JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
21 November 2002 *

In Case T-88/98,

Kundan Industries Limited,

Tata International Limited,

established in Mumbai (India), represented by J.-F. Bellis and P. De Baere, lawyers, with an address for service in Luxembourg,

applicants,

v

Council of the European Union, represented by S. Marquardt, acting as Agent, assisted by H.-J. Rabe and G. Berrisch, lawyers,

defendant,

* Language of the case: English.

supported by

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

intervener,

APPLICATION for the annulment of Article 1 of Council Regulation (EC) No 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand (OJ 1998 L 50, p. 1)

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 February 2002

gives the following

Judgment

Legal background

1 Article 2(8) and (9) 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') lay down the detailed rules for the calculation of the export price.

2 Article 2(8) of the basic regulation in particular provides that '[t]he export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community'.

3 Article 2(9) of the same regulation provides as follows:

'In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable

basis. In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Community frontier level. The items for which adjustment shall be made shall include those normally borne by an importer but paid by any party, either inside or outside the Community, which appears to be associated or to have a compensatory arrangement with the importer or exporter, including usual transport, insurance, handling, loading and ancillary costs; customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and a reasonable margin for selling, general and administrative costs and profit.'

4 Article 2(10) of the basic regulation lays down the criteria on the basis of which the institutions arrive at a fair comparison between the export price and the normal value. It provides, *inter alia*:

'This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade.'

5 In particular, Article 2(10)(i) of the same regulation provides that '[a]n adjustment shall be made for differences in commissions paid in respect of the sales under consideration'.

6 Article 18 of the basic regulation establishes the rules for cooperation between the institutions and undertakings concerned by an anti-dumping investigation. In particular, Article 18(3) provides:

'Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.'

7 Finally, Article 20(4) of the basic regulation on the disclosure of information to the parties provides as follows:

'Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.'

8 Article 20(5) of the basic regulation provides in this respect:

'Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in

each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.'

Facts

9 Kundan Industries Limited and Tata International Limited ('Kundan' and 'Tata') are companies incorporated under Indian law.

10 Kundan manufactures stainless steel fasteners ('SSF') and sells them to Tata, which, as part of its export activities, sells them on to independent importers within the Community. Commercial relations between the applicants are governed by an exclusive distribution memorandum of understanding, entered into on 25 October 1994. On 16 November 1995, the applicants signed an addendum to that memorandum of understanding amending clauses 5 and 7 thereof, which determine respectively the terms for the supply of raw materials to Kundan and the procedure for calculating the purchase price of the goods invoiced by Kundan to Tata and Tata's profit margin.

11 On 7 December 1996, the Commission published in the *Official Journal of the European Communities* a notice of initiation of an anti-dumping proceeding concerning imports into the Community of SSF and parts thereof originating in the People's Republic of China, India, Malaysia, the Republic of Korea and Taiwan (OJ 1996 C 369, p. 3).

12 After the initiation of the proceeding, the Commission sent to the applicants a questionnaire intended for non-EC manufacturers and exporters. The applicants submitted separate responses to the Commission.

13 In February 1997, the Commission officials responsible for dealing with the case visited the applicants' premises in India for the purposes of carrying out an inspection.

14 On 5 September 1997, the Commission published Regulation (EC) No 1732/97 of 4 September 1997 imposing a provisional anti-dumping duty on imports of stainless steel fasteners and parts originating in the People's Republic of China, India, Malaysia, the Republic of Korea, Taiwan and Thailand (OJ 1997 L 243, p. 17, 'the provisional regulation'). Article 1 of that regulation imposed a provisional duty of 53.6% on Kundan.

15 By letter dated 9 September 1997, the Commission's services disclosed to the applicants the essential facts and considerations on the basis of which the provisional anti-dumping duty had been imposed.

16 On 10 October 1997, the applicants submitted to the Commission their comments on the provisional duty determination. They contested in particular the adjustments made by the Commission to Kundan's export price.

17 On 29 October 1997, the Commission's services sent a letter to the applicants requesting information on their pricing strategy. In that letter the Commission also observed that it had found that the prices Kundan charged Tata were approximately 10% higher than the prices Tata charged purchasers within the Community and requested an explanation in that regard.

18 By letter of 3 November 1997, the applicants replied that their pricing policy was explained by Tata's use of the system of reimbursement of import duties established by the Indian Government (known as the Pass Book Scheme), which

allowed it to offset the price adopted on the Community market which was lower than those charged by Kundan.

19 On 23 December 1997, the Commission's services sent to the applicants the disclosure document setting out the essential facts and considerations on the basis of which the proposal to the Council to impose definitive anti-dumping duties on the applicants would be made. In that document it was stated that the export price was no longer calculated on the prices Kundan charged Tata but on the prices Tata charged purchasers within the Community. The Commission's services also explained why it had been decided to deduct from the export price so calculated a notional commission of 2%.

20 The applicants submitted their comments by letters of 13 January and 2 February 1998, challenging the use of Tata's resale price in calculating the export price, the deduction of a notional commission and the difference in dumping margins found for the Indian exporters who had cooperated with the Commission.

21 The Commission replied by letter of 10 February 1998.

22 On 16 February 1998, the Council adopted Regulation (EC) No 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand (OJ 1998 L 50, p. 1, 'the definitive regulation' or 'the contested regulation'). That regulation imposes a definitive anti-dumping duty of 47.4% on imports of SSF exported by the applicants.

Procedure

23 By application lodged at the Registry of the Court of First Instance on 7 June 1998 the applicants brought the present action.

24 On 29 September 1998, the Commission applied for leave to intervene in support of the form of order sought by the Council.

25 As the principal parties did not raise any objection to that application, the Commission was granted leave to intervene by order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance on 16 November 1998.

26 The Commission waived its right to submit a statement in intervention and so the written procedure was concluded on 26 May 1999.

27 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure.

