

OPINION OF ADVOCATE GENERAL

BOT

delivered on 27 January 2011¹

1. The present appeal concerns the provisions applicable to the calculation of anti-dumping duties where the product in question is imported from a State which does not have a market economy.

2. Council Regulation (EC) No 384/96² enables the European Commission and the Council of the European Union to impose pecuniary sanctions on undertakings which dump imports in the European Community, that is, broadly speaking, which sell the product in question at a lower price than that at which it is sold on the undertaking's domestic market.

3. In accordance with the basic regulation, sanctions may be imposed in respect of such a practice only if the following two conditions are met; first, the product in question must be sold in the Community at a price below 'normal' value and, second, the practice must cause injury to the Community.

4. In order to verify whether the first condition has been met, it is therefore necessary to compare the price at which the product in question is sold within the Community, namely the export price, with its normal value. That comparison requires each of those values to be determined as a preliminary step. The basic regulation lays down the criteria to be used for the purpose of those calculations.

5. As a general rule, normal value corresponds to the price at which the product in question is sold in the exporting State. However, where that price is unknown or cannot be identified because the undertaking does not market the product in question in its own State or that State does not have a market economy, the basic regulation provides other criteria, which include, as a final criterion, the price payable in the Community for a like product, calculated by including a reasonable profit margin.

6. Moreover, the basic regulation requires a fair comparison to be made between the export price and the normal value, that is, at the same level of trade.

¹ — Original language: French.

² — Regulation 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 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12) ('the basic regulation').

7. The issue on which the present case centres relates to compliance with that condition.

8. In Regulation (EC) No 1136/2006,³ the definitive regulation fixing the anti-dumping duties owed by Dongguan Nanzha Leco Stationery Mfg. Co. Ltd ('the appellant'), the Council considered that the normal value of the product in question was to be determined, in the absence of any other relevant information, on the basis of the information available in the complaint submitted by the Community industry. It therefore fixed the normal value on the basis of the costs of manufacturing and the general and administrative costs of Community producers, including a reasonable profit.

9. However, it deducted from that calculation the direct-sales expenses on the ground that the appellant markets all its products, both in its State of establishment and for export, through 'related companies', that is companies of which it is or which are its principal shareholder.

10. The export price was determined on the basis of the selling price charged for the product on the Community market by related companies. However, in order to compare that export price with the normal value at

the same level of trade, that is, at the stage at which the product leaves the appellant's production line, the Council applied an adjustment to that price by deducting the percentage corresponding to sales expenses and the profits of the related companies.

11. In its judgment of 23 September 2009 in *Dongguan Nanzha Leco Stationery v Council*,⁴ the Court of First Instance of the European Communities (now 'the General Court') dismissed the action brought by the appellant against the definitive regulation. It considered, inter alia, that the adjustment applied by the Council to the export price was consistent with the basic regulation.

12. That finding is challenged in the present appeal. The appellant submits that the General Court erred in law by considering that the normal value corresponded to the level at which the products leave its production line. According to the appellant, under the basic regulation, the normal value must necessarily correspond to the price at which the product in question would have been sold on the domestic market if the State had a market economy.

13. It follows, according to the appellant, that the normal value and the export price had to be compared at the stage at which the product is sold for the first time to an independent

³ — Regulation of 24 July 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of lever arch mechanisms originating in the People's Republic of China (OJ 2006 L 205, p. 1) ('the definitive regulation').

⁴ — Case T-296/06 ('the judgment under appeal').

operator, that is at the stage at which the final related undertaking sells the product.

14. The appellant infers from this that the General Court also erred in law in finding that the adjustment of the export price designed to deduct the costs of marketing on the Community market was consistent with the provisions of the basic regulation which require a fair comparison to be made.

15. In this Opinion, I shall set out the grounds on which, in my view, the appeal must be dismissed as unfounded.

16. I will state that the object of the appeal is not to call into question the General Court's finding that the normal value was calculated in accordance with the provisions of the basic regulation. In its appeal, the appellant simply submits that the General Court erred in law in considering that the normal value corresponded to the stage at which the product concerned leaves the appellant's production line, so that the adjustment applied by the Council to the export price complied with the requirement for a fair comparison.

17. I shall argue that, since the legality of the calculation of the normal value is not disputed and it is accepted that the normal value

was determined in such a way as to reflect the value of the product at the stage at which it leaves the appellant's production line, the appellant cannot criticise the Council for applying an adjustment to the export price designed to restore it to that stage, that is the stage before the related companies which market the product became involved.

