JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
29 September 2000 *

In Case T-87/98,

International Potash Company, established in Moscow (Russia), represented by J.F. Bellis and R. Luff, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A.F. Brausch, 8 Rue Zithe,

applicant,

v

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

defendant,

* Language of the case: English.

supported by

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

and by

European Potash Producers' Association, represented by D. and D. Ehle, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of M. Lucius, 6 Rue Michel Welter,

interveners,

APPLICATION for annulment of Article 1 of Council Regulation (EC) No 449/98 of 23 February 1998 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine (OJ 1998 L 58, p. 15),

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

composed of: K. Lenaerts, President, J. Azizi, R.M. Moura Ramos, M. Jaeger and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 April 2000,

gives the following

Judgment

The facts

1 The applicant is a Russian company which exports potassium chloride produced in Russia and Belarus by Production Amalgamation 'Belaruskali', PLC 'Silvinit' and PLC 'Uralkali'.

2 By Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine (OJ 1992 L 308, p. 41), the Council imposed on the products exported by the applicant an anti-dumping duty equal to the difference between a minimum price set by the regulation for each type and grade of potassium chloride and the net free-at-Community-frontier price, before customs clearance, for each of the products.

3 By a notice published in the *Official Journal of the European Communities* of 26 June 1993 (OJ 1993 C 175, p. 10), the Commission initiated a review of Regulation No 3068/92.

4 By Regulation (EC) No 643/94 of 21 March 1994 amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine (OJ 1994 L 80, p. 1), the Council altered the form of the duty imposed. Under Article 1 of Regulation

No 643/94, the amount of anti-dumping duty was equal to the fixed amount in ecus per tonne of potassium chloride per type and grade, or the difference between the minimum price in ecus and the net, free-at-Community-frontier price per tonne of potassium chloride, before customs clearance, for the corresponding type and grade, whichever was the higher.

5 The reasons underlying the Council's decision to amend the form of the duty imposed are set out in recital 42 in the preamble to Regulation No 643/94 as follows:

'In view of the strong indications that circumvention of the previous minimum price duty occurred and the potential which exists for [compensatory] arrangements in this sector, it is necessary to impose a duty in the form of a fixed amount per tonne of imported potash corresponding to the dumping margin calculated... Further, it is considered that in view, on the one hand, of high overcapacity for the production of potash in the exporting countries concerned, the lack of domestic purchasers and the corresponding availability of large quantities for export and, on the other hand, the relative attractiveness of the Community market compared with other export markets due to the high level of prices and spending power of users, its proximity and the availability of a [highly] developed transport infrastructure, there is a possibility that the exporters will respond to the imposition of this duty by further lowering their export prices. This danger is further exacerbated by the fact that exports could be made available at very low prices due to currency problems in the exporting countries concerned and the fact that the prevalence of long term supply contracts in the Community can make the offering of potash to users in the Community at very low prices attractive to exporters. To guard against such an increase in dumping, it is considered necessary to provide also that if the price of the imported product should fall below a minimum price established on the basis of the normal value, the duty to be imposed should be the difference between the import price and the minimum price. Such a system is justified in view of the clear risk of an increase in the dumping margin.'

6 By a notice published in the *Official Journal of the European Communities* of 5 August 1995 (OJ 1995 C 201, p. 4), the Commission instigated, at the request of the applicant, a review of Regulation No 3068/92 as amended by Regulation No 643/94. In its request for review, the applicant, which had not been involved in the proceedings resulting in the adoption of Regulation No 3068/92 and its amendment by Regulation No 643/94, argued that the accession of Austria, Finland and Sweden had altered the circumstances on the basis of which the measures in force had been adopted. It also submitted that, in 1994, export prices had had to be based on the facts available, whereas in future it was prepared to cooperate. Lastly, it claimed that the form of the measures imposed, namely a combination of a fixed duty per tonne and a minimum price, should be reexamined since it disproportionately impeded its normal trading activity with the Community.