28 As a measure of organisation of procedure, the Court requested the Council to reply to certain written questions. The Council complied with that request within the time allowed. The Council was also requested to disclose data relating to the calculation of the normal constructed value of the two other Indian producers/exporters concerned by the investigation which had terminated with the adoption of the contested regulation. By letters of 13 and 20 February 2002 addressed to

the Court Registry, the Council informed the Court that it regarded those data as confidential and that it was not permitted to disclose them. By letter of 22 February 2002, the Court Registry informed the parties that the Court was reserving its decision on whether to adopt measures concerning the issue of confidentiality raised by the Council.

29 The parties presented oral argument and answered the Court's questions at the hearing on 28 February 2002. At that hearing, the President of the Fourth Chamber, Extended Composition, of the Court informed the parties that it might decide to order disclosure of the data in respect of which the Council claimed confidentiality. For that reason, the termination of the oral procedure was deferred to a later date.

30 As the Court did not consider it necessary to order such a measure of inquiry, the parties were informed in a letter of 12 March 2002 that the oral procedure had closed on that date.

Forms of order sought

31 The applicants claim that the Court should:

— annul the contested regulation insofar as it imposes a definitive anti-dumping duty on the SSF manufactured and exported by the applicants;

— order the Council to pay the costs.

32 The Council contends that the Court should:

— dismiss the application;

— in the alternative, annul Article 1 of the contested regulation insofar as it imposes a definitive anti-dumping duty in excess of 45.5% on imports of SSF manufactured and exported by the applicants;

— order the applicants to pay the costs.

Law

33 The applicants put forward four pleas in law in support of their application: the first alleges a breach of Article 2(8) and (9) of the basic regulation; the second alleges a breach of Article 2(10) of the basic regulation; the third alleges a breach of Article 18(3) of the basic regulation and the fourth alleges a breach of Article 20(4) of the basic regulation.

The first plea in law: breach of Article 2(8) and (9) of the basic regulation

Arguments of the parties

34 The applicants submit that, insofar as the contested regulation determines their export price on the basis of the price charged by Tata on the Community market

and not on the basis of that charged to Tata by Kundan, the Council infringed Article 2(8) and (9) of the basic regulation. The applicants submit that, under Article 2(8) of the basic regulation and according to the settled practice of the Community institutions, where a producer sells its products for export to the Community to an unrelated trading company or to another intermediary located in the same country (or in another non-member country), the export price to be used is the price charged by the producer to the trading company which will resell the product to the Community customer and carry out the export formalities.

35 Article 2(9) of the basic regulation allows the institutions to depart from the above practice only where the export price is unreliable because of an association or compensatory arrangement between the exporter and importer or a third party.

36 In that regard, the applicants submit, first, that they are not associated, within the meaning of Article 2(9) of the basic regulation, and that the existence of an exclusivity agreement such as that governing their commercial relations does not, in itself, suffice for them to be regarded as associated within the meaning of that provision.

37 Second, the applicants submit that the fact that, by reason of the repayment of import duty under the Pass Book Scheme, Tata is able to resell the products in question in the Community at a price below that at which it had purchased them from Kundan does not make the latter price unreliable within the meaning of Article 2(9) of the basic regulation. The applicants claim that it is only under Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1) that an action against the benefits granted to Tata by the Pass Book Scheme should be brought by the institutions.

38 Third, the applicants challenge the Council's assertion that, in the light of the amendments to their memorandum of understanding in 1995, the prices charged between the parties should be regarded as unreliable. Firstly, the amended memorandum of understanding merely contains a price calculation formula which is a normal element of any exclusive sales and/or purchasing agreement. Secondly, the inclusion, in the prices Kundan charged Tata, of an amount corresponding to 75% of the benefits received by Tata under the Pass Book Scheme should be considered in the light of the operation of that scheme and the history of their commercial relationship.

39 In that regard, the applicants state, first, that the Pass Book Scheme is one of several duty drawback schemes benefiting Indian exporters. They assert that Article 2(10)(b) of the basic regulation provides that an adjustment must be made to the normal value in respect of such schemes. That adjustment reduces the normal value by an amount corresponding to the reimbursement of import duties and thereby reduces the dumping margin. Thus, a producer manufacturing and exporting products directly to the Community without relying on intermediaries could, by availing himself of a duty drawback scheme, set a lower export price than when selling on the domestic market, without thereby increasing his dumping margin.

40 The applicants claim, next, that since, in their case, the producer and exporter are different companies, they can benefit from the adjustment under Article 2(10)(b) of the basic regulation only by adapting their relationship so that the party who buys the raw materials is also the one who receives the reimbursement of the import duties. Thus, when, in 1995, they decided to amend their memorandum of understanding in respect of the supply of raw materials by agreeing that Kundan would import its raw materials directly, it was necessary to adapt the price calculation formula so that Kundan could receive reimbursement of the import duties. They therefore agreed that an amount equivalent to 75% of the reimbursement of import duties obtained by Tata under the Pass Book Scheme as the exporter of the finished products would be passed on to Kundan in the

form of a corresponding increase in the price paid by Tata to Kundan. Tata consented to this amendment because, by reason of its status as a 'Star Trading House', it could obtain additional benefits under the Pass Book Scheme which were not available to a small company like Kundan.

41 Finally, the applicants submit that the reason why the institutions rejected the export price Kundan charged Tata is to be found not in their memorandum of understanding, but rather in the fact that those institutions considered the benefits obtained by Tata under the Pass Book Scheme to be non-allowable drawbacks under Article 2(10)(b) of the basic regulation. In that regard, the applicants note that, as is apparent from recital 42 of the provisional regulation, the Commission rejected the applicants' claim for an adjustment under that article for the benefits obtained by Tata under the Pass Book Scheme. In the present case, the Commission concluded that the applicants had not demonstrated the existence of a link between the import of the raw materials used in the manufacture of the products in question and the reimbursements obtained under the Pass Book Scheme. The applicants note that it was only after the publication of the provisional regulation that the Commission realised that the rejection of that claim for adjustment had no effect on the calculation of the dumping margin. The reaction of the Commission's services was to disregard the price Kundan charged Tata and to use the resale price charged by Tata instead in calculating the export price. The applicants cite, in that regard, the Commission's letter of 10 February 1998 in which the Commission's services neither alleged that there was a compensatory arrangement between Tata and Kundan, nor mentioned the amendments in 1995 to their memorandum of understanding.