18. I will therefore propose to the Court that it should find that the General Court did not err in law in considering that the adjustment at issue was consistent with the basic regulation.

I — Legal and factual background

A — The basic regulation

19. Article 2(1) to (7) of the basic regulation defines the normal value of products which are regarded as having been dumped. Those provisions are worded as follows:

‘1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

...

3. Where there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative 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. ...

...

(b) In anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any non-market economy country which is a member of the [World Trade Organisation (WTO)] at the date of the initiation of the investigation, 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 subparagraph (a) shall apply.

...

7. (a) 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.

20. Article 2(8) of the basic regulation provides as follows:

‘The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.’

21. Article 2(10) of the basic regulation is worded as follows:

‘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.

...

B – *The facts and the definitive regulation*

22. The facts and the content of the definitive regulation are set out as follows at paragraphs 8 to 24 of the judgment under appeal.

23. The appellant is a company governed by Chinese law with its headquarters in Dongguan (China). It manufactures lever arch mechanisms⁵ used for securing sheets of paper in binders or files.

24. The appellant sells all of its production to World Wide Stationery Ltd⁶ via its principal shareholder, Leco Stationery Manufacturing Co. Ltd.⁷ WWS and LECO are both established in Hong Kong (China). WWS then resells the LAMs manufactured by the appellant to customers on the Chinese market and, also, for export outside China to the European Community and to other non-member countries.

25. On 11 March 2005, a complaint was made to the Commission by three Community producers, which together accounted for more than 50% of the total production of LAMs within the Community. The complaint was supported by IML Industria Meccanica Lombarda Srl.

5 – 'LAMs'.

6 – 'WWS'.

7 – 'LECO'.

26. On 28 April 2005, a notice of initiation of an anti-dumping proceeding concerning imports of LAMs originating in China was published, in accordance with Article 5 of the basic regulation, in the *Official Journal of the European Union*.⁸

duty of 33.3% on imports of LAMs manufactured by the appellant from 28 January 2006, and of 48.1% on all other imports of LAMs originating in China.

27. During that procedure, the appellant made a request for market economy treatment (MET), pursuant to Article 2(7)(b) and (c) of the basic regulation, and, in the alternative, a request for individual treatment (IT), pursuant to Article 9(5) of that regulation. The Commission rejected the appellant's first request but accepted the second.

30. The normal value of LAMs for exporting producers not granted MET status, such as the appellant, was established, in accordance with Article 2(7)(a) of the basic regulation, on the basis of verified information received from a producer in an analogue State. The Commission made a provisional finding that Iran was the most appropriate choice in that regard.

28. The Commission did not carry out a verification visit to Dongguan or Hong Kong in the course of the investigation.

29. On 26 January 2006, the Commission adopted Regulation (EC) No 134/2006 imposing a provisional anti-dumping duty on imports of lever arch mechanisms originating in the People's Republic of China.⁹ That regulation imposed a provisional anti-dumping

31. The export price for LAMs, for the export sales to the Community of the exporters granted IT which were made via related companies established outside the Community, was determined on the basis of resale prices to independent customers in the Community, in accordance with Article 2(8) of the basic regulation. In particular, the export price of the appellant's LAMs was established on the basis of the prices applied by WWS to the first independent customer within the Community, with a deduction of 12.6% for certain costs incurred between the factory gate and the Community border (namely, transport, insurance, handling etc.).

⁸ — OJ 2005 C 103, p. 18.

⁹ — OJ 2006 L 23, p. 13 ('the provisional regulation').

32. At paragraph 17 of the judgment under appeal, the General Court then states:

‘Under the provisional regulation, the normal value and the export prices were compared on an ex-factory basis and at the same level of trade. For the purpose of a fair comparison between the normal value and the export price, due account was taken, in accordance with Article 2(10) of the basic regulation, of differences which were claimed and demonstrated to affect prices and their comparability. As regards the applicant, an adjustment was made on the basis of Article 2(10)(i) of the basic regulation, as the export sales were made via a related company established in a country other than the country concerned or outside the Community. That adjustment consisted in a deduction, from the export price of LAMs, of 18.6% for sales, general and administrative (“SG&A”) expenses of WWS; of 1.8% for those of LECO; and of 5% in respect of a reasonable profit margin.’