7 The review was limited to the questions of dumping and the Community interest. The investigation covered the period between 1 July 1994 and 30 June 1995.

8 On 4 December 1997, the applicant received written disclosure of the essential facts and considerations on the basis of which it was intended to recommend amendment of the anti-dumping measures in force in the light of the review findings ('the definitive disclosure document'). The Commission explained in that document that 'the... review has shown that the inclusion of the three new Community Member States does not alter the analysis of, or the conclusions on, the dumping practised by the exporters in the countries subject to investigation; indeed, the dumping margin has changed little since the last examination. Further, it has been alleged that circumvention of the measures was still taking place'. Therefore, the Commission considered that 'the form [of] the measures should remain a combination of a minimum price with a fixed duty [but that] the amounts of minimum prices and fixed duties should be adapted in accordance with the findings of the current investigation'.

9 On 15 December 1997, the applicant submitted its observations on the definitive disclosure document to the Commission. In that letter it maintained that the combination of a fixed duty per tonne and a minimum price infringed Article 9(4) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1; 'the basic regulation').

10 By letter of 16 February 1998, the Commission informed the applicant that:

'The double system of measures was implemented in 1994 to prevent the exporters from circumventing the measures applicable at that time, i.e. a minimum price. The analysis of the present situation has shown that this double system is still warranted.'

11 On 23 February 1998 the Council adopted Regulation (EC) No 449/98 amending Regulation (EEC) No 3068/92. (OJ 1998 L 58, p. 15; 'the contested regulation'). As in Regulation No 643/94, Article 1 of the contested regulation provides that the amount of duty is to be equal either to the amount fixed in ecus per tonne of potassium chloride per type and grade ('fixed duty') or equal to the difference between the minimum price in ecus and the net, free-at-Community-frontier price per tonne of potassium chloride, before customs clearance, for the corresponding type and grade ('variable duty'), whichever is the higher.

12 As regards the choice of duty, recitals 78 and 79 in the preamble to the contested regulation state:

'The present review has shown that the inclusion of the three new Community Member States does not alter the analysis of, or the conclusions on, the dumping practised by the exporters in the countries subject to investigation; indeed, the dumping margin has changed little since the last examination.

Therefore, it is considered that the form of the measures should remain a combination of a minimum price with a specific duty. However, the minimum prices and fixed duties should be adapted in accordance with the findings of the current investigation.'

13 By letter of 25 February 1998, the applicant reiterated the criticisms which it had made in its letter of 15 December 1997.

Procedure and forms of order sought by the parties

14 Those are the circumstances in which, by an application lodged at the Registry of the Court of First Instance on 8 June 1998, the applicant brought the present action.

15 By documents lodged at the Registry on 29 September 1998 and 8 October 1998 respectively, the Commission and the European Potash Producers' Association ('APEP') sought leave under Article 115 of the Rules of Procedure to intervene in

support of the forms of order sought by the Council. The applicant requested that certain items in the file be treated confidentially.

16 By order of 30 June 1999, the President of the Third Chamber (Extended Composition) granted the Commission and APEP leave to intervene in support of the forms of order sought by the Council. The applicant's request for confidential treatment was also granted.

17 APEP lodged its statement in intervention on 13 September 1999 and the main parties duly submitted their observations thereon. The Commission did not lodge a statement in intervention.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.

19 The parties presented oral argument and answered questions put to them by the Court at the hearing on 11 April 2000.

20 The applicant claims that the Court should:

— annul Article 1 of the contested regulation in so far as it imposes a fixed duty on potassium chloride exported by the applicant;

— order the Council to pay the costs of the action;

— order APEP to bear its own costs.

21 The Council and the Commission contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the action.

22 APEP contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs incurred by APEP as a result of its intervention.

Substance

23 The applicant advances three pleas in law in support of its application: (i) infringement of Article 9(4) of the basic regulation, (ii) breach of the principle of

proportionality laid down in Article 3b of the EC Treaty (now Article 5 EC) and (iii) infringement of Article 190 of the EC Treaty (now Article 253 EC).

