JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

18 March 2009 *

In Case T-299/05,

Shanghai Excell M&E Enterprise Co. Ltd, established in Shanghai (China),

Shanghai Adeptech Precision Co. Ltd, established in Huaxin Town (China),

represented by R. MacLean, Solicitor, and E. Gybels, lawyer,

applicants,

* Language of the case: English.

Council of the European Union, represented by J.-P. Hix, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

supported by

Commission of the European Communities, represented initially by K. Talabér-Ritz and E. Righini, and subsequently by H. van Vliet and K. Talabér-Ritz, acting as Agents,

intervener,

ACTION for annulment of Articles 1 and 2 of Council Regulation (EC) No 692/2005 of 28 April 2005 amending Regulation (EC) No 2605/2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating, inter alia, in the People's Republic of China (OJ 2005 L 112, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of V. Tiili (Rapporteur), President, F. Dehousse and I. Wiszniewska-Białecka, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2008,

gives the following

Judgment

Background to the dispute

A — *Investigation and original regulation*

1 On 27 November 2000, the Council adopted Regulation No (EC) 2605/2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating in the People's Republic of China, the Republic of Korea and Taiwan (OJ 2000 L 301, p. 42) ('the original regulation').

2 During the investigation which led to the adoption of that regulation ('the original investigation'), the Commission inter alia examined whether there had been dumping of imports from those three countries into the European Community of certain electronic weighing scales having a maximum weighing capacity not exceeding 30 kg, for use in the retail trade, which incorporate a digital display of the weight, unit price and price to be paid (whether or not including a means of printing that data) ('the electronic weighing scales').

3 As regards China, three exporting producers decided to cooperate in the investigation and received individual treatment. Those three companies requested market economy status ('MES') pursuant to Article 2(7) 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), as amended by Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18), as rectified ('the basic regulation'). However, the Council took the view that the criteria set out in Article 2(7)(c) of that regulation had not been met and rejected that application. Consequently, it was necessary to compare the export prices of the Chinese exporting producers with a normal value established for an analogous market economy country, pursuant to Article 2(7) of the basic regulation (recitals 45 to 48 and 52 in the preamble to the original regulation).

4 The institutions took the view that Indonesia was the most appropriate market economy third country for the purpose of establishing normal value (recitals 49 and 50 in the preamble to the original regulation). That value was thus established in accordance with Article 2(2) and (3) of the basic regulation on the basis of the normal values established for an Indonesian undertaking, namely PT Toshiba TEC Corporation Indonesia ('Toshiba Indonesia') (recital 53 in the preamble to the original regulation).

5 The Council compared the normal value and the export price on an ex-factory basis and at the same level of trade, which showed that there was a dumping margin in respect of the three exporting producers in question ranging from 9% to 12.8% (recital 58 of the original regulation).

6 Since the level of cooperation from all the other Chinese exporting producers was low, the residual dumping margin for them was set at the level of the highest individual dumping margin for a single model of electronic weighing scale produced by the cooperating companies, namely 30.7%.

7 Consequently, Article 1(2) of the original regulation imposed on the three cooperating Chinese exporting producers individual anti-dumping duties whose maximum rate was 12.8% and a duty of 30.7% on all the other Chinese companies.

B — *Review procedure*

8 The applicants, the related companies Shanghai Excell M&E Enterprise Co. Ltd ('Shanghai Excell') and Shanghai Adeptech Precision Co. Ltd ('Shanghai Adeptech'), manufacture electronic weighing scales in China. Shanghai Excell and Shanghai Adeptech began to export electronic weighing scales to the Community in June 2003. An anti-dumping duty rate of 30.7% was applied to them.

9 The applicants submitted to the Commission a request for a 'new exporter' review of the original regulation within the meaning of Article 11(4) of the basic regulation. They claimed that they had not exported any electronic weighing scales to the Community during the original investigation period, namely from 1 September 1998 to 31 August 1999 ('the original investigation period') and that they were not related to any of the exporting producers which are subject to the measures in question.

10 By Commission Regulation (EC) No 1408/2004 of 2 August 2004 initiating a 'new exporter' review of Council Regulation No 2605/2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating, inter alia, in the People's Republic of China, repealing the duty with regard to imports from two exporters in this country and making these imports subject to registration

(OJ 2004 L 256, p. 8), the Commission initiated the review with regard to the applicants. The anti-dumping duty of 30.7% on their electronic weighing scales was repealed and the Commission directed the customs authorities to take appropriate steps to register the imports of those scales, that registration being due to expire nine months following the date of entry into force of Regulation No 1408/2004.

11 On 23 February 2005, the Commission sent the applicants a letter disclosing the reasons why it intended to grant them individual treatment and to impose on them an anti-dumping duty of 54.8%. By letter of 7 March 2005, the applicants challenged the Commission's position.

C — *The contested regulation*

12 On 28 April 2005, the Council adopted Regulation (EC) No 692/2005 of 28 April 2005 amending Regulation (EC) No 2605/2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating, inter alia, in the People's Republic of China (OJ 2005 L 112, p. 1) ('the contested regulation').

13 In the contested regulation, the Council confirmed that the applicants were new exporters for the purpose of Article 11(4) of the basic regulation (recitals 9 to 11).

14 The Council took the view that, as the applicants are established in China, normal value should be determined, as in the original regulation, in accordance with Article 2(7)(a) of the basic regulation, on the ground that the applicants did not meet the first two criteria laid down in Article 2(7)(c) of the basic regulation and that market economy conditions

therefore did not prevail in respect of the manufacture and sale by them of electronic weighing scales (recitals 12 to 26). The Council nevertheless concluded that the applicants met the requirements for individual treatment as set forth in Article 9(5) of the basic regulation (recitals 27 and 28).

15 As in the original regulation, the Council calculated normal value in accordance with Article 2(7)(a) of the basic regulation, on the basis of the price or constructed value in an analogous country, namely Indonesia. The normal value was calculated on the basis of the information received from Toshiba Indonesia.

16 The Council compared the normal value and the export price on an ex-factory basis and at the same level of trade, and account was taken, in accordance with Article 2(10) of the basic regulation, of differences affecting prices and price comparability (recitals 42 to 45). Lastly, the Council compared the weighted average normal value of each type of the product concerned with the weighted average export price and concluded that there was a dumping margin of 52.6% (recitals 55 and 56).

17 Accordingly, Article 1(1) of the contested regulation imposed an anti-dumping duty of 52.6% on imports into the Community of products manufactured by the applicants.

18 Article 1(2) of the contested regulation retroactively applied duties of the same rate to the imports which had been registered pursuant to Article 3 of Regulation No 1408/2004. The applicants thus had a duty of 52.6% imposed on them as from August 2004. Lastly, Article 1(2) of the contested regulation directed European Union customs authorities to cease the registration of imports of products manufactured by the applicants.

19 Pursuant to Article 2 of the contested regulation, that regulation entered into force on the day following its publication in the Official Journal, that is to say on 4 May 2005.

20 The duties imposed by the original regulation, as amended by the contested regulation, expired on 1 December 2005 pursuant to Article 11(2) of the basic regulation. Following publication of the notice of impending expiry of the duties, the Community industry did not request an expiry review pursuant to Article 11(2) of the basic regulation.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 26 July 2005, the applicants brought this action.

22 By document lodged at the Registry of the Court on 18 November 2005, the Commission sought leave to intervene in support of the form of order sought by the Council. That application to intervene was granted by order of the President of the Third Chamber of the Court on 12 January 2006.

23 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the First Chamber and this case was therefore also assigned to that chamber.

24 On 19 March 2008, in the context of the measures of organisation of procedure laid down in Article 64 of the Rules of Procedure of the Court, the Court invited the parties

to reply to certain written questions and to send to it certain documents. The applicants complied with those requests within the prescribed period.

25 By letter of 15 April 2008, the Council informed the Court that it was not able to comply with those requests, claiming that some of the requested documents were confidential and that they were, in any event, in the possession of the Commission. Furthermore, the Council maintained that the applicants no longer had a legal interest in bringing proceedings.

26 By order of 7 May 2008, pursuant to Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure, the Court ordered the Council and Commission to produce some of the requested documents along with certain explanations, but stated that they would not be communicated to the applicant at that stage. The Council and Commission complied with that request within the prescribed period. However, they stated that they regarded those documents as strictly confidential, in so far as they contained sensitive business information relating to Toshiba Indonesia.

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

28 The parties submitted oral argument and their answers to the questions put by the Court at the hearing on 20 May 2008.

29 At the hearing, the applicants agreed that the Court might, if necessary, use the information contained in the documents regarded as confidential by the Council and the Commission, which had not been communicated to them, and this was noted in the

minutes of the hearing. The Court, however, considered it necessary, for the purposes of the present judgment, to use only information which had been made available to the applicants.

30 At the hearing, the applicants also withdrew their ninth plea in law, alleging an error in the identification of the applicants in the contested regulation, and this was also noted in the minutes of the hearing.

31 Lastly, it became clear at the hearing that the documents which the applicants had sent to the Court following its request of 19 March 2008 were not the documents which had been requested. The Council sought permission to lodge a copy of the latter, which are part of the administrative file and were sent to it by the applicants during the investigation which led to the adoption of the contested regulation. The applicants objected to this, and it was noted in the minutes of the hearing. The Court prescribed a period for the applicants to submit their observations on the documents in question and on their possible addition to the file.

32 On 30 May 2008, the applicants lodged their observations on the documents referred to in the preceding paragraph and reiterated their opposition to the addition of those documents to the file. However, the Court, which takes the view that the lodgement by the Council of the documents in question merely rectifies the error made negligently or intentionally by the applicants, is of the opinion that they must be added to the file.

33 On 6 June 2008, the Council lodged at the Registry of the Court a corrigendum to the information which it had sent to the Court in response to the Court's order of 7 May 2008. By letter of 6 June 2008, the Commission informed the Court that the explanations with which it had provided the Court in pursuance of that order had to be amended in the light of the corrigendum lodged by the Council.

34 On 10 July 2008, the applicants submitted observations on the corrigendum in question.

35 The oral procedure was closed on 24 September 2008.

36 The applicants claim that the Court should:

— annul the contested regulation in so far as it applies to them;

— order the Council to pay the costs.

37 In its written pleadings, the Council, supported by the Commission, contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

38 In its letter of 15 April 2008, the Council contends that the Court should:

— declare that there is no longer any need to adjudicate on the action on the ground that the applicants no longer have a legal interest in bringing proceedings;

— order the applicants to pay the costs.