33. On 24 July 2006, the Council adopted the definitive regulation, in which the definitive dumping margin applicable to the appellant was fixed at 27.1%, while for other manufacturers it was 47.4%.

34. As regards the normal value of the LAMs, the Council stated in the definitive regulation that, following a further analysis of all the

information obtained from the producer in Iran, it had to be concluded that that information was incomplete and/or inconsistent and therefore could not be used as the basis for the calculation of the normal value of the LAMs at the definitive level. Recourse was therefore had to another reasonable basis for the calculation of the normal value, in accordance with Article 2(7)(a) of the basic regulation. In that regard, it is stated in the definitive regulation that, due to a lack of information from other third countries in which LAMs are produced, the view was taken that the data available from the complaint and from the Community industry constituted the most reasonable basis on which to establish the normal value of LAMs at the definitive level. The definitive regulation further indicates that adjustments were made to reflect specific verified data obtained during the investigation, in particular concerning prices of raw materials and freight.

35. The export price was established in accordance with the method described in the provisional regulation.

36. The General Court went on to state at paragraph 24 of the judgment under appeal:

‘According to the definitive regulation, the normal value and the export prices were compared at ex-factory level and at the same level of trade. For the purpose of a fair comparison between the normal value and the export

price, as regards the applicant, contrary to the first allegation set out in its letter of 3 March 2006, the adjustment to WWS' export price in accordance with Article 2(10)(i) of the basic regulation was maintained. The Community institutions confirmed their position that the relationship between the applicant, on the one hand, and LECO and WWS, on the other, was similar to that of a trader working on a commissions basis. However, an examination of the applicant's second allegation in the letter of 3 March 2006, to the effect that some of LECO's and WWS's sales expenses had been counted twice, confirmed that a clerical error had been made in the calculation of those expenses. This led to WWS's deduction for SG&A expenses being reduced from 18.6% to 3.2%. Ultimately, the adjustment effected by the Community institutions consisted in a deduction of 3.2% from the export price, by way of, inter alia, WWS's direct-sales, administrative and other general expenses, 1.8% for LECO, and 5% as the profit margin for the two companies together.'

appellant brought an action before that court for annulment of the definitive regulation, in so far as the regulation applies to it, and for an order that the Council pay the costs.

38. It put forward two pleas in law in support of that action. In the first part of the first plea, it submitted that the definitive regulation was flawed because it infringed Article 2(10) of the basic regulation, in that the institutions compared the normal value and the export price of LAMs at different levels of trade.

39. The arguments put forward by the appellant and the relevant grounds of the General Court are set out at paragraphs 34 to 53 of the judgment under appeal. They are as follows:

'The first part: infringement of Article 2(10) of the basic regulation

C — The relevant grounds of the judgment under appeal

Arguments of the parties

37. By application lodged at the Registry of the General Court on 19 October 2006, the

34 The applicant maintains, in essence, that, in making an adjustment for direct-sales,

general and administrative expenses, and for LECO'S and WWS's profits, to the export price of the LAMs produced by it, the institutions compared the normal value and the export price at different levels of trade, thereby infringing Article 2(10) of the basic regulation.

in that regard that the sales price of the LAMs manufactured by it on the Chinese market is WWS's starting price because, as it stated in a number of sections of the questionnaire sent to it by the Commission at the start of the investigation procedure, WWS sells all of its production, whether destined for China or for export.

35 The applicant begins by observing that, according to the definitive regulation, the normal value of the LAMs was determined on the basis of the data available in the complaint [and] from the Community industry. The applicant states in this regard that that determination must have been made according to the principles of the basic regulation, in particular those laid down in Article 2(1) and (3) of that regulation. Under those provisions, the normal value of the products should correspond to the price of the products as sold on the domestic market, which must be more than the costs of manufacture plus SG&A expenses.

37 According to the applicant, it thus follows that the adjustment made by the institutions to WWS's export prices pursuant to Article 2(10)(i) of the basic regulation, that is to say, a deduction of a margin of 5% for SG&A expenses and of 5% in respect of profits for LECO and WWS, brought those prices to a level equivalent to that at the end of the production chain in China, that is, before sales expenses.

36 In support of this argument, the applicant cites Case 250/85 *Brother Industries v Council* [1988] ECR 5683, paragraphs 15 to 18, in which the Court of Justice noted that the purpose of constructing 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. The applicant observes

38 Lastly, the applicant maintains that the SG&A expenses incurred by WWS should have been attributed by the institutions not only to its export activities but also to its selling activities in China for the purpose of determining the normal value. The applicant adds that it does not have any selling costs in China, as it merely manufactures to the order of WWS.