24 At the hearing, however, the applicant stated that the first and second pleas should be examined together.

Preliminary observations on the subject-matter of the action

25 The Council points out that, in the pleas raised in the application, the applicant questions the legality of the contested regulation only in so far as it imposes a fixed duty on imports by the applicant of potassium chloride, in addition to a variable duty. It is clear from the history of the contested regulation, however, and in particular from recital 42 in the preamble to Regulation No 643/94, that the fixed duty is the main type of duty imposed by the contested regulation. The only purpose of the variable duty is to prevent a further lowering of the price which would make the fixed duty ineffective. The fact that the three pleas raised in the application are based on a false premiss, namely that the variable duty is the main type of duty imposed by the contested regulation, is of itself sufficient for the application to be dismissed.

26 The Court notes, first, that the applicant seeks the annulment of Article 1 of the contested regulation only in so far as it imposes a fixed duty on the potassium chloride it exports. Since the applicant does not question the legality of the contested regulation inasmuch as it imposes a variable duty, the issues in the present action are limited to the legality of the contested regulation in so far as it imposes a fixed duty.

27 Secondly, the applicant's pleas for annulment seek to establish the illegality of the fixed duty irrespective of whether that duty constitutes the main duty established by the contested regulation. Therefore, contrary to the Council's submission, ascertaining whether the fixed duty or the variable duty is the main duty established by the contested regulation is irrelevant for the purpose of assessing the legality of the regulation in the present case.

The first and second pleas: infringement of Article 9(4) of the basic regulation and breach of the principle of proportionality laid down in Article 3b of the Treaty

28 The applicant claims, first, that, by imposing in the contested regulation a duty which is variable or fixed, whichever is the higher, the Council introduced a duty in excess of the dumping margin and therefore infringed Article 9(4) of the basic regulation, the variable duty having been calculated in such a way as to correspond exactly to the dumping margin. Since the minimum price was set at the level of the normal value of the product, the variable duty corresponds to the difference between the normal value and the CIF (cost, insurance, freight) export price and thus to the dumping margin established for each transaction. Under Article 1(2) of the contested regulation, the variable duty will not apply where it is lower than the fixed duty which, for its part, corresponds to the dumping margin calculated on the basis of exports made during the period of the investigation. Since the amount of the variable duty represents exactly the dumping amount for each export transaction, the applicant maintains that each time the fixed duty is applied, the amount of duty will automatically exceed the dumping margin for the export transaction in question. Therefore, by adopting a fixed duty in addition to a variable duty, the Council has infringed Article 9(4) of the basic regulation.

29 In the reply, the applicant adds that, in order not to deprive Article 9(4) of the basic regulation of its effectiveness, the Community institutions must ensure that anti-dumping duty is not likely to be applied in such a way as systematically to

exceed the 'actual' dumping margin in all future transactions. In the present case, whenever the fixed duty is applied, the amount of anti-dumping duty will always and automatically exceed the actual dumping margin for all future transactions.

30 The Council, supported by APEP, contends that under Article 9(4) of the basic regulation, anti-dumping duties are based on the findings relating to the investigation or reference period. As to the applicant's argument that the fixed duty will always and automatically exceed the actual dumping margin in all future transactions as a result of the conditions governing its application laid down in Article 1(2) of the contested regulation, the Council considers that it is a new plea in law and thus inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance.

31 The Court notes, first, that the applicant stated in its application:

'(S)ince the amount of the variable duty represents exactly the dumping amount for every export transaction, each time the [fixed] duty will be applied, the level of the duty will automatically exceed in every single case the dumping margin of the export transaction.'

32 In those circumstances, whilst the argument that the fixed duty will always and automatically exceed the 'actual' dumping margin in all future transactions by reason of the conditions governing its application laid down in Article 1(2) of the contested regulation was expanded by the applicant in the reply, it cannot be considered to be a new plea in law for the purposes of Article 48(2) of the Rules of Procedure.