42 The Council contends that the prices Kundan charged Tata are not reliable within the meaning of Article 2(9) of the basic regulation since they contain a compensatory element.

43 The Council notes in that regard that, according to the amended memorandum of understanding, the price Kundan charges Tata is, in reality, composed of two

elements: the actual price of the products supplied to Tata and an amount equivalent to 75% of the benefit received by Tata under the Pass Book Scheme. In the Council's opinion, that second element constitutes a compensatory element.

44 The Council also challenges the applicants' argument that the appropriate remedy in the present case is an action under the Community anti-subsidy rules. Contrary to the applicants' assertion, the resale price charged by Tata on the Community market, on which the export price was based, is not affected by the benefits received under the Pass Book Scheme. The Council notes in that regard that the amended memorandum of understanding shows that Tata was operating with a gross profit margin of 8 to 10% on the 'ex-works prices' charged by Kundan. The Council claims that it follows that Tata's resale price on the Community market was merely the result of a commercial calculation based on the actual price charged by Kundan plus a fixed profit margin.

45 The Council claims that, contrary to the applicants' submission, the Pass Book Scheme cannot be regarded as a normal import duty drawback system. The benefits to the Pass Book holder are determined on the basis of a simple estimation of the quantity of imported raw materials contained in the exported product, without the exporter having to show that the product in question was actually manufactured from the imported raw materials.

46 The Council further observes that the applicants are attempting to establish a link between the reliability of the export price and the issue of whether the Pass Book Scheme can give rise to an adjustment under Article 2(10)(b) of the basic regulation. The Council submits that those two questions are not linked and, in any event, the applicants' argument is irrelevant since they do not allege that the Council wrongly failed to make an adjustment in their case under that article.

Findings of the Court

47 By their first plea in law, the applicants essentially submit that, by basing the export price on the price charged by Tata within the Community, the Council infringed Article 2(8) and (9) of the basic regulation.

48 Article 2(8) of the basic regulation provides that the export price is the price actually paid or payable for the product when sold for export to the Community. Under Article 2(9), where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

49 It is apparent from Article 2(9) that the institutions may treat the export price as unreliable in two cases, namely where there is an association between the exporter and the importer or a third party or a compensatory arrangement between the exporter and the importer or a third party. In any other case, where an export price exists, the institutions are required to base their determination of dumping on that price.

50 Next, according to settled case-law, in the field of measures to protect trade, the institutions enjoy a wide discretion (see, *inter alia*, Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraphs 32 and 33). On that point, in Case T-51/96 *Miwon* v *Council* [2000] ECR II-1841, paragraph 42, the Court held that the question whether or not the export prices reported by the applicant were reliable

necessarily entails complex economic assessments in respect of which the institutions enjoy a wide discretion, so that the Court's power of review is restricted.

51 Consequently, in the present case, the Court must examine merely whether the institutions committed a manifest error of assessment in finding, on the basis of the information in their possession, that the prices Kundan charged Tata were unreliable.

52 In that regard, it is apparent from recital 29 of the contested regulation that, after verification, the institutions concluded that 'the approach taken at the provisional stage was not appropriate as the price charged to the trading company [Tata] was not reliable because of the existence of an association or compensatory arrangement between the producer and this company'.

53 In order to know the factors on which the institutions based their decision, it is necessary to refer to the administrative procedure and, in particular, to the exchange of correspondence between the Commission and the applicants after the adoption of the provisional regulation.

54 By letter of 29 October 1997, the Commission informed the applicants that, after comparing the sale prices Kundan charged Tata with those Tata charged purchasers within the Community, it had found that the former were, on average, approximately 10% higher than the latter. The Commission therefore requested the applicants to justify their pricing policy in respect of the sales in question, failing which those sales would be regarded as not being made 'in the ordinary course of trade'.

55 In its letter of 3 November 1997, replying to the Commission's request, the applicants pointed out that, whilst it was true that the prices charged by Tata within the Community were approximately 10% lower than those charged by Kundan, that difference was more than made up for by the benefits Tata received from the Indian Government under the Pass Book Scheme.

56 On 23 December 1997, the Commission's services sent to the applicants' lawyer the disclosure document setting out the essential facts and considerations on the basis of which the proposal to impose definitive anti-dumping duties on the applicants would be made to the Council. The Commission stated, under the heading 'Export Price' that 'the prices charged by Kundan to Tata Exports for all its export sales to the EC for the product concerned during the [investigation period] could not be considered as being made in the ordinary course of trade as those companies are considered to be related regarding those sales (existence of an exclusivity agreement)'.

57 On 13 January 1998, the applicants submitted to the Commission their comments on the disclosure document of 23 December 1997. On the question of the export price, after stressing that Kundan and Tata must be considered to be independent companies in all respects, they assert that '[a]ny other assumption, e.g. one suggesting a compensatory arrangement between the parties, is completely incorrect'.

58 In their letter of 10 February 1998, the Commission services replied, *inter alia*, to those comments:

'... the investigation showed that the prices charged by Tata Exports to the EC customers were lower than the prices charged by Kundan to Tata. Given that situation, the Commission's services considered that the latter prices could not

reflect the economic reality. The fact that this situation resulted from the compensation system set up by the Pass Book Scheme... did not alter the unreliability of the prices charged by Kundan to Tata Exports with regard to those charged on the EC market. Indeed, to use Kundan's price would have been equivalent to granting a duty drawback adjustment, which has already been refused.'

59 It is apparent from that exchange of correspondence that the Commission's services based their conclusion that the prices Kundan charged Tata were unreliable principally on the finding that those prices were higher than the prices charged by Tata in the Community market and that, consequently, they could not reflect economic reality.

60 It therefore appears that, in the course of the administrative procedure, the institutions did not prove that the applicants had entered into an association or a compensatory arrangement with each other, but they inferred such an association or arrangement essentially from the finding that the resale prices charged by Tata on the Community market were below the purchase price charged by Kundan.