39 The Council, the Commission and the other interveners dispute the applicant's arguments.

II-3911, paragraph 28 and case-law cited). That limited judicial review covers, in particular, the choice between the different methods of calculating the dumping margin and the assessment of the normal value of a product (see *Ikea Wholesale*, cited in paragraph 40 above, paragraph 41 and case-law cited).

Findings of the Court

40 It should be borne in mind, as a preliminary point, that in the sphere of measures to protect trade, the institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40, and Case T-221/05 *Huvis v Council*, judgment of 8 July 2008, not published in the ECR, paragraph 38).

41 It is, moreover, settled case-law that, in the sphere of measures to protect trade, 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 (see Case T-35/01 *Shanghai Teraoka Electronic v Council* [2004] ECR II-3663, paragraphs 48 and 49 and case-law cited, and Case T-300/03 *Moser Baer India v Council* [2006] ECR

42 The case-law has further established that it is apparent from both the wording and the scheme of Article 2(10) of the basic regulation that an adjustment to the export price or the normal value may be made only in order to take account of differences in factors which affect the prices and therefore their comparability (Case T-88/98 *Kundan and Tata v Council* [2002] ECR II-4897, paragraph 94). That means, in other words, that the purpose of an adjustment is to re-establish the symmetry between normal value and export price, with the result that, if the adjustment has been validly made, that implies that it has re-established the symmetry between normal value and export price. By contrast, if the adjustment has not been validly made, that implies that it has created an asymmetry between the normal value and the export price (Case T-249/06 *Interpipe Niko Tube and Interpipe NTRP v Council* [2009] [ECR II-383], paragraphs 194 and 195).

43 It is in this context that [the] Court must examine the issue whether the level of comparison chosen by the institutions was respected in the calculation of the normal value and the export price and ascertain, subsequently, whether the

adjustment made led to a re-establishment of the symmetry in the comparison of those two factors or whether, on the contrary, it resulted in a comparison at different levels of trade.

- 44 In the present case, it is apparent from recital 22 in the preamble to the definitive regulation that the comparison between the normal value and the export price of the LAMs originating in China was carried out by the institutions at the same level of trade, namely at the ex-factory stage. In particular, as regards the LAMs manufactured by the applicant, it is stated in the letter of 3 July 2006 that both the normal value and the export price of those products were determined before any involvement by any intermediate trader in the sales process, that is, before the involvement of LECO and WWS in the marketing of LAMs manufactured by the applicant.
- 45 Next, as regards, first, the export price, the Court notes that the applicant does not dispute that the calculation of that price was made in accordance with Article 2(8) of the basic regulation. The applicant acknowledges, with the institutions, that the export price of its LAMs corresponds to the prices applied by WWS to independent customers on the Community market, as provided for in recital 21 in the preamble to the definitive regulation and, by reference to that recital, in recitals 41 and 42 in the preamble to the provisional regulation.
- 46 As regards, secondly, the normal value, the applicant, by contrast, takes the view that that value ought to have been determined in accordance with Article 2(1) and (3) of the basic regulation and thus correspond to the price of its LAMs as applied by WWS on the Chinese domestic market.
- 47 It should be borne in mind in that regard that it is apparent from the wording of Article 2(7)(b) of the basic regulation that the determination of the normal value of products originating in China by reference to the rules laid down in Article 2(1) to (6) thereof is confined to specific individual cases in which each of the producers concerned has made a properly substantiated claim in accordance with the criteria and procedures laid down in Article 2(7)(c) of the basic regulation to show that market-economy conditions prevail for them (see, to that effect, Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon v Council* [2003] ECR II-4741, paragraph 40).
- 48 It is clear in the present case, by contrast, that, according to recital 14 in the preamble to the definitive regulation, the claim submitted by the applicant pursuant to Article 2(7)(b) of the basic regulation was rejected. Accordingly, the normal value of the applicant's LAMs could not be established as corresponding to the

prices of those products on the applicant's domestic market, namely, the prices applied by WWS on the Chinese market, in so far as it had been determined that they were not the subject of normal market transactions.

49 The Court further notes that the applicant's reference in this regard to paragraphs 15 to 18 of the judgment in *Brother Industries v Council*, cited in paragraph 36 above, is not relevant to the present case. In that judgment, although the Court of Justice found that the institutions had correctly calculated the normal value of the imports originating in Japan on the basis of the resale prices applied by the distributor on the domestic market, that assessment was based on the fact that Japan is a market-economy country.