The request for a ruling that there is no need to adjudicate

A — *Arguments of the parties*

39 The Council submits that the applicants' electronic weighing scales have not been subject to any anti-dumping duty as of the expiry of the original regulation on 1 December 2005. Moreover, it is apparent from information received from the Member States, first, that the Member States collected only very small amounts of the anti-dumping duties imposed by the contested regulation and, secondly, that those small quantities were not paid by the applicants, but by importers not related to the applicants.

40 Consequently the Council takes the view that the annulment of the contested regulation would have no legal consequences for the applicants, who, therefore, no longer have a legal interest in bringing these proceedings.

41 The applicants submit that the Court should not examine the Council's argument because it is out of time. They confirm that they did not pay any anti-dumping duty at the rate imposed by the contested regulation. They submit, however, that making their electronic weighing scales subject to very high anti-dumping duty for a period of almost five months ruined their marketing efforts in Europe, which explains precisely why a very small amount of anti-dumping duties was paid by their importers. The applicants state that they retain a legal interest in bringing proceedings because they intend to plead the unlawfulness of the contested regulation in a subsequent action for damages.

B — *Findings of the Court*

42 Since the conditions of admissibility of an action, in particular whether there is a legal interest in bringing proceedings, concern an absolute bar to proceedings, it is for the Court to consider of its own motion whether an applicant has an interest in obtaining annulment of the decision it contests (Order of the Court of First Instance in Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission* [2005] ECR II-787, paragraph 22). Therefore, the Court must examine the argument raised by the Council and there is no need to rule on the plea that it is out of time.

43 In that regard, it is important to bear in mind that, according to established case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the time at which the action is brought, failing which the action will be inadmissible. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, otherwise there will be no need to adjudicate; this presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see Joined Cases C-373/06 P, C-379/06 P and C-382/06 P *Flaherty and Others* v *Commission* [2008] ECR I-2649, paragraph 25 and the case-law cited).

44 In the present case, according to the Council, the applicants had a legal interest in bringing proceedings when the action was brought, but have subsequently lost that interest because, since the expiry of the original regulation and consequently of the contested regulation on 1 December 2005, the applicants have no longer been able to derive any advantage from the possible annulment of the latter regulation, in so far as, first, it no longer applies to their Community exports and, secondly, since they did not pay any anti-dumping duty under that regulation in the past, no sum would be reimbursed to them as a direct consequence of the annulment.

45 Having regard to the circumstances of the case, the Council's argument must, however, be rejected for a number of reasons.

46 First, the expiry of a measure in the course of proceedings seeking its annulment does not in itself mean that the Community judicature must declare that there is no need to adjudicate for lack of purpose or for lack of interest in bringing proceedings at the date of the delivery of the judgment (see, to that effect, Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 47).

47 In that regard, it must be noted that the contested regulation was not formally withdrawn by the Council (see, to that effect, *Wunenburger* v *Commission*, paragraph 46 above, paragraph 48).

48 Secondly, it follows from the case-law of the Court of Justice that an applicant may retain an interest in claiming the annulment of an act of a Community institution to prevent the unlawfulness alleged by it from recurring in the future (*Wunenburger* v *Commission*, paragraph 46 above, paragraph 50; see also to that effect, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21, and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16).

49 That interest in bringing proceedings follows from the first paragraph of Article 233 EC, under which the institutions whose act has been declared void are required to take the necessary measures to comply with the judgment (*Wunenburger* v *Commission*, paragraph 46 above, paragraph 51).

50 Admittedly, such an interest in bringing proceedings can exist only if the unlawfulness alleged is liable to recur in the future independently of the circumstances of the case which gave rise to the action brought by the applicant (*Wunenburger* v *Commission*, paragraph 46 above, paragraph 52).

51 That is true of an action for annulment, such as that in the present case, brought by undertakings made subject to an anti-dumping duty following a review procedure, even if that duty no longer applies, in so far as they dispute the procedure which led to its imposition. In contrast to the substantive assessment as to the existence of dumping, the detailed rules of a review procedure are liable to be referred to in the future in the context of similar procedures, and thus the applicants retain a legal interest in bringing proceedings against the contested regulation — even though it is now of no effect with regard to them — in view of future anti-dumping procedures against them (see, to that effect, *Wunenburger* v *Commission*, paragraph 46 above, paragraphs 56 to 59).

52 In that regard, it must be pointed out that, in the present action, the applicants dispute in a number of respects the methodologies chosen by the Council in the contested regulation to decide whether they satisfied the criteria for MES and to calculate their dumping margin, methodologies which are liable to be referred to in the future in the context of similar procedures.

53 Thirdly, an applicant may retain an interest in seeking the annulment of an act which directly affects him in order to obtain a finding, by the Community judicature, that an unlawful act has been committed against him, so that such a finding can then be the basis for any action for damages aimed at properly restoring the damage caused by the contested act (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 74).

54 That is the case here. The contested regulation made imports of the applicants' electronic weighing scales subject, for a period of five months, to an anti-dumping duty which is almost double that applied to other Chinese manufacturers and increases their selling price in the Community by more than 50%.

55 Against that background, the applicants retain an interest in having the contested regulation found to be unlawful because that finding will bind the Community judicature in any action for damages and could constitute the basis for any extrajudicial negotiations between the Council and the applicants aimed at reparation of the damage suffered by them.

56 Fourthly, to accept the Council's argument would be tantamount to admitting that acts adopted by the institutions whose temporal effects are limited and which will expire after an action for annulment has been brought but before the Court is able to give the relevant judgment would be excluded from review by the Court, unless they had given rise to the payment of sums of money.

57 Such a situation is incompatible with the spirit of Article 230 EC under which the Community judicature is to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank (ECB), other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. The Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with its basic constitutional charter, the Treaty, or the law which derives from that treaty (see, to that effect, Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23).

58 In the light of the foregoing considerations, it must be held that the applicants still have a legal interest in bringing proceedings.

Substance

59 The applicants rely on eight pleas in law in support of their action, some of which may be grouped together. The first plea alleges infringement of the second subparagraph of Article 2(7)(c) of the basic regulation. The second plea alleges infringement of the first indent of the first subparagraph of Article 2(7)(c) of the basic regulation. The third plea alleges infringement of the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation. The fourth plea alleges infringement of Article 11(9) of the basic regulation. The fifth and eighth pleas allege infringement of Article 2(7)(a) of the basic regulation. Lastly, the sixth and seventh pleas allege infringement of Article 2(10) of the basic regulation.

60 The Court is of the opinion that it is appropriate to deal with the second and third pleas first.

A — *The second and third pleas, alleging infringement of the first and second indents of the first subparagraph of Article 2(7)(c) of the basic regulation*

61 Article 2(7) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in paragraphs 1 to 6 of that provision, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country.

62 However, Article 2(7)(b) of the basic regulation provides:

'In anti-dumping investigations concerning imports from [Russia] and … China, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under [Article 2(7)](a) shall apply.'

63 Lastly, Article 2(7)(c) of the basic regulation provides:

'A claim under [Article 2(7)](b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

…

and

— exchange rate conversions are carried out at the market rate.

…’

64 The applicants claimed MES from the outset of the review investigation. The Council took the view, in the contested regulation, that that claim should be rejected on the ground that the applicants did not meet the first two criteria laid down in Article 2(7)(c) of the basic regulation (recitals 13 to 15).

65 As regards the first of those criteria, the Council took the view, in the contested regulation, that a number of factors indicated that there is significant State-interference with regard to the applicants. Those factors, are first, the fact that the articles of association of one of the applicants allow its State-controlled partner, which does not hold any capital of the company and was presented as performing the functions of a mere landlord, to claim compensation if the company does not achieve its production, sales and profit targets; secondly, the fact that the approval of the local authorities is necessary to recognise buildings as fixed assets and to start amortising the land use rights; thirdly, the fact that one of the applicants has never paid rent for the land use rights; and, fourthly, that it benefited from bank guarantees provided free of charge by a third party (recital 16 of the contested regulation).

66 As regards the second criterion, according to which undertakings wishing to obtain MES must show that they have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes, the Commission observed, in recital 17 in the preamble to the contested regulation, that the applicants were in breach of certain International Accounting Standards ('IAS') adopted by the International Accounting Standards Board.

67 As regards IAS 1, the Council took the view that the applicants breached three fundamental accounting concepts: the accrual basis of accounting, prudence and substance over form. According to the Council, the applicant also failed to comply with IAS 2 on inventories, buildings were not recognised and depreciated in line with IAS 16, the land use rights were not amortised according to IAS 38, the applicants breached IAS 21 on the effect of changes in foreign exchange rates and IAS 36 on the impairment of assets and, lastly, a number of the applicants' auditor's reports noted accounting problems regarding inventories and noted that the company had not established the relevant policy on provisions for impairment of assets. The Council also considered that the fact that the audit reports were silent as regards most of the breaches of the IAS indicates that the applicants' audits were not carried out in accordance with the IAS (recitals 17 and 18 in the preamble to the contested regulation).

1. *Arguments of the parties*

68 The applicants maintain that the assessment made by the Council in recitals 12 to 26 in the preamble to the contested regulation, in terms of which they did not meet the first two criteria set out in Article 2(7)(c) of the basic regulation, is incorrect.

69 In the second plea, the applicants submit that the Council's analysis in the contested regulation as to whether, first, their decisions regarding prices, costs and inputs are

made in response to market signals reflecting supply and demand and without significant State interference in that regard and, secondly, costs of major inputs substantially reflect market values is manifestly erroneous.

70 In the third plea, the applicants argue that the Council wrongly concluded in the contested regulation that they failed to fulfil the second criterion laid down in Article 2(7)(c) of the basic regulation, namely that undertakings claiming MES must have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes.

71 In that regard, the applicants note that as the accounting standards applied in this case by the Commission, namely the IAS, have not been adopted in China, no company established in that country is required to comply with them. Therefore, if their application were to be required, it would be impossible for any Chinese company to obtain MES. Moreover, pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1), as from 1 January 2005, even within the Community, compliance with the IAS is obligatory only for certain companies.

72 Furthermore, the applicants argue that, in the Council's minutes relating to Regulation No 905/98, which introduced the concept of MES into the basic regulation, the Commission was asked to implement that regulation in such a way that all undertakings, whatever their size, have the same opportunity to make use of its provisions. However, the Community institutions required that the applicants' accounts comply with an extremely high standard, with which they, as small and medium-sized enterprises, are unable to comply.

73 The applicants criticise the fact that the Community institutions made no attempt to apply alternative standards accepted internationally, although requests to that effect were made on several occasions by the applicants, and note that, during the verification carried out by the Commission at the premises of Shanghai Adeptech, the Commission

asked the auditors of that company to leave the premises for a while, thus depriving the company of any opportunity to explain that its accounts complied with the international standards.