61 That method is not contrary to either the letter or the spirit of Article 2(9) of the basic regulation. It is apparent from that provision, and in particular from the use of the term 'where it appears', that the institutions have a certain latitude in deciding whether it is appropriate to apply that article and that recourse may be had to the constructed export price not only where the institutions obtain evidence of the existence of a compensatory arrangement but also where such an arrangement appears to exist (see, by analogy, *Miwon* v *Council*, cited above, paragraph 40, on the interpretation of Article 2(8)(b) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1)).

62 Consequently, it is necessary to ascertain whether, in the light of the information in their possession, the institutions were entitled to infer the existence of an association or a compensatory arrangement within the meaning of Article 2(9) of the basic regulation.

63 It is therefore necessary, first, to examine whether Tata's pricing policy enabled the institutions to infer the existence of such an association or arrangement and, second, whether the institutions were entitled to reject the alternative explanations given by the applicants referring to the operation of the Pass Book Scheme.

— Tata's pricing policy

64 It should be noted as a preliminary point that in the judgment in *Miwon* v *Council* the Court of First Instance held that the pricing policy of importers of monosodium glutamate from the Republic of Korea, and in particular the fact that, during the investigation period, those importers had consistently and systematically resold at a loss on the Community market, should, in the absence of alternative explanations, be regarded as relevant evidence establishing the unreliability of the export prices notified by the applicant company and/or the existence of compensatory arrangements (paragraphs 46 to 53). The Court held that the defendant institutions had rightly held that sales at prices which did not cover the purchase price plus a sum corresponding to selling costs, general and administrative expenses and a reasonable profit margin constituted sales at a loss.

65 In the present case, it is apparent from the documents in the case-file and, in particular from the table in annex 10 to the application, that during the investigation period Tata resold the products in question to its Community

customers at prices which were, for the most part, below the 'ex-works' purchase price charged by Kundan and, in all cases, below the purchase price plus a sum corresponding to selling costs and other expenses borne by Tata. That fact was not challenged by the applicants during either the administrative procedure or the proceedings before the Court.

66 In those circumstances, the institutions were entitled to find during the administrative procedure that, subject to alternative explanations from the undertakings concerned, the pricing policy adopted by Tata on the Community market constituted evidence of the unreliability of the prices charged by Kundan and, in particular, of the existence of a compensatory arrangement.

— The alternative explanations put forward by the applicants concerning the operation of the Pass Book Scheme

67 The applicants claim that there was no compensatory arrangement between them and that it was only thanks to the system of reimbursement of import duties under the Pass Book Scheme that Tata was able, whilst maintaining its profit margin, to charge its Community customers prices which in the majority of cases were lower than the purchase prices Kundan charged Tata. Under that system, Tata obtained import duty credits for the products exported which enabled it to absorb the difference between the prices Kundan charged for the products in question, and the prices, plus the selling and other costs, at which it resold those products on the Community market.

68 It is apparent from the case-file and from the explanations given by the parties during the procedure before the Court that the Pass Book Scheme, which entered into force on 30 May 1995 and was repealed on 31 March 1997, was an import duty credit scheme open to certain categories of exporter, namely Indian

manufacturers who exported (producer-exporters) and exporters, whether manufacturers or simply merchants, certified as 'Export Houses', 'Trading Houses', 'Star Trading Houses' or 'Superstar Trading Houses'. Any qualifying exporter could request a pass book in which the duties were recorded as a credit or a debit. When the finished goods were exported, the exporter could apply for a credit which he used to pay the customs duties imposed on his subsequent imports. Various factors were taken into consideration in calculating the amount of the credit which could be granted pursuant to the 'Standard Input/Output norms'. The Indian authorities published those norms in respect of each product exported. They stated the quantities of raw materials normally imported which were necessary for the manufacture of one unit of the finished product and were defined by the Special Advance Licensing Committee based on a technical analysis of the production process and general statistics. Pursuant to the 'Standard Input/Output norms', the credit was granted up to the amount of the customs duty imposed on the usually imported inputs used by the Indian industry to manufacture the exported product in question. The credit granted was recorded in the pass book and could be used to pay the customs duty on future imports of any product. The imported goods did not necessarily have to be connected with the exporter's production and could be sold on the Indian market. The pass book was valid for two years from its date of issue.

69 In the present case, reference should be made to the table in annex 10 to the application, containing a list of Tata's sales within the Community during the investigation period and stating, in respect of each transaction, the prices Tata charged Community buyers, the amounts paid by Tata to Kundan, the overall costs borne by Tata, the credits Tata received under the Pass Book Scheme and its gross profit margin. It is apparent from that table that it is only as a result of the credits received under the Pass Book Scheme that Tata was able to obtain a gross profit margin of between 8 and 10% on each transaction, notwithstanding the fact that all of its sales within the Community were at a loss.

70 It follows that, as the applicants submit, Tata's pricing policy on the Community market could be justified by the benefits it obtained under the Pass Book Scheme.

71 In those circumstances, it is necessary to examine whether the Commission was right, given the data in its possession, to reject the alternative explanations put forward by the applicants.

72 On that point it is necessary to analyse the applicants' pricing policy in the light of the amendments in 1995 to the memorandum of understanding governing their commercial relationship.

73 Those amendments concern clauses 5 and 7 of the memorandum of understanding setting the terms for the supply of raw materials to Kundan and the procedure for calculating the purchase price which Kundan charged Tata for the goods, the resale prices on the Community market, and Tata's profit margin. Clause 7 of that memorandum, as amended in 1995, provided that an amount corresponding to 75% of the import credits obtained by Tata under the Pass Book Scheme would be transferred to Kundan by means of a corresponding increase in the price paid by Tata to Kundan. Furthermore, that clause provided that Tata's profit margin and the costs it bears in respect of each transaction would be covered by an increase of between 8 and 10% of that price.

74 The applicants submit that it is purely because the amended version of the memorandum of understanding provided that Kundan was to import raw materials independently that they had to abandon the new procedure for calculating prices so that Kundan could take advantage of the Pass Book Scheme.

Consequently, the applicants claim, the amendments to the memorandum of understanding contain no evidence of a compensatory arrangement between them which would enable the institutions to depart from the rule in Article 2(8) of the basic regulation and to refer to the constructed export price.