50 Next, the Court notes that, according to recital 17 in the preamble to the definitive regulation, the normal value of the LAMs produced by the applicant was calculated on a reasonable basis in accordance with Article 2(7)(a) of the basic regulation. According to the case-law, the aim of that provision is precisely to prevent account from being taken of prices and costs in non-market-economy countries, as they are not the normal result of market forces (see, by way of analogy, Joined Cases C-305/86 and C-160/87 *Neotype Tech-masheexport v Commission and Council* [1990] ECR I-2945, paragraph 26, and Case C-16/90 *Nölle* [1991] ECR I-5163, paragraph 10). As regards, in particular, the applicant's LAMs, it is apparent from

the letter of 3 July 2006 that the normal value was calculated on the basis of the costs of manufacture, administrative expenses and other general costs of similar Community producers and a reasonable profit estimate. No direct sales expenses could be included in that calculation, however, because, as the applicant acknowledges a number of times, including in the answers to the questionnaire sent to the Commission during the investigation and in the letter of 5 June 2006, LECO and WWS were in charge of marketing the applicant's products.

51 It thus follows from the manner in which the calculation of the normal value of the applicant's LAMs was carried out, including the non-inclusion in that calculation of the sales expenses, that an imbalance would have occurred in the comparison of the normal value and the export price of the applicant's LAMs if an adjustment had not been made by the institutions in accordance with Article 2(10) of the basic regulation, consisting in a deduction from the export price of the sales costs arising from the marketing of the applicant's LAMs on the Community market.

52 Consequently, the Court finds that the institutions did not make a manifest error of assessment in making an adjustment to the export price of the LAMs manufactured by the applicant in accordance with Article 2(10) of the basic regulation.

53 In the light of the foregoing, the first part of the first plea put forward by the applicant must be rejected.’

43. The Council contends that the appeal should be dismissed and, in the alternative, that the application be dismissed. It also seeks an order that the appellant pay the costs.

40. At the conclusion of the judgment under appeal, the General Court dismissed the appellant’s action and ordered it to bear its own costs and to pay those incurred by the Council and by IML Industria Meccanica Lombarda Srl, Interkov spol. s r.o., MI.ME. CA. Srl and NIKO – kovinarsko podjetje, d.d. Železniki, the interveners.

B — *Arguments of the parties*

1. The appellant

II — The appeal

A — *The claims*

41. In the present appeal, the appellant seeks to have the judgment under appeal set aside, in so far as it rejects the first part of its first plea and orders it to pay the costs incurred by the Council and the interveners.

44. In support of its appeal, the appellant relies on a single ground, alleging infringement of Article 2(10) of the basic regulation and failure to have due regard to the notion of ‘normal value’ as defined in Article 2(7)(a) of the basic regulation.

42. The appellant also seeks annulment of the definitive regulation, in so far as it imposes a duty on LAMs which it produces at a rate higher than a duty calculated without the contested adjustment to the export price.

45. The appellant submits that, in the judgment under appeal, the General Court failed to give correct legal effect to the notion of ‘normal value’ as defined in Article 2(7)(a) of the basic regulation.

46. It maintains that, in that judgment, it was accepted on a number of occasions that the SG&A expenses incurred by LECO and WWS in Hong Kong were incurred in making

export sales and sales in China and it was not disputed that it did not have any selling costs in China.

47. The appellant points out that, at paragraph 50 of the judgment under appeal, the General Court recognises that the normal value was calculated on the basis of the costs of manufacture, administrative expenses and other general costs of similar Community producers and a reasonable profit estimate.

48. The appellant observes that, in the same paragraph of the judgment under appeal, the General Court also states that '[n]o direct sales expenses could be included in that calculation ... because, as the applicant acknowledges a number of times, including in the answers to the questionnaire sent to the Commission during the investigation and in the letter of 5 June 2006, LECO and WWS were in charge of marketing the applicant's products'.

49. The appellant submits that, by that statement, the General Court made an error of assessment, for two reasons.

50. First, the fact that LECO and WWS were in charge of marketing the appellant's products is irrelevant to the determination of the normal value, since that value is an analogue normal value and is not, therefore, based on the costs incurred by the appellant.