33 Secondly, as regards the substance of the applicant's argument it should be noted that Article 9(4) provides:

'... The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.'

34 The 'established' dumping margin referred to in that provision is the margin found during the period of investigation, since Article 2(11) and (12) of the basic regulation provide that the dumping margin is determined by reference to that period.

35 It must be emphasised that the basic regulation does not permit any factors other than those in respect of which findings are made during the period of investigation, such as, for example, the 'actual' dumping margin for future export transactions, to be taken into account for the purposes of fixing the dumping margin. A Council regulation imposing anti-dumping duties must be based on facts established following a procedure in which interested parties make known their views (see Case 240/84 *NTN Toyo* v *Council* [1987] ECR 1809, paragraph 26). Thus, under the basic regulation, the concept of an 'actual' dumping margin is relevant only in the context of procedures for the review of existing duties or the refund of duty collected, which are referred to in paragraphs (3) and (8) respectively of Article 11 of the regulation.

36 In the present case the applicant acknowledges 'that the [fixed] duty was set [at] a level equal to the margin of dumping established during the investigation'. Nor does it dispute that the dumping margin was lower than the injury margin.

37 In those circumstances, even if the anti-dumping duty imposed was higher than the 'actual' dumping margin, the applicant cannot claim that the imposition of a fixed duty in the contested regulation infringed Article 9(4) of the basic regulation.

38 In the second place, the applicant asserts that the Council breached the principle of proportionality laid down in Article 3b of the Treaty by adopting a fixed duty in addition to a variable duty. The Council could have achieved the aim of eliminating dumping harmful to the Community industry by adopting measures having less effect on the applicant's interests. A variable duty alone would have been sufficient to remove the injury caused by the applicant's dumping by eliminating the dumping margin.

39 The Court observes that, by virtue of the principle of proportionality, as expressed in Article 3b of the EC Treaty, the legality of Community rules is subject to the condition that the means employed must be appropriate to attain the legitimate objective pursued and must not go further than is necessary to attain it, and, where there is a choice of appropriate measures, it is necessary, in principle, to choose the least onerous (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 69).

40 It is apparent from Article 9(4) and Article 21(1) of the basic regulation that the objective pursued by the Community institutions in imposing an anti-dumping duty is the elimination of the dumping margin in so far as that margin harms the Community industry (see, to that effect, Case C-136/91 *Findling Wälzlager* v *Hauptzollamt Karlsruhe* [1993] ECR I-1793, paragraphs 11 and 13; and *NMB France*, cited at paragraph 39 above, paragraph 76). Nevertheless, having regard to the fact that Article 14(1) of the basic regulation leaves the Community institutions a wide discretion to determine, in each case, the appropriate type of duty (see, to that effect, Case C-189/88 *Cartorobica* v *Ministero delle Finanze dello Stato* [1990] ECR I-1269, paragraph 25; and Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 141), review by the Community

judicature must be limited to ascertaining whether the measures adopted by the Community legislature, in this case a combination of a fixed duty and a variable duty, are manifestly inappropriate having regard to the objective pursued (*NMB France*, cited at paragraph 39 above, paragraphs 70 and 73; and Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, paragraph 89).

41 It is generally acknowledged that a variable duty is more favourable to the exporters and importers in question than a fixed duty or an *ad valorem* duty (*Ferchimex*, cited at paragraph 40 above, paragraph 143). In certain cases, a variable duty enables payment of anti-dumping duties to be avoided altogether.

42 However, before imposing anti-dumping duties, the Community institutions balance the various interests at stake (see, to that effect, *NMB France*, cited at paragraph 39 above, paragraph 71). They take into account not only the interests of the importers and exporters being investigated, but also the interests of the Community industry, and, as is apparent from Article 21 of the basic regulation, the interests of users and consumers. The fact that various interests are to be balanced is conveyed by the wording of Article 9(4) of the basic regulation, which provides that the amount of the anti-dumping duty may not exceed the amount necessary to remove the injury to the Community industry.