74 Lastly, the applicants take the view that, by applying inappropriate accounting standards in the contested regulation, like the IAS, rather than the 'international accounting standards' referred to in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation, the Council made a manifest error in assessing the audited accounts of the two companies.

75 The Council contends that the second and third pleas should be rejected as unfounded.

2. *Findings of the Court*

76 It follows both from the use of the word 'and' between the fourth and fifth indents of Article 2(7)(c) and from the very nature of the criteria set out there that the criteria are cumulative, and thus should a producer claiming MES fail to fulfil one of them, its claim must be rejected (Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 54).

77 Therefore, as the Council took the view in the contested regulation that the applicants' MES claim should be rejected on the ground that it did not meet the first two criteria laid down in Article 2(7)(c) of the basic regulation (recitals 13 to 15), the present pleas could result in the annulment of the contested regulation only if they were both upheld.

78 Against that background, the Court is of the opinion that the third plea must be examined first.

79 In that regard, it should be observed, first of all, that, in the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 72; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 32; Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II-2905, paragraph 53; and *Shanghai Teraoka Electronic* v *Council*, paragraph 76 above, paragraph 48).

80 It follows that review by the Community judicature of assessments made by the institutions must be limited to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of those facts or a misuse of power (Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 19; *Thai Bicycle* v *Council*, paragraph 79 above, paragraph 33; *Arne Mathisen* v *Council*, paragraph 79 above, paragraph 54; and *Shanghai Teraoka Electronics* v *Council*, paragraph 76 above, paragraph 49).

81 The same applies to factual situations of a legal and political nature in the country concerned which the Community institutions must assess in order to determine whether an exporter operates in market conditions without significant State interference and can, accordingly, be granted market economy status (*Shanghai Teraoka Electronics* v *Council*, paragraph 76 above, paragraph 49).

82 Moreover, the method of determining the normal value of a product set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down for that purpose in Article 2(7)(a), which is, in principle, applicable to imports from non-market economy countries. It is settled case-law that any derogation from or exception

to a general rule must be interpreted strictly (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 23; Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19; Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 56; and *Shanghai Teraoka Electronics* v *Council*, paragraph 76 above, paragraph 50).

83 Lastly, it must be pointed out that the burden of proof lies with the exporting producer wishing to claim MES. Article 2(7)(c) of the basic regulation provides that the claim 'must … contain sufficient evidence'. Accordingly, there is no obligation on the Community institutions to prove that the exporting producer does not satisfy the criteria laid down for the recognition of such status. On the contrary, it is for the Community institutions to assess whether the evidence supplied by the exporting producer is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled and for the Community judicature to examine whether the institutions' assessment is vitiated by a manifest error (*Shanghai Teraoka Electronics* v *Council*, paragraph 76 above, paragraph 53).

84 It is in the light of those considerations that it must be examined whether the applicants' arguments are such as to show that the Council's conclusion that they did not meet the second criterion laid down in Article 2(7)(c) of the basic regulation is manifestly erroneous.

85 In that regard, the applicants maintain, in essence, that the IAS are not mandatory in China and that within the Community they are mandatory only for certain undertakings.

86 First, it must be pointed out that the fact that Chinese undertakings are not subject under their domestic law to compliance with certain accounting standards has no bearing on whether their accounts may be assessed in the light of those standards. The second criterion laid down in Article 2(7)(c) of the basic regulation clearly states that

the accounts of any undertaking which comes from a country without a market economy and wishes to obtain MES must be audited in line with international accounting standards and it is irrelevant whether the application of those standards is mandatory in its State of origin. Furthermore, it is precisely because that State does not have a market economy that the basic regulation requires the undertakings concerned to comply with accounting standards which are not necessarily national standards.

87 Secondly, the fact that the international accounting standards applied in the present case are not mandatory for all Community undertakings under a Community act does not necessarily imply that those standards, or even other accounting standards which pursue the same objectives and implement them just as strictly, if not more so, are not mandatory for those undertakings under their domestic laws. Nor does it imply that those standards are not widely accepted at international level or that they might not embody accounting principles common to the majority of countries with market economies, including the Member States.

88 Secondly, the applicants maintain that it is impossible for small or medium-sized enterprises such as theirs to comply with the IAS. However, that is a mere assertion, which is not substantiated by the slightest evidence or even by a brief explanation of the reasons why the accounting standards applied by the Commission in the present case are impossible for a small or medium-sized enterprise to attain. Consequently, the applicants' argument cannot be accepted.

89 Thirdly, the applicants criticise the fact that the Community institutions did not examine their accounts in the light of internationally accepted accounting standards other than the IAS.

90 However, the examination of whether the accounts of undertakings wishing to claim MES comply with the internationally accepted accounting standards chosen by the Community institutions falls within the wide discretion of those institutions. It is for the undertakings in question, if they do not agree with that choice, to prove that the standards selected by the institutions are not internationally accepted or that any infringements of those standards by its accounts do not constitute such infringements in the light of other internationally accepted standards, since the burden of proof lies with the exporting producer wishing to claim MES (see paragraph 83 above). The applicants have not proved that either is the case here.

91 Lastly, in any event, in order to reject all of the applicants' arguments it is sufficient to state that not one of them is capable of contradicting the Council's finding, set out in recital 17 in the preamble to the contested regulation, that the applicants' accounts are in breach of certain fundamental accounting concepts, such as those of accrual accounting, prudence and substance over form. To challenge properly that finding by the Council, which is amply sufficient to substantiate its assessment that the applicants do not meet the second criterion in Article 2(7)(c) of the basic regulation, the applicants would have had to prove that their accounts comply with those principles or that they comply with international accounting standards other than the IAS which themselves comply with those principles. Far from providing such proof, the applicants have merely criticised the Commission's choice of the international standards applied in the present case.

92 It follows that the third plea must be rejected.

93 Accordingly, in the light of the considerations in paragraphs 76 and 77 above, it is not necessary to examine the second plea.

B — *The first plea, alleging infringement of the second subparagraph of Article 2(7)(c) of the basic regulation*

1. *Initial observations*

94 The second subparagraph of Article 2(7)(c) of the basic regulation provides:

'A determination whether the producer meets the … criteria [mentioned in Article 2(7)(c)] shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'

95 On 2 August 2004, the Commission adopted Regulation No 1408/2004 pursuant to which the review procedure was initiated. That regulation came into force the day after it was published in the Official Journal, that is to say, on 4 August 2004.

96 On 3 August 2004, the Commission sent the applicants a form ('the MES form') concerning, first, whether they ought to be entitled to MES, provided for in Article 2(7)(b) and (c) of the basic regulation, and, second, the issue of their individual treatment. The MES form, completed separately by each applicant, was to be returned to the Commission within 15 days of the entry into force of Regulation No 1408/2004. On the same date, the Commission sent the applicants a questionnaire ('the anti-dumping questionnaire') concerning whether they were dumping in the Community. The anti-dumping questionnaire, completed separately by each applicant, was to be returned to the Commission by 13 September 2004.

97 On 19 August 2004, the applicants filed the completed MES forms with the Commission and, on 20 August 2004, they sent an English translation of a document annexed to those forms.

98 On 3 September 2004, the Commission wrote to the applicants with a request for additional information regarding their responses to the MES forms. A response was required by 13 September 2004. The Commission also wrote to the applicants requesting that a company related to them, Excell Precision Co. Ltd, established in Taiwan ('Excell Taiwan'), and any other company related to the applicants selling electronic weighing scales, complete an annex to the anti-dumping questionnaire ('the annex to the questionnaire').

99 On 20 September 2004, the applicants submitted the completed anti-dumping questionnaires to the Commission.

100 On 21 September 2004, after an extension of the deadline was granted by the Commission, the applicants responded to the abovementioned letter of 3 September 2004. On 4 October 2004, the Commission asked the applicants to provide further information.

101 On 5 October 2004, the applicants sent the Commission the annex to the questionnaire, completed separately by Excell Taiwan and by a second Taiwanese company related to them, namely Summing International Ltd.

102 Between 18 and 21 October 2004, the Commission carried out on-the-spot verifications of the information provided by the applicants in their responses to the MES forms.

103 On 26 October 2004, the Commission asked the applicants to provide information additional to that provided on their MES forms. The responses to those questions were submitted to the Commission on 3 November 2004. A further request for additional information was made by the Commission on 15 November 2004 and the responses were submitted to it on 17 November 2004.

104 On 7 January 2005, the Commission wrote to the applicants requesting that other related companies, namely Bright Advance Co. Ltd and Total Lead Ltd, established in Samoa, complete the annex to the questionnaire.

105 By letter dated 14 January 2005, the Commission informed the applicants that they would not be granted MES.

106 The annex to the questionnaire completed separately by Bright Advance and Total Lead was returned to the Commission on 25 January 2005.

2. *Arguments of the parties*

107 The applicants submit that, since a new exporter review was initiated on 4 August 2004 by Regulation No 1408/2004, the three-month period from the initiation of the investigation imposed upon the Commission by the second subparagraph of Article 2(7)(c) of the basic regulation for determining whether a producer meets the criteria required to claim MES ('the three-month period') ended on 4 November 2004. However, the Commission took a decision regarding their MES on 14 January 2005 and greatly exceeded that period without justification.

108 The applicants submit that the three-month period ensures legal certainty. It is apparent from the Communication from the Commission to the Council and the European Parliament on the treatment of former non-market economies in anti-dumping proceedings (COM(97) 677 final) and from the Proposal for a Council regulation amending the basic regulation (COM(97) 677 final), that the purpose of the three-month period is to require the Community institutions to take an irrevocable decision on MES without having an adverse effect on the normal course of the investigation. The applicants take the view that the fact that the three-month period was exceeded must entail the annulment of the contested regulation, because otherwise that period would be rendered redundant.

109 The applicants submit that they fully completed their MES forms within the prescribed period, as is clear from recital 13 in the preamble to the contested regulation. Furthermore, the Commission subsequently requested numerous items of information and clarifications, several of which had already been provided. The applicants responded within the prescribed periods and only asked for a five-day extension to respond to the letter of 3 September 2004. Other extensions were granted but they related to the responses to the anti-dumping questionnaire and not to the responses to the MES form, which was accepted without any comments as to its comprehensiveness. Similarly, the applicants acknowledge that they exceeded certain deadlines for responding to requests for information concerning their anti-dumping questionnaires, but not that they did so in connection with requests for information concerning their MES forms.

110 The applicants point out that the Commission took two months after receipt of the final responses to the requests for information relating to the MES forms to take a decision regarding their entitlement to MES. Furthermore, they submit that the Council cannot argue that the Commission's continued questioning of them justified the failure to meet the three-month period, since it was the Council's responsibility to draw a line under that process.