75 It should be noted in that regard that, in the present case, the benefits of the system of import duty credits derived from the Pass Book Scheme were taken into consideration in calculating the price negotiated between the manufacturer and the exporter and constituted, more precisely, one of the factors determining that price. Furthermore, it is apparent from clause 7 of the amended version of the memorandum of association that the applicants had set up a system to share those benefits.

76 In those circumstances, it must be held that the price Kundan charged Tata, which is the export price actually paid, was influenced by the benefits accruing to Tata under the Pass Book Scheme.

77 It is therefore necessary to ascertain whether that influence was such as to render the prices charged between the applicants unreliable within the meaning of Article 2(8) of the basic regulation.

78 It should be noted in this regard, first, that as held at paragraph 69 above, the only factor allowing Tata to charge lower prices on the Community market than the purchase price plus costs, whilst maintaining a gross profit margin of 8 to 10%, was the credits obtained under the Pass Book Scheme. Since, under the amended version of the memorandum of association, 75% of the credits obtained under that scheme were passed on to Kundan, it is as a result of the remaining 25% that Tata was able to absorb the sales at a loss on the Community market and obtain its profit margin.

79 Next, the Court finds that, as the Council submits, the Pass Book Scheme, unlike any normal import duty drawback system, does not require a direct link between the import of goods and the manufacture of goods for export. The benefits to the holder of the Pass Book were determined on the basis of an estimate, by the competent authority, of the quantity of imported raw materials contained in the product exported, based on the standard norms.

80 In those circumstances, the Pass Book Scheme left the applicants scope for the arrangements to share the benefits it generated.

81 Furthermore, the fact that the duties reimbursed under that scheme were calculated on the basis of standard norms enabled them to know with certainty, at the time of the placing of the order with Kundan and of calculating the price, the exact amount of the import duties to be reimbursed to Tata upon export. In calculating in advance the amount corresponding to 25% of those duties due to Tata pursuant to the amended version of the memorandum of understanding, the applicants were in a position to set Kundan's prices for each order at a level enabling Tata always to obtain the same profit margin notwithstanding the prices it charged on the Community market.

82 Finally, the transfer to Kundan of 75% of the credit obtained by Tata under the Pass Book Scheme, by means of an increase in the purchase price charged to Tata, enabled the applicants to show a higher export price actually paid, which made it appear, when that price was compared with the normal value in the course of an anti-dumping proceeding, that the dumping margin was lower.

83 In the light of the foregoing considerations, it must be concluded that the institutions did not commit a manifest error of assessment in finding that the price Kundan charged Tata was unreliable because of a compensatory

arrangement between them. Consequently, the institutions did not infringe Article 2(8) and (9) of the basic regulation in deciding to reject that price and refer to the constructed export price.

84 Accordingly, the first plea in law is rejected as being unfounded.

The second plea in law: breach of Article 2(10) of the basic regulation

Arguments of the parties

85 The applicants claim that the Council had no legal basis for deducting a notional commission of approximately 2% from the price Tata charged its clients within the Community. They challenge the Commission's finding that Tata performed tasks which are typical of a commercial trader working on a commission basis and stress that the relationship between them is one of buyer and seller, not principal and agent. They state that Kundan never paid Tata any commission for its role as intermediary, either directly or indirectly on the same or a separate invoice. Article 2(10)(i) of the basic regulation only provides for an adjustment for commissions which have actually been paid and which are directly linked to the sales under consideration.

86 The Council contends that it made an adjustment to the export price for a commission payment because it considered Tata's role to be similar to that of a trader acting on a commission basis. It refers in that regard to the content of the

memorandum of understanding as amended by the applicants in 1995 and, especially, to the clauses stating that Tata was to work with a mark-up of 8 to 10% on Kundan's 'ex-works prices' and to indicate the delivery terms to purchasers.

87 The Council states that the institutions may make an adjustment on the basis of Article 2(10)(i) of the basic regulation not only where commission is actually paid, but also where the role played by an intermediary in the exportation is similar to that of an agent acting on a commission basis and that the only difference between those two situations is that the intermediary acquires ownership of the goods which it exports. To treat these two situations differently, on the basis of that difference alone, would, in the Council's view, constitute discrimination.

88 Alternatively, the Council submits that even if the institutions committed a manifest error of assessment when making the adjustment, that error would not affect the legality of the imposition of an anti-dumping duty, merely the amount of that duty. Since the dumping margin established for the applicants was 47.4% and, without adjustment for a commission payment, would have been 45.5%, the Council considers that even if the Court were to conclude that the second plea in law is well founded, that could only result in the annulment of Article 1 of the contested regulation only insofar as it imposed a definitive anti-dumping duty in excess of 45.5%.

Findings of the Court

89 By their second plea in law, the applicants challenge the deduction of a notional commission of approximately 2% from the export price found for the applicants, namely the price charged by Tata on the Community market.

90 It should be noted as a preliminary point in relation to that deduction that recital 35 of the contested regulation states that in the applicants' case, in order to make a fair comparison between the normal value and the export price, the latter had to be adjusted to take account of the activities of the trading company. The same recital continues:

'Since [Tata's] function can be considered to be similar to that of a trader acting on a commission basis, an adjustment was made on the basis of this company's own [sales, general and administrative expenses] and a reasonable amount for profit. This adjustment was deducted from the prices charged by the... company to independent customers in the Community.'

91 It follows from that recital that the adjustment was made on the basis of Tata's general and administrative expenses and costs of sale plus a reasonable amount for its profit. However, it is apparent from a letter of 19 February 1998 from the Commission's services to the applicants that the amount of the deduction corresponds to the percentage applied in respect of another trader during the same investigation. The Council explains that inconsistency in its statement in defence by asserting that recital 35 contains a factual error which does not affect the legality of the contested regulation.

92 It should be noted next that Article 2(10) of the basic regulation provides that in making the comparison between the export price and the normal value, 'due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability'. Article 2(10)(i) of the same regulation provides that '[a]n adjustment shall be made for differences in commissions paid in respect of the sales under consideration'.