43 It should be noted that originally Regulation No 3068/92 imposed only a variable duty. The imposition of such a duty was favourable to the economic operators concerned, and was based, as is the acceptance of any undertaking, on a relationship of trust between the Community institutions and the importers and exporters. Whether a variable duty is effective depends on whether the economic operators in question make accurate declarations of the export price.

44 Secondly, it is clear that it was precisely the fact that the variable duty was being circumvented that led the Council to amend Regulation No 3068/92 in 1994: it explained in recital 42 in the preamble to Regulation No 643/93 that, given the strong indications that circumvention of the minimum price duty imposed by Regulation No 3068/92 had occurred, it was necessary to impose a fixed duty.

45 It is also apparent from recital 42 that the Council deemed it necessary to retain the variable duty, which applied only in cases where it was higher than the fixed duty, in order to guard against the risk of a reduction in export prices and thus against an increase in dumping. According to the Council, this was a real risk because of the high overcapacity for the production of potash in the exporting countries concerned, the lack of domestic purchasers, the availability of large quantities for export and the relative attractiveness of the Community market compared with other export markets.

46 In the contested regulation, which was adopted following a review of Regulation No 643/94 requested by the applicant, the Council stated that 'the form of the measures [had to] remain a combination of a minimum price with a fixed duty' (recital 79 in the preamble to the contested regulation), which shows that the trust necessary for the reinstatement of a variable duty alone was still absent. Thus, the Commission explained in its definitive disclosure document (see paragraph 8 above) that 'it has been alleged that circumvention of the measures was still taking place.' In its letter of 16 February 1998 (see paragraph 10 above), the Commission again stated:

'The double system of measures was implemented in 1994 to prevent the exporters from circumventing the measures applicable at that time i.e. a minimum price. The analysis of the present situation has shown that this double system is still warranted.'

47 It is also apparent from the case-file (Exhibits 4 to 7 of the application and recitals 75 to 77 of the contested regulation) that, for the same reasons, the Community institutions rejected the undertakings offered by the applicant during the procedure prior to the adoption of the contested regulation.

48 It follows that the Council opted, in the contested regulation, for a combination of a fixed duty and a variable duty in order to eliminate the dumping margin in the most effective way. While its initial evaluation of the various interests had led the Council to impose in Regulation No 3068/92 a variable duty only, advantageous to exporters and importers, the Council found itself obliged to impose a fixed duty in Regulation No 643/94 and the contested regulation because the variable duty, which was being circumvented, had not succeeded in preventing injury to the Community industry. Having regard to the real risk of a reduction in export prices, the Council also considered that the imposition of a fixed duty in Regulation No 643/94 and in the contested regulation was not sufficient to ensure that the harmful effects of dumping would be removed, and therefore opted for a combination of a fixed duty and a variable duty.

49 It must be emphasised that the applicant does not dispute the reality of the circumvention of the variable duty imposed by Regulation No 3068/92 which had led to the imposition of the fixed duty together with the variable duty in Regulation No 643/94 and in the contested regulation. It merely points out that the methods of circumvention changed between the adoption of Regulation No 643/94 and that of the contested regulation (see paragraphs 55 to 60 below). It also does not deny that a fixed duty, which is the only duty referred to in the heads of claim in the application, is not as easily circumvented as a variable duty.

50 Accordingly, it has not established that the Council breached the principle of proportionality by imposing in the contested regulation a fixed duty in addition to a variable duty, even though a regulation imposing a variable duty only would have had 'less effect on its interests'.

51 In the third place, having observed that the purpose of imposing an anti-dumping duty is to remove injury to the Community industry caused by dumped imports, the applicant claims that the adoption in the contested regulation of a system combining a variable and a fixed duty cannot be justified by a concern to prevent circumvention of the duties imposed, since there are other means of curbing all forms of customs fraud.