111 The applicants submit, lastly, that the failure to comply with the three-month period had a material influence on the decision regarding whether or not to verify the information provided by the applicants and by Toshiba Indonesia. Since the duration of a review investigation is limited to a total of nine months under Article 11(5) of the basic regulation, the investigation would have exceeded that period if the Commission had carried out a verification visit. In the absence of that verification, the calculations of the

anti-dumping margins made in the contested regulation took no account of any adjustments claimed by the applicants and could not be refined on the basis of the information provided by Toshiba Indonesia, which might have led to the result of those calculations being different.

112 The Council acknowledges that the Commission did not take a decision on MES within the three-month period, but takes the view, supported by the Commission, that that does not render the contested regulation unlawful.

3. *Findings of the Court*

113 It is common ground between the parties that the three-month period was exceeded in the present case. By contrast, they disagree on the conclusions to be drawn legally from that failure to comply with the three-month period. The applicants submit that, contrary to what the Council maintains, the three-month period is mandatory and that failure to comply with it should entail the automatic annulment of the contested regulation.

114 In that regard, the fundamental issue for the purposes of the present case is not to establish whether the three-month period is mandatory or not, but merely to consider what are the consequences of the Commission's failure to comply with that period and, in particular, to assess whether that failure to comply with the period must, in the present case, entail the annulment of the contested regulation.

115 It is necessary to reject at the outset the applicants' contention that any failure to comply with the three-month period on the part of the Commission must automatically entail the annulment of the regulation relating to the review which was adopted subsequently.

116 It must be pointed out that the second subparagraph of Article 2(7)(c) of the basic regulation does not contain any indication as regards the consequences of the Commission's failure to comply with the three-month period. In particular, that article does not specify whether such a failure to comply with the three-month period means that grant of MES becomes mandatory or the continuation of the investigation in question becomes impossible, those being the only reasons for which the contested regulation could be annulled automatically because that period had been exceeded.

117 Therefore, in so far as clarification is not provided by any other provision of the basic regulation, the Court must examine the purpose and the structure of that regulation in order to determine whether it must be interpreted as meaning that the grant of MES becomes mandatory or the continuation of the relevant review investigation becomes impossible when the three-month period is exceeded by the Commission (see, by analogy, Case C-245/03 *Merck, Sharp & Dohme* [2005] ECR I-637, paragraph 26).

118 As regards the question whether it is apparent from the purpose and the structure of the basic regulation that failure by the Commission to comply with the three-month period means that MES must be granted to the undertakings which have requested it, it must be pointed out, first, that there is a difference in the treatment that the basic regulation reserves for failure by the institutions to comply with procedural time-limits other than the three-month period.

119 Thus, for example, in the cases provided for in Article 8(5) and Article 9(2), if, within one month, the Council, acting by a qualified majority, does not take a decision contrary to a proposal submitted by the Commission that the investigation be terminated, the investigation is deemed terminated under those provisions. Likewise, if the Council does not decide by a simple majority, within a period of one month, to reject the Commission proposal referred to in Article 9(4) of the basic regulation, as amended by Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12), or that referred to in Article 14(4) of that regulation, those proposals must be adopted under the provisions in question.

120 Therefore, where the basic regulation means to penalise failure to observe a procedural time-limit on the part of the institutions by automatic acceptance of an application or by other specific consequences, it expressly states so.

121 Secondly, as Article 2(7)(b) of the basic regulation provides, in respect of certain countries, for an exception to the method of determining normal value referred to in Article 2(7)(a), that exception must be interpreted strictly (see *Shanghai Teraoka Electronic* v *Council*, paragraph 76 above, paragraph 50 and the case-law cited). It cannot, therefore, automatically apply where the Commission exceeds the three-month period, in the absence of a provision to that effect.

122 Lastly, as regards the question whether it is apparent from the purpose and the structure of the basic regulation that failure by the Commission to comply with the three-month period prevents the Community institutions from adopting a regulation imposing anti-dumping duties on the undertakings in question, the conclusion must be that, at least in the context of a review investigation such as that in the present case, the basic regulation must be interpreted as precluding such a consequence.

123 In the context of a request for a 'new exporter' review of an original regulation within the meaning of Article 11(4) of the basic regulation, one or more undertakings which are subject to an anti-dumping duty fixed at a time when they were not yet exporting the products in question to the Community request an examination of the dumping margin in light of their own economic situation in order, if successful, to have a new anti-dumping duty imposed on them, which is based solely on that situation and which may be lower than that previously applicable, and even completely abolished.

124 Accordingly, it would be inappropriate to conclude that if those undertakings were established in a country without a market economy and were requesting MES, the Commission ought to refrain from pursuing the investigation with regard to them if it exceeded the three-month period, since that would be detrimental to the purpose of

their original request, namely a review of their individual situations, and would be so for reasons beyond their control.

125 It would also be inappropriate to conclude that the Commission should begin a new investigation with regard to the undertakings in question and at their request, once the three-month period had been exceeded, since that would in practice only aggravate the failure to comply with that period by deferring the final decision on MES still further.

126 Consequently, having rejected the argument that any failure by the Commission to comply with the three-month period must automatically entail the annulment of the review regulation subsequently adopted, the Court must next consider whether the failure to comply with the three-month period in the present case must entail the annulment of the contested regulation.

127 In that regard, the three-month period imposed under the second subparagraph of Article 2(7)(c) of the basic regulation is intended, in particular, to ensure that the question whether the producer meets the criteria set out in that article is not decided on the basis of its effect on the calculation of the dumping margin. Thus, the last sentence of Article 2(7)(c) of the basic regulation prohibits the institutions, after they have adopted an MES decision, from then re-evaluating the information which was available to them in that regard (see to that effect, Case T-138/02 *Nanjing Metalink International* v *Council* [2006] ECR II-4347, paragraph 44).

128 Consequently, the practical effect of that time-limit is not called in question if, in the period between the expiry of the three-month period and the MES decision and having regard to the circumstances of the case, it had to be concluded that the undertakings claiming MES had made it impossible for the Commission to know what effect its MES decision might have on the calculation of the dumping margin.

129 In the present case, the fact that the Commission exceeded the three-month period did not enable it to decide upon the applicants' claim for MES on the basis of its effect on the calculation of the dumping margin. It is sufficient to state in that regard that the applicants had provided information on the export prices charged to related companies but not to unrelated customers, although the latter information was essential for the calculation of the dumping margin. The information regarding the export prices charged to unrelated customers was received in its entirety by the Commission only on 28 January 2005, that is to say, after the final decision on the MES claim.

130 Furthermore, as there is no obligation on the Community institutions to prove that an undertaking does not satisfy the criteria laid down for the recognition of MES, but merely to assess whether the evidence supplied by that undertaking is sufficient to show that those criteria have been fulfilled (see paragraph 83 above), the Commission cannot be required to adopt a decision on an undertaking's MES claim before a reasonable period has expired from the time when that undertaking provided it with all the necessary information to enable it, inter alia, to assess that information correctly and, as is laid down in the second subparagraph of Article 2(7)(c) of the basic regulation, to consult specifically the Advisory Committee and give the Community industry an opportunity to comment.

131 The responses to the MES forms originally provided by the applicants had to be supplemented on important points at the request of the Commission a number of times and, in particular, by the letter the applicants sent to the Commission on 21 September 2004, after the Commission had granted the applicants' request for an extension of the period for so doing. Furthermore, the Commission had to ask the applicants a further time, by its letter of 4 October 2004, to supplement their response.

132 Likewise, it is apparent from the file that the MES forms which the applicants filled out and the information they sent to the Commission in this connection were, even at a

later stage, marred by significant gaps concerning in particular the questions relating to their accounts and thus prevented the Commission from adopting a position on their entitlement to MES within the three-month period.

133 In particular, the applicants' responses left room for significant doubts as to the way in which they made the relevant accounting provisions corresponding to depreciation of assets, as is apparent from an email sent by the Commission to the applicants on 26 October 2004. The Commission could reasonably take the view that it had to have that information in order to decide whether the applicants satisfied the second criterion laid down in Article 2(7)(c) of the basic regulation.

134 Furthermore, it is apparent from the same email that the English version of Shanghai Adeptech's audited accounts, which was also necessary for the Commission to be able to take a decision on whether the applicants had satisfied the second criterion laid down in Article 2(7)(c) of the basic regulation, was incomplete.

135 Lastly, it is apparent from the email in question that the applicants had provided some information concerning Shanghai Adeptech's capital structure which conflicted with the documentary evidence sent. The applicants' capital structure is a fundamental issue in the Commission's analysis of whether they satisfy the first criterion laid down in Article 2(7)(c) of the basic regulation.

136 It is also apparent from the file, and in particular from the fax sent by the applicants to the Commission on 3 November 2004, that the information necessary to fill the gaps in question was fully provided only on that date, that is to say, the day before the three-month period expired.

137 Consequently, it is not possible to interpret the 13th recital in the preamble to the contested regulation, contrary to what the applicants maintain, as stating that their answers to the MES forms were complete. That interpretation is not apparent from the wording of the recital in question and it is also expressly disproved by the correspondence between the applicants and the Commission.

138 Lastly, it must, in any event, be concluded that, in the absence of a provision setting out either expressly or implicitly the consequences of failure to comply with a procedural time-limit such as that in the present case, the failure can entail the annulment in whole or in part of the act to be adopted within the period in question only if it is shown that, in the absence of such alleged irregularity, that act might have been substantively different (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47, and Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375, paragraph 28).

139 The applicants have not proved that, if the Commission had not exceeded the three-month period, the Council might have adopted a different regulation more favourable to their interests than the contested regulation.

140 In that regard, the applicants merely submit that the failure to comply with the three-month period had an effect on the Commission's decision to carry out on-the-spot verification visits to check the information they had provided and the information given by Toshiba Indonesia. They also submit that if those verification visits had taken place, the Commission would have had information of a better quality which might have led to the adoption of a different regulation.

141 Those arguments must be rejected for two reasons.

142 First, the applicants have not established that the fact that the Commission exceeded the three-month period is linked to its decision not to carry out the visits in question or that it had any effect at all on that decision.

143 The applicants merely submit in that regard that the duration of a review investigation such as that in the present case is limited to a total of nine months under Article 11(5) of the basic regulation and that, if the Commission had carried out the visits in question, that period would have been exceeded.

144 It is true that Article 11(5) of the basic regulation provides that review investigations pursuant to Article 11(4) of that regulation must be concluded within nine months of the date of initiation and that if the investigation is not completed within that deadline the applicable anti-dumping measures are to remain unchanged. However, the applicants do not explain why the nine-month period would have been exceeded if the Commission had carried out the verification visits which they deemed to be necessary.