93 The applicants submit that the deduction of commissions under Article 2(10)(i) may only be made in respect of commissions actually paid or to be paid, whilst

the Council submits that the Community institutions may make such an adjustment also where no commission has been paid but the producer sells through a trader established in the country of export operating in a similar way to that of an agent acting on a commission basis.

94 The Council's argument must be rejected. It is apparent from both the wording and the scheme of Article 2(10) of the basic regulation that an adjustment to the export price or the normal value may only be made to take account of differences in factors which affect the prices and therefore their comparability. That is not the case for a commission which has not actually been paid.

95 To be able to make the adjustment in question, the institutions would have had to base their decision on factors capable of showing, or of giving rise to the inference, that a commission was in fact paid and was such as to have a definite effect on the comparison between the export price and the normal value.

96 Just as a party who is claiming adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin must prove that his claim is justified (see, *inter alia*, Joined Cases C-320/86 and C-188/87 *Stanko France* v *Commission and Council* [1990] ECR I-3013, paragraph 48), it is incumbent upon the institutions, where they consider that they must make an adjustment of the kind made in the present case, to base their decision on direct evidence or at least on circumstantial evidence pointing to the existence of the factors for which the adjustment was made, and to determine its effect on price comparability.

97 In the present case, the institutions based their decision solely on the finding that the functions carried out by Tata in the course of its export activity were similar to those of an agent acting on a commission basis. As they took the view that that finding was sufficient in order to make the adjustment in question, they did not adduce any evidence at all from which it could be inferred that Kundan and Tata had agreed a commission.

98 In those circumstances, the Court concludes that the institutions committed an error of law in applying Article 2(10) of the basic regulation.

99 That conclusion is not undermined by the Council's argument that the institutions would have been guilty of discrimination if they had not made the adjustment in question.

100 According to settled case-law, for the Community institutions to be accused of discrimination, they must be shown to have treated like cases differently, thereby placing some traders at a disadvantage by comparison with others, without such differentiation being justified by the existence of substantial objective differences (see, *inter alia*, Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 188). In the present case, even if, as the institutions claim, Tata's situation is similar to that of an agent acting on a commission basis, the institutions could have been accused of discrimination only if they had failed to make an adjustment for commissions which had been shown to have actually been paid or to be due to Tata.

101 In the light of all of the foregoing considerations, the second plea in law is upheld.

The third plea in law: breach of Article 18(3) of the basic regulation

Arguments of the parties

102 The applicants state that the dumping margin was calculated by comparing the normal value by Product Code Number ('PCN'), calculated on the basis of data provided by Kundan relating to its sales on the domestic market, with the export price by PCN, calculated on the basis of Tata's resales on the Community market. The same data by PCN provided by Kundan were used, in the provisional regulation, for comparison with the export prices of other Indian exporters, since Kundan was the only producer to have domestic sales.

103 The applicants submit that, as is apparent from recital 14 of the definitive regulation, after the imposition of the provisional anti-dumping duties the Commission realised that Kundan had erred substantially in grouping the products concerned by PCN. Despite that finding, the institutions continued to use those codes for the comparison with the PCNs used by Tata for its sales on the Community market.

104 The applicants observe that, since Kundan and Tata are not related companies, Tata had no opportunity to check which products were taken into consideration by Kundan to calculate average prices and costs per PCN on the domestic market. As a result, the calculation of the applicants' dumping margin per PCN, based on a comparison of the data for Kundan and Tata, is wholly erroneous. In addition, that fact resulted in a significant difference between the dumping margin fixed for the applicants and those calculated for the two other exporters who cooperated during the investigation proceeding, and this notwithstanding the similarity between the three companies.

105 The applicants admit that they twice sent to the Commission a list of Tata's PCNs corresponding to those already supplied by Kundan. However, they submit that that correlation table could not alter the fact that the data provided by Kundan were incorrect. In any event, Tata would not have been in a position to check whether the various products sold by Kundan on the internal market had been correctly classified.

106 The applicants conclude that, by continuing to rely on data known to be incorrect, and the use of which led to manifestly incorrect findings, the Council infringed Article 18(3) of the basic regulation.

107 The Council contends that Article 18(1) and (3) of the basic regulation cannot give a party the right to make the institutions reject information that it has itself submitted.

108 Furthermore, the Council states that the correlation table which the applicants sent to the Commission after publication of the provisional regulation enabled the Commission to make a valid comparison between Kundan's data concerning the normal value and that of Tata concerning the export price and, consequently, to calculate the dumping margin correctly.

Findings of the Court

109 The Court notes, first, that Article 18(3) of the basic regulation provides that, where the information submitted by an interested party is not ideal in all respects, it should nevertheless not be disregarded provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding.

110 Next, as the Council submits, whilst that provision allows an interested party to claim that the institutions wrongly rejected information submitted by that party, it does not, however, give that party the right to have information rejected which it submitted itself.

111 However, by the third plea in law, the applicants submit, in substance, that the institutions committed a manifest error of assessment when they calculated the normal value in respect of the applicants from the PCN classification made by Kundan.

112 It should be noted in this regard that the applicants do not deny that they submitted to the Commission, in an annex to their observations on the provisional duty regulation dated 10 October 1997, a list setting out Tata's PCNs corresponding to those of Kundan. Nor do they deny that by letter of 28 October 1997 they submitted to the Commission's services a corrected and revised correlation table. Furthermore, it is agreed between the parties that when the definitive anti-dumping duty was imposed, the Commission and the Council based their comparison between the normal value and the export price on the PCNs used in Tata's lists, harmonised with those in Kundan's classification.

113 Consequently, it is necessary to examine whether the institutions committed a manifest error of assessment in deciding that the drawing up by Tata of a correlation table between its PCNs and those of Kundan was sufficient to remedy the inaccuracies in Kundan's classification so as to enable a fair comparison to be made between Kundan's data concerning the normal value and those of Tata concerning the export price.