51. Second, the statement that LECO and WWS were in charge of marketing the appellant's products was relevant for the purpose of determining the stage in the appellant's distribution chain for which the normal value determined pursuant to Article 2(7)(a) of the basic regulation was a true analogue normal value.

52. In analysing that question at paragraphs 46 to 48 of the judgment under appeal, the General Court is claimed to have misunderstood the appellant's arguments at first instance.

53. Thus, contrary to what the General Court states at paragraph 46 of the judgment under appeal, the appellant always recognised that the normal value had to be determined in accordance with Article 2(7)(a) of the basic regulation. However, in order to determine the stage in the appellant's distribution chain to which the analogue normal value corresponded, it was relevant to look at Article 2(1) and (3) of the basic regulation.

54. Moreover, contrary to what is stated at paragraph 49 of the judgment under appeal, the judgment in *Brother Industries v Council* is relevant because it shows that a normal value determined in accordance with Article 2(7)(a) of the basic regulation must be an analogue for a normal value determined in market economy conditions, that is, it must correspond to the value at which the product

is supplied to the first unrelated party. It must therefore include all SG&A costs of all related companies involved in the distribution of the product.

of the LAMs by deducting from that price the SG&A expenses incurred by LECO and WWS in making export sales.

55. It follows that, if the producer in the non-market economy country has related companies which sell the product on the domestic market, the analogue normal value determined in accordance with Article 2(7)(a) of the basic regulation must be an analogue for the normal value of the producer's economic entity, that is to say, an analogue for the normal value at which the product is first supplied to an unrelated party on the domestic market. In the appellant's case, that stage corresponds to 'ex-WWS'.

2. The Council

58. The Council points out that the normal value was calculated at the ex-works level on the basis of costs of manufacturing, SG&A expenses incurred up to the point at which the products left the factory and a reasonable profit.

56. However, at paragraph 44 of the judgment under appeal, the General Court made a finding that is inconsistent with Article 2(7)(a) of the basic regulation, in so far as it proceeded on the assumption that the analogue normal value corresponds to the level at which the goods leave the production line in China.

59. As regards SG&A expenses, it states that verified data from the Community industry revealed that such costs totalled approximately 16%, of which 5% related to selling costs.

57. The appellant concludes from this that the General Court also infringed Article 2(10) of the basic regulation in stating, at the end of paragraph 51 and in paragraph 52 of the judgment under appeal, that the institutions had not made a manifest error of assessment in making an adjustment, in accordance with that provision, to the export price

60. The Council explains that, as the appellant did not incur any such costs, the institutions included in the constructed normal value only an amount of approximately 11%, essentially for general and administrative costs.

61. The Council submits that the constructed normal value was properly calculated at ex-works level for a company which does not incur any direct selling costs for domestic sales.

both its export sales and its domestic sales in China.

62. The Council goes on to explain that the institutions established the export price on the basis of the prices charged by WWS to the first independent customer. It states that the institutions, however, adjusted the export price applied by the appellant, pursuant to Article 2(10)(i) of the basic regulation, because the appellant did not sell its products directly to independent customers but made all its export sales via its two related sales companies, LECO and WWS, established in Hong Kong. The institutions concluded that the relationship between the appellant, on the one hand, and its related companies LECO and WWS, on the other, was similar to that of a trader working on a commission basis.

64. The Council points out that it explained in the proceedings before the General Court that the appellant's argument was incorrect for two reasons. First, the institutions had established the normal value not on the basis of the appellant's sales prices in China but pursuant to Article 2(7)(a) of the basic regulation. Second, the constructed normal value established for the appellant pursuant to Article 2(7)(a) of the basic regulation did not include any direct selling costs. Thus, there was a discrepancy between the normal value, on the one hand, and the export price calculated on the basis of prices charged by WWS to the first independent customer, on the other. The normal value included only the costs ex-works at the level of the appellant's factory gate but no direct selling costs. The export price also included the mark-up of LECO and WWS, who performed functions similar to those of an agent working on a commission basis. The Council argued that it was this discrepancy that the contested adjustment addressed, in line with Article 2(10)(i) of the basic regulation.

63. The Council states that, in the proceedings before the General Court, the appellant challenged the adjustment made pursuant to Article 2(10)(i) of the basic regulation but did not dispute that its relationship with LECO and WWS was similar to that of a trader working on a commission basis. It simply claimed that the adjustment was unjustified because LECO and WWS were involved in

65. The Council points out that its arguments were followed by the General Court in the judgment under appeal. It maintains that the appellant's legal submission that the

General Court failed to give correct legal effect to the notion of 'normal value', as defined in Article 2(7)(a) of the basic regulation, is unfounded.