52 Here, too, it must be borne in mind that the Community institutions determine what is the appropriate type of anti-dumping duty after weighing up the various interests (see paragraph 42 above). Since anti-dumping duties are intended to remove injury to the Community industry caused by dumping, it is reasonable for the institutions to take into account considerations relating to the effectiveness of the measure which they may take when choosing the type of duty to be imposed.

53 It follows that in deciding upon the appropriate anti-dumping duty the Community institutions may take into account the risk of the duty in question being circumvented (see Case T-155/94 *Climax Paper Converters* v *Council* [1996] ECR II-873, paragraph 96; and Case T-170/94 *Shanghai Bicycle* v *Council* [1997] ECR II-1383, paragraphs 100 to 108). Where circumvention of a type of duty is foreseeable, that duty will be inappropriate, because applying it will not result in the elimination of the injury caused to the Community industry.

54 In those circumstances, the applicant cannot claim that the Council breached the principle of proportionality by imposing a fixed duty, which is the only duty objected to in the present case, with a view to preventing circumvention of the variable duty, even though there ought to have been other ways of curbing any such circumvention.

55 In the fourth place, the applicant asserts in its reply that the imposition of a fixed duty is not a proper means of combating the forms of circumvention alleged by the Council in its defence, namely false declarations as to both the origin and the composition of the imported product and misuse of the inward processing regime. Those practices are meant to avoid paying anti-dumping duty altogether. According to the applicant, the Council thus acknowledged that the forms of circumvention which had justified the retention of a system of combined duties in the contested regulation bore no relation to the circumstances prevailing at the time when Regulation No 643/94 was adopted.

56 The Court notes that the applicant does not challenge the Council's argument that when Regulation No 3068/92 was being reviewed the traders were circumventing the variable duty imposed by that regulation by means of false declarations relating to export prices, which led to the adoption in Regulation No 643/94 of the combination of a fixed and a variable duty.

57 Furthermore, the Council has never acknowledged that when the contested regulation was adopted the circumstances which prevailed when Regulation No 643/94 was adopted had ceased to exist. The definitive disclosure document and the letter of 16 February 1998 (see paragraphs 8 and 10 above) make it perfectly clear that the Community institutions considered, at the time when the contested regulation was adopted, that the circumstances justifying the imposition of a combination of a fixed and a variable duty, which had been explained in recital 42 in the preamble to Regulation No 643/94, continued to exist. According to the Council, the fixed duty continued to be necessary in order to prevent the risk of the variable duty being circumvented.

58 The applicant cannot claim that the contested regulation breached the principle of proportionality by maintaining the system of combined duties imposed by Regulation No 643/94 when the type of circumvention at issue when Regulation No 643/94 was adopted, namely false declarations relating to export prices, had

ceased by the time that the contested regulation was adopted. The introduction of a combination of a variable and a fixed duty in Regulation No 643/94 may be regarded as having put an end to that type of circumvention of the variable duty.

59 At the time when the contested regulation was adopted, the Council had to assess the risk of the variable duty again being circumvented if it were decided, as the applicant was requesting, to return to the imposition of a variable duty only. The fact that new ways of circumventing the duties, the existence of which is not disputed by the applicant, had been detected illustrates that the traders concerned were still doing their best, at the time when the contested regulation was adopted, to circumvent the applicable duties.

60 In those circumstances, it was not unreasonable for the Council to consider that these persistent attempts at circumvention justified the retention in the contested regulation of the combination of a fixed and a variable duty which had been introduced by Regulation No 643/94.