145 Secondly, and for the sake of completeness, the applicants have not established that, if the Commission had carried out the verification visits which the applicants were calling for, those visits would necessarily have provided it with information which might have resulted in the adoption of a regulation more favourable to their interests than the contested regulation. The applicants cannot claim that, if the Commission had verified, by means of a visit, the information which they had themselves provided, the Council might have adopted a final regulation more favourable to their interests. Furthermore, as regards the information provided by Toshiba Indonesia, the applicants have not provided any evidence to suggest that, if the Commission had verified that information on the spot, the contested regulation might have been more favourable to them.

146 Having regard to the foregoing, this plea must be rejected.

C — *The fourth plea, alleging infringement of Article 11(9) of the basic regulation*

147 Article 11(9) of the basic regulation provides:

'In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.'

148 During the original investigation, three Chinese exporting producers decided to cooperate and received individual treatment, like the applicants during the review investigation. Those three companies, like the applicants during the review investigation, requested MES pursuant to Article 2(7) of the basic regulation.

149 As regards the Chinese exporting producers during the original investigation and the applicants during the review investigation, the Council took the view that the conditions set out in Article 2(7)(c) of the basic regulation had not been met and rejected their MES applications. Consequently, it was necessary to compare the export prices of the exporting producers in question with a normal value established for an analogous market economy country, pursuant to Article 2(7) of the basic regulation (recitals 45 to 48 and 52 in the preamble to the original regulation).

150 The institutions came to the conclusion, both in the original investigation and in the review investigation, that Indonesia was the most appropriate market economy third country for the purpose of establishing normal value (recitals 49 and 50 in the preamble to the original regulation).

151 During the original investigation, the normal value was established in accordance with Articles 2(2) and 2(3) of the basic regulation on the basis of the normal values established for an Indonesian producer, namely Toshiba Indonesia, by using the most competitive low-range segment model sold both on the Indonesian and on the export markets in significant quantities, and which was found to be comparable to the Chinese types exported to the Community (recital 53 in the preamble to the original regulation).

152 During the review investigation, normal value was also calculated on the basis of information communicated by Toshiba Indonesia. However, although the Council considered that the export sales of that producer were significant, it took the view that its sales to unrelated customers on the Indonesian market were not sufficiently representative to determine normal value and decided to base its decision on a constructed value for product types comparable to those exported to the Community by the applicants, that is to say on the basis of the manufacturing costs of the electronic weighing scales manufactured in Indonesia plus a reasonable amount for selling, general and administrative expenses ('the SGA expenses') and for profits (recitals 29 to 33 and 37 to 39 in the preamble to the contested regulation).

153 The export price was calculated, during the original investigation, in cases of sales to independent importers in the Community, by reference to the prices actually paid or payable, pursuant to Article 2(8) of the basic regulation. In cases of sales through related importers, the export price was constructed on the basis of the price at which the imported products were first resold to an independent buyer, pursuant to Article 2(9) of the basic regulation (recitals 54 and 55 in the preamble to the original regulation).

154 As the Council took the view during the review investigation that the applicants had sold their electronic weighing scales to the Community through related companies, the export price was established on the basis of the resale price paid by the first independent buyer in the Community (recital 42 in the preamble to the contested regulation).

155 During the original investigation, the Council compared the normal value and the export price on an ex-factory basis and at the same level of trade. For the purpose of ensuring a fair comparison, account was taken, in accordance with Article 2(10) of the basic regulation, of differences affecting prices and price comparability. Certain allowances for differences in transport, insurance, handling, loading and ancillary costs, credit, commissions, import charges and after-sales costs were made (recital 56 in the preamble to the original regulation).

156 During the review investigation, the Council also compared the normal value and the export price on an ex-factory basis and at the same level of trade. It took account, in accordance with Article 2(10) of the basic regulation, of differences affecting prices and price comparability. In particular, given that it had concluded that the related traders of the applicants had functions similar to those of an agent working on a commission basis, the Council adjusted the export price for a commission in accordance with Article 2(10)(i) of the basic regulation (recitals 43 to 45 in the preamble to the contested regulation).

1. *Arguments of the parties*

157 The applicants refer at the outset to a contradiction in the original regulation. Recital 50 in the preamble to that regulation states that, in view of the significant volume of domestic and export sales made by Toshiba Indonesia, normal value for the Chinese exporting producers was calculated in accordance with Article 2(2) and (3) of the basic regulation. However, it is clear from the questionnaire responses provided by Toshiba Indonesia in the course of the relevant procedure that it did not make any domestic sales of electronic weighing scales.

158 Apart from that contradiction, the applicants argue that, in the course of the review investigation, the Community institutions changed significant aspects of the methodology applied in the original investigation for determining the normal value and export price.

159 Accordingly, first, the Council took into account, in recital 37 in the preamble to the contested regulation, the SGA expenses of a company related to Toshiba Indonesia, whereas there is no reference to such additional items in the original regulation. Secondly, the Council made adjustments to the normal value for after-sales costs, guarantees, credit costs and domestic sales commissions in the original investigation but not in the review investigation (recital 43 in the preamble to the contested regulation). Thirdly, verification was carried out at Toshiba Indonesia's premises in the course of the original investigation, but not during the review investigation. However, the obligation to apply the same methodology to the two investigations extends to verifications, all the more so since, according to the Council, the conditions in which Toshiba Indonesia was operating had changed significantly. Fourthly, in recital 45 in the preamble to the contested regulation the Council introduced adjustments to the export prices, as so-called 'sales commissions' paid to related companies.

160 The Council disputes the arguments put forward by the applicants.

2. *Findings of the Court*

161 It must be borne in mind that in both the original investigation and the review investigation normal value was determined on the basis of data relating to a producer located in a country analogous to China. In both cases the analogous country chosen was Indonesia and the Indonesian producer selected was Toshiba Indonesia.

162 The applicants, however, take the view that there are certain differences in the methodologies of the two investigations once Toshiba Indonesia had been selected. According to the applicants, the existence of those differences infringes Article 11(9) of the basic regulation.

163 Consequently, it is necessary to establish whether the methodological differences relied on by the applicants exist and, if they do, to examine them in the light of the abovementioned provision in order to ascertain whether their existence infringes it.

164 The first difference in methodology between the original investigation and the review investigation highlighted by the applicants is the fact that, in calculating the normal value of Toshiba Indonesia's products in the review investigation, the Council took into account the SGA expenses of an undertaking related to that company, whereas it did not do so in the original regulation.

165 Clearly there is in fact a difference in that regard between the methodologies applied in the two investigations, as the Council itself admitted in recitals 40 and 41 in the preamble to the contested regulation. Its existence is clear from a comparison of recitals 37 and 38 in the preamble to the contested regulation and recital 53 in the preamble to the original regulation.

166 Thus, in the contested regulation the normal value of Toshiba Indonesia's products was established on the basis of the cost of production of the electronic weighing scales manufactured by that undertaking plus an amount for the SGA expenses and for profits. In that regard, the SGA expenses taken into account were those of Toshiba Indonesia itself and those of a company related to Toshiba Indonesia.

167 By contrast, in the original regulation the normal value of Toshiba Indonesia's products was calculated on the basis of the prices of those of its electronic weighing scales which were comparable to those manufactured in China and sold both on the Indonesian and on the export markets in significant quantities.

168 That difference between the two investigations is explained by the fact that, in the contested regulation, the Council calculated a constructed normal value which was not, therefore, connected to the actual selling price used by Toshiba Indonesia, whilst in the original regulation it calculated a normal value based on such prices.

169 According to Article 2(3) of the basic regulation, when there are insufficient sales of the like product, the normal value of the like product may be calculated in two ways. First, it may be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for SGA costs and for profits. Secondly, it may be calculated on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

170 As is apparent from the file and from the Council's corrigendum of 6 June 2008, the Indonesian sales of electronic weighing scales taken into account during the original investigation were insufficient to calculate the normal value of Toshiba Indonesia's products. Accordingly, the Council chose to calculate that value on the basis of Toshiba Indonesia's export prices and its domestic selling prices.

171 During the review investigation, Toshiba Indonesia's sales of the model of electronic weighing scales in question were also insufficient to allow the Council to calculate normal value on the basis of the prices of those scales. However, on that occasion, the Council decided to calculate the normal value in accordance with the first possibility provided for in Article 2(3) of the basic regulation, that is to say on the basis of the cost of production in Indonesia plus a reasonable amount for SGA costs and for profits.

172 It is thus obvious that, faced with two identical situations, namely the absence of sufficient domestic sales of Toshiba Indonesia, the Council reacted in two different ways during the two investigations in question. Consequently, the unavoidable conclusion is that there was a change in the methodology for calculating normal value

in the present case and that it was not due to a change in circumstances. Furthermore, that was expressly admitted by the Council in its corrigendum of 6 June 2008.

173 However, in the present case the fact that, in the contested regulation, the Council established the normal value of Toshiba Indonesia's products on the basis of the cost of production of the electronic weighing scales manufactured by that undertaking plus an amount for the SGA expenses and for profits, whereas, in the original regulation, it had calculated that value on the basis of the prices of those of Toshiba Indonesia's electronic weighing scales which were comparable to those manufactured in China and sold both on the Indonesian and on the export markets in significant quantities, does not constitute a change in methodology which infringes Article 11(9) of the basic regulation.

174 Indeed, the Council would have infringed Article 2(3) of the basic regulation if it had calculated normal value in the contested regulation in the same way as it did in the original regulation, namely by taking into account both Toshiba Indonesia's export prices and its domestic selling prices.

175 Thus, Article 2(3) of the basic regulation provides, as was stated in paragraph 169 above, that when there are insufficient sales of the like product, the normal value of that product may be calculated either on the basis of the cost of production in the country of origin plus a reasonable amount for SGA costs and for profits or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative; this precludes the possibility of including the price of domestic sales that are deemed to be insufficient.

176 It must be borne in mind that, although Article 11(9) of the basic regulation provides that in all review or refund investigations carried out pursuant to that article the Commission must, provided that circumstances have not changed, apply the same

methodology as in the investigation which led to the duty, it is also apparent from that article that the methodology applied must comply with Articles 2 and 17 of the basic regulation.

177 It follows that institutions are not bound to apply in a review investigation a methodology which was followed during the original investigation if that methodology does not comply with the provisions of Article 2 of the basic regulation.

178 Any interpretation to the contrary would result in an absurd situation in which the applicants would be entitled to seek annulment of the contested regulation for infringement of Article 2(3) of the basic regulation if the Council had calculated the normal value on the basis of the addition of the actual export prices and the actual Indonesian selling prices of Toshiba Indonesia, whereas if the Council had calculated a constructed normal value the applicants could seek annulment of the contested regulation for infringement of Article 11(9) of the basic regulation.