114 To that end, it is apparent from paragraph 2 of Part B of the questionnaire sent to the applicants during the investigation procedure that the purpose of the

classification by PCN was essentially to enable the institutions to establish a correspondence between the products exported to the Community and similar products distributed on the domestic market. It is apparent from paragraph 2 of Part H of the same questionnaire that the PCNs are composed of the following data: the product type, the questionnaire identifying for this purpose seven types of SSF; the raw material used; the DIN (German Standards Institute) number recording the standards complied with in manufacturing the SSF; the diameter and length of the product concerned.

115 The essential function of the PCNs is therefore to define the physical and technical characteristics of the products sold on the domestic market by grouping them on the basis of those characteristics so as to enable the institutions to identify identical or similar products which are exported to the Community.

116 It is apparent from the correlation table drawn up by the applicants and sent to the Commission by letter of 28 October 1997 that, for each category of products grouped under the same PCN by Kundan, they indicated the corresponding category of products exported by Tata to the Community, classified under the correct PCN.

117 In those circumstances and having regard to the function of the classification by PCN, as shown in the questionnaire sent to the applicants, the institutions were entitled to find that the data thus harmonised could be used *vis-à-vis* the applicants notwithstanding the inaccuracies contained in the original classification submitted by Kundan.

118 Furthermore, the correlation table in question was specially drawn up by the applicants with a view to its being used during the investigation and the applicants did not object to its use during that investigation.

119 The applicants also submit that, because of the errors contained in Kundan's classification, the result of the calculation of their dumping margin for each category of products grouped under the same PCN is incorrect. The applicants claim that the inaccuracy of the institutions' calculations is apparent in particular from the very sizeable difference between the dumping margin adopted for the applicants and that fixed for the other Indian producer-exporters concerned by the investigation, Lakshmi Precision Screws Limited and Audler Fasteners, for which the normal value was not calculated on the basis of the data provided by Kundan. The applicants point out, first, that those two producer-exporters operate in similar conditions to those in which Kundan operates and, second, that in the provisional regulation their dumping margin was in line with that fixed for Kundan.

120 It should be noted, first, in this regard that, amongst the exporters concerned by the investigation, only Tata had drawn up a correlation table allowing the classification made by Kundan to be harmonised with its own data. Accordingly, the institutions were entitled to reject the data submitted by Kundan in calculating the normal value for the two other Indian exporters and therefore to proceed to construct that value.

121 Second, it should be noted that in the contested regulation the dumping margin established for Tata and Kundan was determined by reference to an export price calculated on the basis of the prices charged by Tata on the Community market and not, as in the provisional regulation, on the basis of the prices Kundan charged Tata, which resulted in an increase in the applicants' dumping margin.

122 Lastly, it should be noted that, in reply to the written questions put by the Court, the Council stated that the appreciable difference between the applicants' dumping margin and that of the other Indian exporters concerned by the same investigation is explained by various factors, including, in particular, the difference in the products manufactured by the three producers and in their

manufacturing processes, Kundan's higher production costs and the institutions' use of a different method for calculating the normal value. The applicants' explanations on this point at the hearing were not such as to cast doubt on the Council's assertions.

123 In those circumstances and in the light of the foregoing, the institutions did not commit a manifest error of assessment in calculating the normal value for the applicants on the basis of the classification by PCN provided by Kundan.

124 Accordingly, the third plea in law must be rejected.

The fourth plea in law: breach of Article 20(4) of the basic regulation

Arguments of the parties

125 The applicants allege that they never received clear disclosure of all the grounds of fact and law on the basis of which the contested measures were adopted. The disclosure document sent to them during the administrative proceeding contradicts the definitive regulation in several important respects. In particular, they never received a clear explanation of the conclusion that the prices Kundan charged Tata were unreliable and of the decision to deduct from Tata's export price a notional commission of 2%.

126 As regards the information concerning the unreliability of Kundan's prices, the applicants submit, first, that the Commission did not inform them, in sufficient time so that they could defend themselves, of the fact that Tata's prices could be used instead of Kundan's in calculating the export price. They submit, second, that the explanations put forward by the Commission as to the unreliability of Kundan's prices differed each time that the institutions raised the question of the export price. Lastly, the applicants note that it is only in its statement in defence that the Council, for the first time, contended that the amended version of their memorandum of understanding contained a compensatory element.

127 As regards the adjustment made for a notional commission, the applicants state that the Commission only gave them a clear explanation in its letter of 10 February 1998, when they were no longer able to reply because the written procedure had closed.

128 Consequently, the applicants submit that they were not in a position to defend their interests effectively during the administrative procedure, contrary to the requirements of Article 20(4) of the basic regulation.

129 The Council observes that a breach of Article 20(4) of the basic regulation can lead to annulment of the contested measure only if the disclosure given by the institutions was incomplete and if, because of that incompleteness, the applicants were not able to defend their interests effectively. That is not the situation in the present case since the applicants were aware of the Commission's position and were able to reply to it, both on the issue of the reliability of the prices Kundan charged Tata and on the adjustment to the export price.

130 Alternatively, the Council submits that, even if the institutions had infringed the applicants' rights of defence with regard to the calculation of the amount of the adjustment to the export price, that would not affect the legality of the anti-dumping measures imposed but only their amount. In that case, the Court should merely annul Article 1 of the contested regulation insofar as it imposes a definitive anti-dumping duty in excess of 45.5%.

Findings of the Court

131 The purpose of the obligation on the Commission under Article 20(4) of the basic regulation to disclose to undertakings concerned by an anti-dumping procedure the essential facts and considerations on the basis of which it is intended to impose anti-dumping duties is to ensure respect for the rights of the defence of the undertakings involved in such a procedure. The present plea in law, alleging breach of that provision, must therefore be interpreted as alleging, in essence, a breach of the rights of the defence of the applicants during the administrative procedure which came to an end with the adoption of the contested regulation.

132 It should be noted as a preliminary point that, according to settled case-law, pursuant to the principle of the respect of the rights of the defence, the undertakings affected by an investigation preceding the adoption of an anti-dumping regulation must be placed in a position during the administrative procedure in which they can 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 (Case C-49/88 *Al-Jubail Fertiliser and Saudi Arabian Fertiliser* v *Council* [1991] ECR I-3187, paragraph 17; Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, paragraph 84; Joined Cases T-159/94 and T-160/94 *Ajinomoto and Nutrasweet* v *Council* [1997] ECR II-2461, paragraph 83 and Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 55).

