NSC to take advantage of the United States rules on the reimbursement of import duties. Nor, in view of the patent covering the United States market, did the applicant's shareholding in the jointly owned company NSAG permit it to influence price levels. The aspartame sold by the applicant to NSC for resale in the United States had no connection with the shipments of aspartame intended for resale in the Community. Not only were those shipments separately recorded; they were also invoiced at a different price. Ajico retained control over those shipments after their delivery to NSC, since NSC was contractually bound to resell them immediately to the applicant's European sales subsidiary, Deutsche Ajinomoto GmbH, for onward sale to NSAG. Lastly, whilst it is true that some of the aspartame originating in Japan was repackaged in larger containers or granulated to facilitate handling, this related only to a very small proportion of the aspartame shipped, namely 1.4% and 7% respectively. Furthermore, that practice was followed only during the period from November 1988 to December 1989, which corresponds almost exactly with the investigation period, and only in order to accommodate demands made by Community customers after the shipments had left Japan.

174 However, since the volume of sales on the market of the country of origin was less than five per cent of sales on the Community market, and since Article 2(6) of the basic regulation does not preclude the formulation of a constructed normal value in accordance with Article 2(3) of that regulation, the normal value should have been determined by constructing it on the basis of the applicant's manufacturing costs plus a reasonable profit. As stated in the context of the previous plea, the Commission was able to verify the applicant's manufacturing costs.

175 According to the defendant and the intervener, the criteria laid down by Article 2(6) of the basic regulation for determining the normal value on the basis of the comparable price actually paid or payable in the country of origin (in this instance, Japan) were not fulfilled in the present case, in particular because the aspartame was not merely transhipped through the country of export (in this case, the United States) during the investigation period. The defendant adds that, by contrast, the

criteria for determining the normal value on the basis of the price actually paid or payable in the country of export were fulfilled, because that price was comparable. The defendant and the intervener therefore contend that the plea should be rejected.

Findings of the Court

176 Article 2(6) of the basic regulation provides:

'Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate, inter alia, where the product is merely transhipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export.'

177 It is not disputed that the aspartame sold by Ajico was not imported direct into the Community from the country of origin (Japan) but through an intermediate country (the United States).

178 In such circumstances, Article 2(6) of the basic regulation confers on the Community institutions a wide margin of appreciation as to whether to use either the price paid or payable on the market of the country of export or the price paid or payable on the market of the country of origin, provided that the price used is comparable.

179 In the present case, the Community institutions determined the normal value on the basis of the price paid or payable on the domestic market of the country of export (the United States market).

180 By merely asserting that that price could not be used because the product in question was covered by a patent, the applicant has not shown that it was not comparable (see paragraphs 126 to 129 above).

181 Moreover, the criteria which would have allowed the Community institutions to use the prices prevailing in the country of origin (in this instance, Japan) were not fulfilled in the present case. The Japanese aspartame was not merely transhipped through the United States since, first, it was in fact sold to an American operator and, second, part of it was transformed and repackaged.

182 It follows that the Community institutions correctly determined the normal value on the basis of the price paid or payable on the United States market.

183 This plea must therefore be rejected.

IV — *Pleas advanced solely in Case T-160/94*

The plea alleging infringement of essential procedural requirements and of Article 190 of the Treaty

Arguments of the parties

184 NSC complains that, in the Council regulation, the defendant merely noted that the Commission had rejected the undertakings offered by the applicant, without stating the reasons for its own decision to reject those undertakings. It is apparent

from the judgments of the Court of Justice in *Toyo* v *Council* and *Nachi Fujikoshi* v *Council*, cited in paragraph 130 above, and Case 256/84 *Koyo Seiko* v *Council* [1987] ECR 1899, read in conjunction with the judgment in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, that the final decision to reject an offer of an undertaking, which is a decision appreciably affecting the applicant's interests, is a matter for the Council. In order to permit the Community judicature to exercise its power of review, the defendant should have stated the reasons for its decision in that regard. By failing to do so, it infringed the fundamental rights of the defence.