179 It follows from the above that the first difference in methodology between the original investigation and the review investigation relied on by the applicants cannot entail the annulment of the contested regulation.

180 The second difference in methodology highlighted by the applicants is the fact that, in the original investigation, the Council made certain adjustments to the normal value of Toshiba Indonesia's products for after-sales costs, although such adjustments were not made in the review investigation.

181 In that regard, it must be stated that, in an anti-dumping investigation, it may prove necessary to make adjustments, pursuant to Article 2(10) of the basic regulation, to the export price and normal value to take account of differences in factors which are claimed, and demonstrated, to affect prices and price comparability. However, such

adjustments are not generally necessary when the normal value used is a constructed value and, thus, artificially established. In such circumstances, the normal value, far from reflecting an actual figure before the removal of elements affecting its comparability, consists solely of the cost of production in question plus a reasonable amount for SGA costs and for profits. Consequently, the absence of adjustments to the normal value of Toshiba Indonesia's products calculated in the contested regulation is the direct consequence of the fact that, in that regulation, the Council used a constructed normal value.

182 As the Council rightly applied a methodology based on a constructed value (see paragraphs 177 to 179 above), the applicants cannot dispute the practical consequences of that methodology.

183 The third difference in methodology highlighted by the applicants is the fact that in recital 45 in the preamble to the contested regulation the Council introduced adjustments to the export prices as so-called sales commissions paid to companies related to the applicants, whereas it did not do so in the original regulation.

184 However, that difference, which actually exists between the two investigations in question, does not constitute a change in methodology prohibited by Article 11(9) of the basic regulation.

185 During the original investigation, the Council did not calculate the export price of the applicants, who were not the subject-matter of that investigation. It was precisely for that reason that they requested, and obtained, recognition of their status as new exporters, as is apparent from recitals 9 to 11 in the preamble to the contested regulation. Each exporter's export price must necessarily be calculated in each investigation by reference to the particular circumstances of that exporter. The calculation in the present case of the export price by applying adjustments — the result

of circumstances in which the Council took the view that the applicants were exporting their products to the Community — cannot, therefore, be held to constitute a change in methodology for the purposes of Article 11(9) of the basic regulation.

186 The final difference in methodology highlighted by the applicants is the fact that verification visits to check the information provided by Toshiba Indonesia were carried out in the course of the original investigation, whereas that was not the case in the review investigation.

187 However, the Commission's obligation, under Article 11(9) of the basic regulation, to apply in all review investigations carried out pursuant to that article, provided that circumstances have not changed, the same methodology as in the investigation which led to the duty, does not imply that it must, or must not, carry out verification visits in the review investigation according to whether or not those visits were carried out in the original investigation. The verification of an item of information cannot be regarded as part of the methodology chosen to establish the existence of dumping but merely as a means of obtaining information which makes it possible to apply the methodology in question.

188 Having regard to the foregoing, this plea must be rejected.

D — *The fifth and eighth pleas, alleging infringement of Article 2(7)(a) of the basic regulation*

189 Article 2(7)(a) of the basic regulation provides:

'In the case of imports from non-market economy countries …, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.'

190 The Council calculated the constructed normal value in respect of Toshiba Indonesia on the basis of the cost of production of its electronic weighing scales in Indonesia plus a reasonable amount for SGA expenses and for profits (recital 37).

191 For the calculation of the applicable profit margin, the Council decided, given that it had previously come to the conclusion that Toshiba Indonesia had not sold sufficient quantities to unrelated customers on its domestic market, to take the same profit margin used to construct normal value in the original investigation concerning imports of certain electronic weighing scales from Taiwan, because those scales belonged to the same range as those of Toshiba Indonesia (recital 39 in the preamble to the contested regulation).

1. *Arguments of the parties*

192 In the fifth plea, the applicants claim that even though the Community institutions have an obligation to satisfy themselves of the accuracy of the information provided to them the Commission failed to verify that provided by Toshiba Indonesia, which is therefore unsuitable for calculating constructed normal value.

193 In particular, in the light of the non-confidential versions of the information submitted by Toshiba Indonesia, that information contains several deficiencies. The table concerning profitability contains no data on production costs, purchases of finished goods or variations in inventories and adjustments. The table concerning inventories indicates no changes in inventory, which is unrealistic. The table concerning sales on the domestic market does not contain the requested information. The table concerning costs of production contains, on the one hand, information relating to direct expenses, work-in-progress and general expenses stated to be 'not applicable' or '0' and, on the other hand, unchanged figures for transport and handling costs and SGA expenses. Lastly, the total SGA expenses reported in the relevant table increased between the last financial year and the investigation procedure whereas in another table they decreased. The onus is therefore on the Council to establish that the confidential versions of the questionnaire responses of that producer are sufficiently consistent.

194 In any event, considering the large number of inadequacies in the information provided, the Commission was able to make only an approximate and therefore incorrect calculation of the constructed normal value to be applied in the review.

195 The applicants add that, by failing to verify during the review investigation the facts and information provided by Toshiba Indonesia, whereas it did so during the original investigation, the Commission discriminated against them. In that regard, the applicants state that there is no precedent in Community review investigations in which the Community institutions failed to verify both export prices and normal value.

196 Moreover, if, as the Council submits, the circumstances in the present case had changed significantly, there were even more reasons for carrying out a new investigation.

197 Furthermore, in the eighth plea, the applicants claim that the Council's calculation of the profit margin to be taken into account in determining the constructed normal value for Toshiba Indonesia infringes Article 2(7)(a) of the basic regulation. Indeed, that profit margin was derived from a different market and from a period more than five years previously, which is unusual, in particular since Toshiba Indonesia no longer makes sales on the domestic market, presumably because it is no longer as profitable as it once was.

198 With regard to the fifth plea, first, the Council argues that the decision to carry out verification visits is within the Commission's discretion. However, a visit to Toshiba Indonesia during the review investigation was unnecessary because the information it had provided was consistent with that provided in the original investigation, which was verified by the Commission, and with the documentary evidence.

199 Secondly, the Council takes the view that the information provided by Toshiba Indonesia was suitable for calculating constructed normal value and that the institutions correctly assessed that information.

200 Thirdly, the Council disputes the applicants' allegations as to the supposed inadequacies in the information provided by Toshiba Indonesia.

201 Fourthly, the Council argues that the applicants have failed to establish that they were discriminated against within the meaning of the case-law.

202 With regard to the eighth plea, the Council argues that it correctly determined the profit margin for Toshiba Indonesia when constructing the normal value in the contested regulation. Moreover, had the institutions used the actual profit margins from the few domestic sales made by the Indonesian producer, the constructed normal value would have been higher.

2. *Findings of the Court*

203 By the present pleas, the applicants rely, in essence, on three complaints. First, they maintain that the calculation the Commission made in the contested regulation in respect of Toshiba Indonesia's constructed normal value is neither reliable nor accurate on the ground that the calculation of the cost of production and SGA expenses of that company was carried out on the basis of certain information provided by that company which the applicants deem to be defective and unverified. Secondly, they maintain that the calculation of the normal value of Toshiba Indonesia's products is inaccurate on the ground that its profit margin was calculated on the basis of that of a Taiwanese undertaking. Thirdly, and lastly, the applicants submit that they have been discriminated against.

204 The choice between the different methods of calculating the dumping margin and establishing the normal value of a product require an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 41 and the case-law cited). The applicants can therefore claim that the contested regulation should be annulled on the grounds set out in the context of the first two complaints on which they rely only if they are able to show that the errors on which they rely are manifest.

205 In those circumstances, the Court considers that it should begin by examining the applicants' first two complaints separately and then examine the complaint alleging that the applicants were discriminated against.

(a) The first complaint: the constructed normal value was established on the basis of unverified and defective information

206 In essence, the applicants make two criticisms of the information provided by Toshiba Indonesia on the basis of which the constructed normal value was calculated.

207 First, the applicants maintain that the information provided by Toshiba Indonesia was not verified by means of visits and that, consequently, it is not reliable.

208 In that regard it is important to point out that failure to verify, by means of visits, information provided in the course of an anti-dumping investigation does not make that information incorrect or necessarily less reliable.

209 Although, under Article 6(8) of the basic regulation, the information supplied by interested parties and upon which findings are based must be examined by the Commission as far as possible, except in the circumstances provided for in Article 18, that is to say, in cases of non-cooperation, there is nothing to prevent it from verifying that information in the way it deems most appropriate and not solely by means of a visit. That interpretation is borne out by the fact that Article 16 of the basic regulation provides that verification visits must only be carried out where the Commission considers it appropriate.

210 Therefore, it is necessary to examine whether the Commission sufficiently verified the information provided by Toshiba Indonesia by means other than a verification visit.

211 In that regard, the Council maintains that the information provided by Toshiba Indonesia was consistent with that provided in the original investigation and with the documentary evidence provided by that company. The applicants have not disputed that assertion.

212 Furthermore, the Community institutions could legitimately take account, when evaluating the expediency of visits to verify the information provided by Toshiba Indonesia in the review investigation, of the fact that that company had already provided information during the original investigation and, therefore, had already allowed the institutions in question to test the reliability of the information provided, including by means of visits, on dates reasonably close to those on which the review examination took place.

213 Accordingly, it must be held that the institutions concerned did not make a manifest error of assessment in deciding that it was not necessary to verify further, by means of a visit, the information provided by Toshiba Indonesia.

214 Secondly, the applicants maintained, albeit very succinctly, that there are some specific deficiencies in the information provided by Toshiba Indonesia which they discovered by examining their non-confidential versions and from which it is apparent that the Commission was able to make only an approximate and therefore incorrect calculation of the constructed normal value to be attributed to Toshiba Indonesia.

215 First, they claim that the information provided by Toshiba Indonesia in a table specifically concerning its profitability contains no data on production costs, purchases of finished goods or variations in inventories and adjustments.

216 It must, however, be pointed out that, in the contested regulation, the Council did not calculate Toshiba Indonesia's constructed normal value on the basis of that company's own profit margin, but on the basis of the profit margin of a Taiwanese company. Accordingly, even if the information provided by Toshiba Indonesia in the table concerning its profitability were incomplete, that could not have had the slightest influence on the calculation of the constructed normal value. Consequently, any criticism of that information by the applicants is irrelevant.

217 Secondly, the applicants claim that the information provided by Toshiba Indonesia in a table specifically concerning inventories indicates no changes in inventory, which is unrealistic.