133 Those requirements are contained in Article 20 of the basic regulation. Article 20(2) of that regulation provides that the complainants, importers and exporters and their representative associations, and representatives of the exporting country, 'may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures..., particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures' (*Champion Stationery and Others* v *Council*, cited above, paragraph 55). Article 20(4) provides that final disclosure is to be given in writing. It must be made as soon as possible and not normally later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9 of the basic regulation. Where the Commission is not in a position to disclose certain facts or considerations at that time, these must be disclosed as soon as possible thereafter. Disclosure is not to prejudice any subsequent decision which may be taken by the Commission or the Council and, where that decision is based on any different facts and considerations, these are to be disclosed as soon as possible. Article 20(5) of the basic regulation also grants undertakings which have received such final disclosure the right to submit any representations within the period set by the Commission, which must be at least 10 days.

134 It is therefore necessary to examine whether, in the light of those principles, the applicants' rights of the defence were infringed during the investigation.

135 The fourth plea in law has two parts. Under the first part, the applicants submit that their rights of defence were infringed on the ground that the Commission's decision that the prices Kundan charged Tata were unreliable was not disclosed to them in sufficient time for them to be able to defend their interests.

136 It should be noted in this regard, first, that in its letter of 29 October 1997 to the applicants the Commission not only requested explanations of their pricing policy as between each other but also warned the applicants that, in the absence of

plausible explanations, it would have to regard the prices that Kundan charged Tata as not being 'in the ordinary course of trade'. The Commission's position is sufficiently clear from the content of that letter, namely that, in the absence of convincing explanations provided by the applicants, the prices Kundan charged Tata could be regarded as unreliable and therefore be rejected.

137 Next, it should be pointed out that, in the disclosure document sent to the applicants on 23 December 1997 the Commission made known its decision not to take the prices Kundan charged Tata as the basis for calculating the export price. It explained that those prices could not be considered to be charged in the ordinary course of trade because the applicants had to be regarded as associated, given the exclusivity agreement between them. Consequently, it informed the applicants that the export price would be calculated on the basis of the prices Tata charged its Community customers.

138 It should be noted that, in their comments on the abovementioned disclosure document, the applicants did not merely challenge the Commission's assertion that there was an association between them on the ground that they had entered into an exclusive agreement but they also stated why it was not possible to find that any compensatory arrangement existed between them which would enable the Commission to consider the prices charged by Kundan to be unreliable.

139 In those circumstances, the applicants were not only in a position to make known their point of view effectively, but also in fact expressed their view, both on the validity of the conclusions which the Commission reached on the basis of the

exclusivity agreement and the pricing strategy they had adopted, and on the possibility, in general terms, of inferring from those, or other, factors the existence of a compensatory arrangement within the meaning of Article 2(9) of the basic regulation.

140 Furthermore, it should be noted that the principal argument put forward by the applicants before the Court of First Instance to challenge the decision of the institutions to calculate the export price on the basis of Tata's prices, an argument based on the operation of the Pass Book Scheme, had already been put forward during the administrative procedure both in their letter of 3 November 1997 and in their comments on the disclosure document of 23 December 1997.

141 In those circumstances, the first part of the fourth plea in law must be rejected.

142 By the second part, the applicants contend that their rights of defence were infringed on the ground that the Commission's decision to adjust the export price on the basis of a notional commission was not disclosed to them in sufficient time for them to be able to defend themselves.

143 That second part of the fourth plea in law is redundant in that it has been held at paragraphs 89 to 101 above that the institutions made that adjustment unlawfully.

144 Accordingly, the fourth plea in law must be rejected.

The alternative form of order sought by the Council

Arguments of the parties

145 In its written submissions, the Council requested that the Court should, in the alternative, and insofar as it were to uphold the second plea in law, annul Article 1 of the contested regulation only insofar as it imposes on the applicants an anti-dumping duty in excess of 45.5% corresponding to the rate which would have been imposed had the institutions not made the disputed adjustment (see paragraph 88 above).

146 The applicants dispute the Council's request on the ground that, in exercising its review of the lawfulness of the contested regulation, the Court has power only to annul that regulation and not to vary it.

Findings of the Court

147 It should be noted, first, that in the present case the Court is required only to review the lawfulness of the contested measure and does not have unlimited jurisdiction. Thus, whilst it has the power to annul the contested measure it does not have the power to vary it.

148 Next, the unlawfulness of the adjustment in question affects the lawfulness of Article 1 of the contested regulation only insofar as the anti-dumping duty it sets exceeds that which would apply but for that adjustment.

149 Consequently, by annulling Article 1 of the contested regulation only insofar as it imposes on the applicants an anti-dumping duty in excess of that which would apply but for that adjustment, the Court merely gives due effect to its findings and is not substituting its view for that of the defendant institution.

150 For those reasons, and in the light of all of the foregoing, Article 1 of the contested regulation must be annulled insofar as it imposes on the applicants an anti-dumping duty in excess of that which would apply but for the adjustment of the export price made in respect of a commission.

Costs

151 Under Article 87(3) of the Rules of Procedure the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or order each party to bear its own costs. In the present case, the application for annulment has been partially successful. The Court considers it to be fair in the circumstances of the case to order the Council to bear its own costs and to pay 30% of the applicants' costs and to order the applicants to bear 70% of their own costs.

152 The Commission shall bear its own costs in accordance with Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. **Annuls Article 1 of Council Regulation (EC) No 393/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating in the People's Republic of China, India, the Republic of Korea, Malaysia, Taiwan and Thailand insofar as it imposes an anti-dumping duty on exports to the European Community of products manufactured by Kundan Industries Limited and exported by Tata International Limited which exceeds that which would apply but for an adjustment to the export price made in respect of a commission;**

2. **Dismisses the remainder of the application;**

3. **Orders the Council to bear its own costs and to pay 30% of the costs of the applicants and orders the Commission to bear its own costs.**

Vilaras Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 21 November 2002.

H. Jung M. Vilaras

Registrar President