185 Furthermore, it did not reply to the arguments advanced by the applicant in its letter of 15 May 1991, in which the latter contested the Commission's reasons for rejecting the undertakings. It thereby infringed Article 190 of the Treaty and the fundamental rights of the defence. Consequently, Articles 1 and 2 of the contested regulation should be annulled.

186 The defendant and the intervener contend that this plea should be rejected, since the applicant was given a sufficient statement of the reasons for rejecting the undertaking.

Findings of the Court

187 Point 49 in the preamble to the contested regulation states:

'[...] After consultations these undertakings were not considered acceptable by the Commission. The Commission notified the producers/exporters of the reasons for this decision.'

188 That reference to the reasons given by the Commission must be interpreted as meaning that the defendant concurred with them.

189 Those reasons were communicated to the applicant by letter from the Commission of 7 May 1991 (see paragraph 33 above). That letter shows, in essence, that the undertakings offered were unacceptable on account of the restrictions on competition to which they would have given rise in the highly oligopolistic aspartame market. The letter further states that those undertakings would have forced one of the main producers to set its prices in a way which could have been foreseen by the other producer.

190 Those detailed explanations show clearly and unequivocally the Community authority's reasoning and are such as to enable the Court to exercise its power of review. Furthermore, it is apparent from the applicant's letter of 15 May 1991 that NSC did in fact understand the reasons for rejecting the undertakings offered, since it challenged them (see paragraph 34 above). Consequently, it must be held that a sufficient statement of reasons was given for the rejection of the undertakings offered (see the case-law cited in paragraph 130 above).

191 In any event, it was open to the defendant merely to refer to the Commission's assessment, since the power to accept proposed undertakings falls within the exclusive competence of the Commission (paragraph 27 of the order in *Miwon* v *Commission*, cited in paragraph 87 above).

192 Consequently, the plea must be rejected.

The plea alleging infringement of the applicant's rights under the patent held by it in the United States

Arguments of the parties

193 NSC maintains that, by determining normal value on the basis of United States prices, the Community institutions indirectly forced it to relinquish the opportunity of maximizing the prices charged by it in the United States market. In so

doing, the Community institutions expropriated, unlawfully and without compensation, the rights which it enjoyed under its patent. According to the general principles of Community law, however, any expropriation requires the payment of compensation (point 7 of the Opinion of Advocate General Capotorti in Case 44/79 *Hauer* [1979] ECR 3727, 3752, at 3760).

194 Alternatively, even if the decision of the Community institutions did not amount to such an expropriation, it nevertheless constituted a disproportionate interference with the free use by the applicant of its patent rights. The Community institutions could have based their determination on export prices to third countries or, as proposed by the applicant, on the constructed value. The application of those methods would have constituted a less serious interference with the applicant's ability to earn a premium from the patent on the United States market.

195 The defendant challenges the applicant's argument; it asserts, in essence, that it was required in the present case to determine the normal value on the basis of the price paid or payable on the United States market. The intervener considers that, insofar as the plea seeks a finding that the Community institutions infringed or unlawfully expropriated the applicant's industrial property rights under United States law, the Court of First Instance lacks jurisdiction. They contend that the plea should be rejected.

Findings of the Court

196 The applicant has not shown how it was prevented from exercising its patent rights. It has merely asserted that the contested regulation prevented it from maximizing its prices in the United States market. Even assuming that the rights which it derived from its patent in the United States included the right to maximize its prices in the United States market, that allegation lacks any factual basis. None of the anti-dumping measures restricted NSC's ability to charge whatever prices it wished in that market.

197 The plea must therefore be rejected.

Costs

198 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, and since the defendant has applied for costs, the applicants must be ordered to pay, in addition to their own costs, the costs of the defendant. Since Article 87(4) of the Rules of Procedure provides that institutions which intervene in the proceedings are to bear their own costs, the intervener must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to bear their own costs and to pay the costs of the Council;**

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

García-Valdecasas Tiili Azizi

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 18 December 1997.

H. Jung J. Azizi

Registrar President

Summary