218 It must be pointed out in that regard that the applicants have in no way explained how that information was used or should have been used to calculate the constructed normal value and that, therefore, they cannot claim that its erroneous nature may have affected the calculation of that value. Moreover, the Council has stated, without being contradicted by the applicants, that Toshiba Indonesia shipped its products to a related undertaking, namely Toshiba TEC Singapore ('Toshiba Singapore'), which was responsible for sales of weighing scales and therefore inventory as well, and that explains the fact referred to by the applicants (see, in that regard, paragraphs 259 to 262 below). Consequently, it must be held that the applicants have not shown that there is any deficiency in the table in question which is capable of calling into question the calculation of the normal value.

219 Thirdly, the applicants claim that the information provided by Toshiba Indonesia in a table specifically concerning sales on the domestic market does not correspond to the information requested by the Commission.

220 It must be pointed out, however, that the applicants have in no way explained how the information which was allegedly not provided should have been used to calculate the constructed normal value and that, therefore, they cannot claim that the absence of that information may have affected the calculation of that value. Furthermore, the Council has stated, without being contradicted by the applicants, that that table is concerned with information on the whole of Indonesia and not on Toshiba Indonesia itself, which had no information concerning other producers, imports and exports of the product concerned in Indonesia; that explains why that table does not contain part of the information requested by the Commission.

221 Consequently, it must also be held that the applicants have not shown that there is any deficiency in the table in question which is capable of calling into question the calculation of the normal value.

222 Fourthly, the applicants claim that the information provided by Toshiba Indonesia in a table specifically concerning costs of production contains, on the one hand, information relating to direct expenses, work-in-progress and general expenses

stated to be 'not applicable' or '0' and, on the other hand, unchanged figures for transport and handling costs and SGA expenses.

223 The Council has stated as regards the information relating to direct expenses, work-in-progress and general expenses, without being contradicted by the applicants, that the entries 'not applicable' or '0' are to be explained by the fact that Toshiba Indonesia gave information on its own costs regarding a model of electronic weighing scale which, after manufacturing, was shipped to Toshiba Singapore. Therefore, it is Toshiba Singapore which bears almost all of the expenses concerned.

224 Furthermore, it is apparent from the file that the questionnaire sent in the present case by the Commission to Toshiba Indonesia uses a standard structure which is designed for a number of products and contains, among other items, several tables divided into predefined cells. As stated by the Council, certain cells may not be used for certain products or models. In those circumstances, the response sent by the recipient of the questionnaire at issue can only state values like '0' or 'not applicable' and, therefore, the applicants cannot reasonably criticise the information in question on the ground of those entries without stating, even briefly, how the information in the cells concerned would have been relevant.

225 The Council also stated, without being contradicted by the applicants, that, in the table in question, Toshiba Indonesia only provided data in respect of electronic weighing scales and not in respect of other products, which explains why the column headed 'All products' always shows the entry 'not applicable'.

226 As regards the fact that the figures for transport and handling costs and SGA expenses remain unchanged, it is sufficient to point out that the applicants do not explain, even

briefly, how that shows that the table in question contains incorrect information. Therefore, the applicants cannot rely on that alleged error to dispute the legality of the contested regulation.

227 It follows that the applicants have not shown that the information provided by Toshiba Indonesia in the table in question is deficient.

228 Fifthly, the applicants submit that the increase in the total SGA expenses reported in the relevant table between the last financial year and the investigation procedure is not credible since the total decreased in another table.

229 It must be pointed out that the applicants again merely call in question the accuracy of a piece of information without explaining how it ought to have been used to calculate the constructed normal value. Thus they cannot claim that the existence of that very specific information among the large quantity of data provided by Toshiba Indonesia on which the calculation of the constructed normal value was based could in the present case have affected that calculation.

230 In any event, the table concerning the SGA expenses relates to all the products manufactured by Toshiba Indonesia while the other table to which the applicants refer relates only to the specific model used to calculate the normal value, which explains the difference pointed out by the applicants.

231 Having regard to the foregoing, it must be held that the applicants have not succeeded in showing that the Commission was able to make only an approximate and therefore incorrect calculation of the constructed normal value attributed to Toshiba Indonesia on the basis of the information provided by that undertaking. Accordingly, the present complaint cannot be upheld.

(b) The second complaint: manifestly inappropriate nature of the profit margin attributed to Toshiba Indonesia

232 It must be pointed out, at the outset, that the applicants do not dispute that the profit margin attributed to Toshiba Indonesia by the Council when constructing the normal value was reasonable.

233 The applicants merely claim that it was illogical to establish that margin on the basis of that attributed to a Taiwanese company in the original investigation, because the Taiwanese market is different from the Indonesian market and the period of the original investigation was prior to the period of the review investigation.

234 However, the applicants have not submitted to the Court any evidence capable of proving that it is manifestly incorrect to take the view that the profit margin achieved five years before the beginning of the review investigation by a Taiwanese company manufacturing — as the Council states without being contradicted by the applicants — electronic weighing scales of the same range as those of Toshiba Indonesia may reasonably be attributable to the latter when constructing its normal value.

235 In particular, the applicants have not proved that the conditions under which the electronic weighing scales were marketed in Taiwan and Indonesia over those two periods were different and still less that those differences were likely to affect the profit margins of companies marketing electronic weighing scales in those two countries to such an extent that it is manifestly unreasonable to use the profit margin of a Taiwanese undertaking to calculate the profit margin attributable to an Indonesian undertaking when the latter's actual margin cannot be used.

236 It follows that the present complaint cannot be upheld.

(c) The third complaint: discrimination

237 The applicants maintain, in essence, that they were discriminated against because the information provided by Toshiba Indonesia was verified by means of a visit during the original investigation but not during the review investigation.

238 It must be pointed out in that regard that compliance with the principles of equality and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 72, and Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56).

239 The applicants have not shown that the review investigation and the original investigation constituted comparable situations, in particular as regards the credibility which the Community institutions should have given to the information provided by Toshiba Indonesia in both cases. In particular, the review investigation concerned a producer who had already been the subject of the original investigation and, therefore, had already allowed the Commission to test the reliability of the information provided, which was not the case at the time of the original investigation (see paragraph 212 above).

240 Accordingly, the complaint alleging discrimination must be rejected.

E — *The sixth and seventh pleas, alleging infringement of Article 2(10) of the basic regulation*

241 Article 2(10) of the basic regulation, as amended by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, p. 1) provides:

'A fair comparison shall be made between the export price and the normal value. 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. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

…

(i) Commissions

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration. The term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

…’

242 In the contested regulation, normal value was calculated on the basis of the cost of production of the electronic weighing scales manufactured by Toshiba Indonesia plus, first, a reasonable amount for its SGA expenses, which was calculated by adding a part of Toshiba Singapore’s SGA expenses to Toshiba Indonesia’s SGA expenses, and, secondly, a reasonable amount for Toshiba Indonesia’s profits (recitals 29 to 33 and 37 to 39).

243 As the Council found that the applicants had sold their electronic weighing scales to the Community through related companies, the export price was established on the basis of the resale prices paid by the first independent buyer in the Community.

244 In the contested regulation, when comparing the normal value and the export price on an ex-factory basis and at the same level of trade, the Council took account, in accordance with Article 2(10) of the basic regulation, of differences in factors which affect prices and price comparability. In particular, given that it had come to the conclusion that the related traders of the applicants have functions similar to those of an agent working on a commission basis, the Council made an adjustment to the export price for a commission in accordance with Article 2(10)(i) of the basic regulation (recitals 43 to 45).

1. *Arguments of the parties*

245 In the sixth plea, the applicants argue that, in order to determine the constructed normal value, only Toshiba Indonesia’s SGA expenses relating to domestic sales should be taken into account. However, Toshiba Singapore, a part of whose SGA expenses was included by the Council in the calculation of that value, is engaged in a wide range of

activities which have nothing to do with the Indonesian market, since it performs regional coordination and sales functions but does not make any sales in Indonesia. The applicants therefore take the view that the Council constructed an export price rather than an Indonesian sales price.

246 The applicants add that two undertakings related to Toshiba Indonesia, namely Toshiba Singapore and Toshiba TEC Corporation, established in Japan ('Toshiba Japan'), should have been regarded as agents for Toshiba Indonesia. Therefore, the Council should have applied a deduction to the constructed normal value corresponding to the sales commissions paid, at the very least on the ground that those deductions were made in calculating the export price.

247 In the seventh plea, the applicants dispute that the Community institutions are entitled, on the basis of Article 2(10) of the basic regulation, to deduct from the applicants' export price so-called 'commissions' in respect of the sales activities of the companies related to them. In Case T-88/98 *Kundan and Tata* v *Council* [2002] ECR II-4897, paragraph 95, the Court of First Instance held that, in order to apply such deductions, the institutions must 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. However, the situation at the origin of that case was no different from that in the present case and no sums were paid.

248 With regard to the sixth plea, the Council argues that the sales of Toshiba Indonesia, which is only a factory, were made through Toshiba Singapore. For that reason, the proportion of SGA expenses incurred by Toshiba Singapore attributable to the Indonesian sales was added to Toshiba Indonesia's expenses.

249 As regards the adjustments for commission, the Council argues that the applicants made their sales in the Community through related companies and, consequently, their export price was constructed on the basis of the prices paid by the first independent buyer within the Community. The Council points out that those sales companies performed functions similar to those of an agent, since they determined the selling prices, received orders directly from customers and were responsible for invoicing those orders. Since agents usually receive commission, an amount for that purpose should be deducted from the price charged to the first independent buyer.

250 On the other hand, since the normal value was constructed taking into account the SGA expenses of Toshiba Indonesia and Toshiba Singapore and not those of Toshiba Japan, which made the final sales on the Indonesian market, it would not have been appropriate to make an adjustment for commissions, even if Toshiba Japan performed the functions of an agent.

251 With regard to the seventh plea, the Council argues that the institutions correctly deducted commissions in respect of the sales activities of the companies related to the applicants when comparing the normal value and the export price.

252 The Council notes that the applicants do not challenge the reasons, set out in recital 53 in the preamble to the contested regulation, for making an adjustment for commissions to their export prices. The applicants merely assert that in the absence of any payment no adjustment should have been made, without substantiating that assertion in any way whatsoever. However, since the sales companies and the applicants are related, it is of little importance whether the commission was actually paid, since the present case is different from that in *Kundan and Tata* v *Council*, paragraph 247 above, in which the exporter and the sales company were unrelated.

253 Moreover, the applicants' interpretation of that judgment disregards the fact that Article 2(10)(i) of the basic regulation was amended by Regulation No 1972/2002 and now provides that the term 'commissions' is to be understood as including the mark-up

received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

2. *Findings of the Court*

254 In the two pleas at issue, the applicants rely, in essence, on three complaints. They maintain that, in the contested regulation, the Council incorrectly calculated the constructed normal value, first, by including Toshiba Singapore's SGA expenses in that calculation and, secondly, by not making adjustments for agency commissions to Toshiba Singapore and Toshiba Japan. Thirdly, the applicants submit that, in the contested regulation, the Council incorrectly calculated their export prices by making adjustments for agency commissions payable to companies related to the applicants which made sales in the Community.