C — My assessment

66. The appellant's claim that, in the present case, the normal value corresponds to the 'ex-WWS' stage fails to take any account of the uncontested fact that the constructed normal value established in the present case did not include any sales expenses. It is also an inadmissible challenge to a factual finding of the General Court.

69. Like the Council, I am of the opinion that the present appeal must be dismissed on grounds which relate to, first, the object of the appeal and, second, the requirement for the institutions under Article 2(10) of the basic regulation to make any adjustments necessary for a fair comparison to be made between the normal value and the export price.

70. With regard to the first point, namely the object of the appeal, it is necessary, in my view, to note that it is very limited.

67. The Council adds that the first plea relied on by the appellant in the proceedings before the General Court did not challenge the manner in which the institutions calculated the constructed normal value pursuant to Article 2(7)(a) of the basic regulation. In particular, the appellant did not claim that the institutions infringed that provision because they did not include selling expenses in the normal constructed value.

71. By its single ground, the appellant submits, in essence, that the General Court erred in law in considering that the normal value was determined at the level at which the products leave the appellant's production line, so that an adjustment to the export price was justified for the purpose of making a fair comparison of that price and that value, that is to say, at the same level of trade.

68. Lastly, the submission alleging infringement of Article 2(10)(i) of the basic regulation should also be rejected because it is based solely on the claim that the normal value corresponds to the 'ex-WWS' stage, which is clearly incorrect.

72. By thus confining itself to that single ground of appeal, the appellant, first, does not seek to establish that the factual finding, at paragraph 44 of the judgment under appeal, that the normal value was determined in the present case before any involvement by an intermediate trader in the selling process,

that is, before the involvement of LECO and WWS, is incorrect. It is clear that at no point in its appeal does it maintain that that finding of the General Court constitutes a distortion of the facts.

two thirds of the total costs of production, on the basis of Chinese prices, and the remaining items on the basis of the data in the complaint and the information available from producers in potential other analogue countries.

73. Next, nor does the appellant, in my view, challenge the General Court's legal finding that the constructed normal value of the LAMs in the definitive regulation was determined in accordance with Article 2(7)(a) of the basic regulation.

74. In its defence before the General Court, the Council provided the following information concerning the methods used to calculate that normal value. It stated as follows at points 9 and 10 of the defence:

'9. ... The constructed normal value was calculated at the ex-works level and consisted of costs of manufacturing, SG&A costs incurred up to the moment the products left the factory, and a reasonable amount of profit. The institutions established these amounts as follows:

- SG&A costs: The institutions established these costs on the basis of verified data from the Community industry, which showed total SG&A costs of about 16%. However, the institutions deducted from the total amount of SG&A costs an amount of 5% for selling costs because the investigation had shown that the applicant did not incur any such costs. Thus, the SG&A costs effectively consisted of an amount of about 11%, mainly for general and administrative costs.
- Costs of manufacturing: The institutions established the raw material costs (mainly steel sheets, steel coils, electroplating and electricity), which account for about
- Profit: Finally, the institutions added a reasonable profit of 5%.

10. Thus, the institutions effectively calculated a constructed normal value at ex-works level for a company that does not incur any direct selling expenses for domestic sales.'

the appellant in excess of the amount of duty that would be payable if the contested adjustment to the export price had not been made.'

75. In the present appeal, as I understand it and as also interpreted by the Council, the appellant does not call into question the finding at paragraph 50 of the judgment under appeal that, in so far as it includes no direct sales expenses, the normal value was calculated in accordance with Article 2(7)(a) of the basic regulation.

78. Thus, in the present appeal, the appellant seeks only the annulment of the reduction in the export price resulting from the contested adjustment, not a fresh determination of the dumping margin on the basis of a reassessment of the normal value and the export price.

76. In other words, in the present appeal the appellant does not dispute the amount of that normal value or, in particular, the fact that it was reduced by 5 % for direct sales expenses.

79. In summary, the appellant's sole plea in law, entitled 'failure to give the correct legal effect to the notion of normal value as defined by Article 2(7)(a) of the basic regulation', does not seek to contest the fact that the normal value, determined on the basis of the price payable for the product in question on the Community market, was reduced by deducting direct sales expenses.