61 Consequently, the first and second pleas must be dismissed.

The third plea: infringement of Article 190 of the Treaty

62 Relying on the case-law of the Court of First Instance (Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, paragraph 32; and Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 103), the applicant claims first that the

Council infringed the obligation laid down in Article 190 of the Treaty by failing to explain adequately in the contested regulation why it was necessary to adopt a fixed duty combined with a variable duty. The applicant stresses that in recital 42 in the preamble to Regulation No 643/94 the Council had provided ample reasoning for its decision to alter the form of the duty originally imposed and to combine a fixed duty with a variable duty (see paragraph 5 above). By contrast, the contested regulation fails to explain why the same combination of a variable duty and a fixed duty was still necessary when that regulation was adopted. The retention of that combination of two duties was based solely on the ground that 'the dumping margin has changed little since the last examination' (recital 78 in the preamble to the contested regulation). The applicant adds that in the definitive disclosure document (see paragraph 8 above), the Commission had given a different explanation for the retention of this form of measures, stating that 'it has been alleged that circumvention of the measures was still taking place' (p. 9).

63 The applicant further observes that, in the written observations it submitted to the Commission on 15 December 1997 and 25 February 1998 (see paragraphs 9 and 13 above), it challenged the form of the measures contemplated on the ground that they were incompatible with Article 9(4) of the basic regulation. It adds that the Commission's statement in its letter of 16 February 1998 that the system of combined duties ought to be retained in view of the analysis of the situation prevailing at the time does not constitute an adequate statement of reasons justifying the adoption of measures in excess of the dumping margin in breach of Article 9(4) of the basic regulation.

64 The applicant goes on to submit that the passage in the definitive disclosure document to which the Council refers in its defence corresponds precisely to the wording of recitals 78, 79 and 80 of the contested regulation, with the exception of the following sentence, which was omitted from the contested regulation: 'Further, it has been alleged that circumvention of the measures was still taking place.' The applicant considers that, following repeated objections by it and owing to the absence of evidence in support of the allegations regarding the persistent circumvention of measures, the Community institutions eventually decided to remove this reason as a justification for the retention of a system combining a variable and a fixed duty.

65 The Court observes that the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the Community authority adopting the contested measure, so as to inform the persons concerned of the reasons given for the measure adopted and thus enable them to defend their rights and the Community judicature to exercise its power of review. The extent of the obligation to state reasons must be assessed in the light of the context and the procedure in which the contested regulation was adopted and the body of legal rules governing the field concerned (see *Petrotub*, cited at paragraph 40 above, paragraph 106).

66 In the present case, an assessment of the statement of reasons for the contested regulation must take into account the grounds for the adoption of Regulations Nos 3068/92 and 643/94, which were amended by the contested regulation, as well as the notices which were sent to the applicant during the administrative procedure and the observations made by it during that procedure regarding the combined application of two anti-dumping duties. In the present case, a review of the first and second pleas reveals that the grounds for the contested regulation, if looked at in context, are sufficient for the applicant and the Court to know the reasons given for the double system. It is apparent in particular from recital 42 in the preamble to Regulation No 643/94 and recital 79 of the contested regulation, as well as from the correspondence conducted between the Commission and the applicant during the administrative procedure, that the contested regulation imposed a fixed duty for the purpose of avoiding the risk of the variable duty being circumvented, retention of the variable duty being necessary to prevent a reduction in export prices.

67 Finally, as the Council maintains, it was not obliged to reproduce in the contested regulation the reasons set out in recital 42 in the preamble to Regulation No 643/94 since the contested regulation was adopted following a review of Regulation No 643/94. It was sufficient to explain, as the Council did, that circumstances had not changed since Regulation No 643/94 was adopted.

68 It follows that the third plea must also be dismissed.

69 Consequently, the application must be dismissed in its entirety.

Costs

70 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.

71 Since the applicant has been unsuccessful and the Council and APEP have applied for costs, the applicant must be ordered to pay, in addition to its own costs, the costs of the Council and APEP.

72 Under Article 87(4) of the Rules of Procedure, institutions intervening in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay its own costs and the costs of the Council and the European Potash Producers' Association;

3. Orders the Commission to bear its own costs.

Lenaerts Azizi Moura Ramos

Jaeger Mengozzi

Delivered in open court in Luxembourg on 29 September 2000.

H. Jung K. Lenaerts

Registrar President