255 It must therefore be examined whether the applicants have succeeded in proving the three errors mentioned above. It must be borne in mind, as pointed out in paragraphs 80 and 204 above, that in appraisals of complex economic situations, such as that of the present case, judicial review is limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. Accordingly, the present pleas can be upheld only if the errors in question were manifest.

(a) The inclusion of Toshiba Singapore's SGA expenses in the calculation of the constructed normal value

256 The applicants do not dispute that the actual amount of the SGA expenses which the Council attributed to Toshiba Indonesia in the contested regulation when constructing the normal value is reasonable. They merely maintain that it was unreasonable to establish that amount on the basis of a part of Toshiba Singapore's SGA expenses on the ground that that company does not make sales on the Indonesian market.

257 However, the methodology the Council chose to calculate the SGA expenses attributable to Toshiba Indonesia in the present case is not manifestly incorrect.

258 According to the scheme of the basic regulation, the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or in the exporting country and consequently it is the expenses relating to sales on the domestic market which must be taken into account in calculating the constructed value (see, by analogy, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 64, and the case-law cited). In constructing the normal value, the institutions do not have to take into account the actual expenses of the company under consideration, but a reasonable estimate of the SGA expenses that that company would have to bear if it marketed the product in question in sufficient quantities in its State of origin.

259 In that regard, it is important to point out that the Council has stated, without being contradicted by the applicants, that Toshiba Indonesia solely pursues manufacturing activities and not marketing activities. It has also submitted that all Toshiba Indonesia's sales were made through Toshiba Singapore, which in turn resold part of the products on the Indonesian market through Toshiba Japan and its related distributor, KDS.

260 Those assertions by the Council are, moreover, borne out by the documents in the file. It is apparent from the information which Toshiba Indonesia provided to the Commission that that company does not directly sell electronic weighing scales in Indonesia, but that it ships all of its products to Toshiba Singapore. It is also apparent from that information that Toshiba Singapore in turn makes no direct sales in Indonesia, but sells solely through Toshiba Japan, which in turn sells in Indonesia through its related company KDS.

261 As all the electronic weighing scales manufactured by Toshiba Indonesia were shipped to Toshiba Singapore and some of those scales were sold in Indonesia by Toshiba Japan, it is not manifestly incorrect to conclude that those scales must necessarily have been sent by Toshiba Singapore to Toshiba Japan.

262 Consequently, the Council was right to decide, in the contested regulation, that the reasonable amount of SGA expenses attributable to Toshiba Indonesia could be established on the basis of the costs actually borne by that company plus a percentage of the costs borne by Toshiba Singapore. That increase merely corrects Toshiba Indonesia's abnormally low SGA expenses, which are connected with the fact that it carries out no commercial activities, and takes account of the fact that part of Toshiba Singapore's marketing efforts, and therefore the expenses relating thereto, are attributable to the Indonesian market.

263 Consequently, the present complaint must be rejected.

(b) The absence of adjustments for agency commissions to Toshiba Singapore and Toshiba Japan

264 The applicants submit that, when calculating the constructed normal value, the Council should have made adjustments for agency commissions to Toshiba Singapore and Toshiba Japan. The applicants take the view that those companies meet the

conditions to be regarded as agents of Toshiba Indonesia and, therefore, that the institutions should have applied a deduction for sales commissions to the constructed normal value.

265 That argument must however be rejected, without the need to establish whether Toshiba Japan and Toshiba Singapore must be regarded as agents of Toshiba Indonesia.

266 The practice of making deductions for agency commissions may prove to be necessary, under Article 2(10) of the basic regulation, to take account of differences between the export price and the normal value which affect their comparability. However, such deductions cannot be made with respect to a value which has been constructed and which is not, therefore, genuine. That value is not generally affected by factors which might damage its comparability, such as agency commissions, because it has been artificially established by adding together various items, but not including payments or profit margins received by distributors which are similar to such a commission and must be deducted.

267 In any event, it must be borne in mind that the Council, in calculating Toshiba Indonesia's constructed value, added a percentage of Toshiba Singapore's SGA expenses to Toshiba Indonesia's production costs and SGA expenses solely on account of the very limited, if not non-existent, commercial activities of the latter. Consequently, it did not make a manifest error of assessment by not deducting an amount for agency commission to Toshiba Singapore from the normal value. The fact that Toshiba Singapore's SGA expenses were taken into account merely makes up for Toshiba Indonesia's abnormally low SGA expenses, which stem from its limited commercial activities, and does not constitute a methodology for establishing what might be a sufficient and therefore reasonable amount of SGA expenses to attribute to a company which markets electronic weighing scales in Indonesia.

268 As regards Toshiba Japan, it must also be concluded that the Council did not have to deduct an agency commission from the constructed value. Rightly or wrongly, no percentage of Toshiba Japan's SGA expenses was taken into account in constructing the normal value of Toshiba Indonesia's products and that favoured the applicants. It would therefore be manifestly inappropriate to deduct any amount for commissions attributable to Toshiba Japan from that value.

269 It follows that the present complaint must be rejected.

(c) The adjustments to the export price in respect of agency commissions

270 The Council took the view in recital 42 in the preamble to the contested regulation that the applicants sold their electronic weighing scales to the Community through related companies registered in Samoa and Taiwan and it therefore established the export price on the basis of the resale prices paid or payable by the first independent buyer in the Community. In recital 45 in the preamble to the contested regulation, the Council explained that those marketing companies had functions similar to those of an agent working on a commission basis and that, therefore, an adjustment to the export price for a commission had to be made in accordance with Article 2(10)(i) of the basic regulation.

271 The applicants maintain that the Council should not have made that deduction from the export prices on the ground that no commission was actually paid.

272 The applicants base their argument, in essence, on the fact that in *Kundan and Tata* v *Council*, paragraph 247 above, the Court found that it was 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 could only be made to take account of differences

in factors which affect the prices and therefore their comparability and that that was not the case for a commission which had not actually been paid (paragraph 94 of the judgment).

273 The applicants' argument must nevertheless be rejected.

274 It must be borne in mind that in *Kundan and Tata* v *Council*, paragraph 247 above, the Court found, inter alia, that to be able to make an adjustment in respect of commissions the institutions would have had to base their decision on factors capable of showing, or of giving rise to the inference, that a commission had in fact been paid and was such as to have a definite effect on the comparison between the export price and the normal value (paragraph 95 of the judgment).

275 In that judgment (paragraph 96), the Court came to the conclusion that, 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 (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 for commission, to base their decision on direct evidence or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made, and to determine its effect on price comparability.

276 However, it is important to point out that the judgment in *Kundan and Tata* v *Council*, paragraph 247 above, was delivered at a time when the legal framework for deductions which could be made from the amount of the export price in respect of commissions was different than that applicable at the time of the review investigation.

277 Indeed, at the time when the judgment in *Kundan and Tata* v *Council*, paragraph 247 above, was delivered, Article 2(10) of the basic regulation provided, as it did when the contested regulation was adopted, that, in comparing 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'.

278 Likewise, at the time when the judgment in *Kundan and Tata* v *Council*, paragraph 247 above, was delivered, Article 2(10)(i) of the basic regulation provided, as it did when the contested regulation was adopted,'[that] an adjustment shall be made for differences in commissions paid in respect of the sales under consideration'.

279 However, a second sentence was added to the above provision, pursuant to Article 1(5) of Regulation No 1972/2002, after the judgment in question had been delivered. Thus, the second sentence of the provision now provides that '[t]he term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.'

280 As set out in recital 6 in the preamble to Regulation No 1972/2002, the rationale for the insertion of the sentence in question in Article 2(10)(i) of the basic regulation is to clarify, in line with the consistent practice of the Commission and the Council, that such adjustments should also be made if the parties do not act on the basis of a principal-agent relationship, but achieve the same economic result by acting as buyer and seller.

281 Therefore, Article 2(10)(i) of the basic regulation allows an adjustment to be made not only for differences in commissions paid in respect of the sales under consideration, but also for the mark-up received by traders of the product if they carry out functions which are similar to those of an agent working on a commission basis.

282 It follows that the sole argument relied on by the applicants against the deduction made, namely that no commission was paid to the marketing companies which are related to them, is not such as to call into question the legality of that deduction, since a deduction may also be made if no commission has actually been paid but the traders in question carry out functions similar to those of an agent and receive a mark-up.

283 In that regard the applicants do not dispute the assertions made in recitals 45 and 53 of the preamble to the contested regulation that companies which market the applicants' electronic weighing scales in the Community have functions similar to those of an agent working on a commission basis, in particular because they invoice all the export sales to unrelated customers, determine the selling prices, and directly receive customer orders.

284 It must also be borne in mind that the applicants also do not dispute that their related companies resell their electronic weighing scales to unrelated customers at a higher price than that which they paid for those scales and thus receive a mark-up.

285 In any event, the applicants' argument cannot be upheld even if it could be interpreted as meaning that the Council, in the contested regulation, did not prove that the marketing companies related to the applicants received a mark-up for their activities.

286 It is not manifestly incorrect to take the view, as the Council did, that the price the marketing companies invoice to their unrelated customers must necessarily be payment for the participation by those companies in the marketing of the relevant products in the Community or, at the very least, cover the costs connected with that participation. Those companies could not otherwise be regarded, as the Council did in

the contested regulation, without being contradicted, as having functions which are similar to those of an agent working on a commission basis.

287 Furthermore, in the present case the Council calculated a reasonable mark-up for the marketing companies related to the applicants on the basis of genuine data.

288 It is apparent from recital 45 in the preamble to the contested regulation, which was not challenged by the applicants, that the deduction was calculated on the basis of the SGA expenses of the marketing companies related to the applicants. Consequently, the Council established the mark-up of those companies solely on the basis of their expenses, which manifestly have to be covered by the difference between the selling price and the buying price of the electronic weighing scales they market, without even adding an amount corresponding to a profit margin.

289 The present complaint and, consequently, the two pleas in question must therefore be rejected.

290 Having regard to the foregoing, the action must be dismissed in its entirety.

Costs

291 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council.

292 The Commission must bear its own costs pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Shanghai Excell M&E Enterprise Co. Ltd and Shanghai Adeptech Precision Co. Ltd to bear their own costs and to pay those incurred by the Council;

3. Orders the Commission to bear its own costs.

Tiili Dehousse Wiszniewska-Białecka

Delivered in open court in Luxembourg on 18 March 2009.

[Signatures]

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