77. That analysis appears to me to be confirmed by the fact that, in the form of order sought in the application by which the present appeal was brought, the appellant expressly requests the Court, in the event that it should declare its ground of appeal well founded and set aside the judgment under appeal, to annul the definitive regulation only 'in so far as it imposes a duty on LAMs produced by

80. In my opinion, the plea is to be understood to mean that, notwithstanding the Council's deduction of those expenses, the General Court should have accepted that, in accordance with Article 2(7)(a) of the basic regulation and the judgment in *Brother Industries v Council*, the normal value was necessarily the price at which the LAMs would have been sold on the Chinese market if they had been marketed in a market economy and that such a price necessarily includes the sales expenses of the companies which market the

product, such as LECO and WWS, where those undertakings form, together with the production undertaking, a single economic entity.

81. That plea cannot, in my view, be accepted.

82. It is true that in *Brother Industries v Council* the Court found that the division of production and sales activities within a group made up of legally distinct but closely linked companies can in no way alter the fact that they form a single economic entity, so that the normal value of the product must be determined on the basis not of the selling price which the producing company charges the distribution company but of the selling price which the latter company charges an independent economic operator.

83. It could therefore have been asked whether, in the light of the provisions in Article 2(7)(a) of the basic regulation and that judgment, the Council was entitled to reduce the constructed normal value of the LAMs by an amount corresponding to the direct sales expenses, on the ground that the appellant did not itself bear the costs of selling its products on the domestic market.

84. However, as has been seen, that question has not been raised in the present appeal. As I have said, the appellant does not dispute that the normal value of the LAMs was calculated in accordance with Article 2(7)(a) of the basic regulation.

85. It is worth repeating that the appellant's argument amounts simply to a claim that, in accordance with Article 2(7)(a) of the basic regulation and the judgment in *Brother Industries v Council*, the General Court should have conceded that the normal value corresponded to the stage at which the products are marketed by WWS.

86. That argument cannot succeed because, in my opinion, it is incomplete, not to say contradictory. The appellant cannot claim that the General Court infringed Article 2(7)(a) of the basic regulation, without calling into question that court's finding that the normal value, in so far as it excluded direct sales expenses, was determined in accordance with that provision.

87. Contrary to what is suggested in the appellant's argument, the General Court could not disregard the fact that the normal value of the LAMs had been calculated by the Council at the stage at which those products leave the appellant's production line. From the point at which it then took the view that that

assessment was consistent with Article 2(7) (a) of the basic regulation, it was required to draw the appropriate conclusions from this in verifying compliance with the requirement laid down in Article 2(10) of the basic regulation to make a fair comparison.

regulation.¹⁰ In order to compare the normal value and the export price at the same level of trade, that is to say, at the stage at which the LAMs leave the appellant's production line, it was indeed necessary to adjust the export price so as to remove the element of the price reflecting the involvement of the related companies which marketed the product on the Community market.

88. I thus come to the second point of my argument, relating to the scope of Article 2(10) of the basic regulation.

91. Consequently, I propose that the Court should dismiss the present appeal as unfounded.

89. That provision requires the institutions to make a fair comparison of the export price and the normal value. It expressly provides that, to ensure compliance with that requirement, the comparison must be made at the same level of trade.

92. If the Court shares my view, the appellant, which is therefore unsuccessful in these proceedings, should be ordered to bear its own costs and to pay those incurred by the Council, pursuant to Article 69(2) of the Rules of Procedure of the Court.

90. Since the normal value was determined at the stage at which the LAMs leave the appellant's production line, the General Court did not err in law in considering that the adjustment to the export price, which consisted in deducting the expenses and profits of the companies which marketed those products, was consistent with Article 2(10) of the basic

93. The Commission must be ordered to bear its own costs, pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure.

¹⁰ — See, to that effect, Case C-179/87 *Sharp Corporation v Council* [1992] ECR I-1635, paragraphs 16 to 19.

III — Conclusion

94. In the light of the foregoing considerations, I propose that the Court should:

- dismiss as unfounded the appeal brought by Dongguan Nanzha Leco Stationery Mfg. Co. Ltd against the judgment of the Court of First Instance of the European Communities of 23 September 2009 in Case T-296/06 *Dongguan Nanzha Leco Stationery v Council*;
- order Dongguan Nanzha Leco Stationery Mfg. Co. Ltd to bear its own costs and to pay those of the Council of the European Union;
- order the European Commission to bear its own costs.