OPINION OF ADVOCATE GENERAL LÉGER

delivered on 5 October 2000 [1]

1. This is an appeal against the judgment of the Court of First Instance of 18 December 1997 in the case of *Ajinomoto and NutraSweet* v *Council*. [2]

Ajinomoto Co. Inc. (hereinafter 'Ajinomoto') and NutraSweet Co. (hereinafter 'NutraSweet') are requesting that the Court annul the contested judgment to the extent to which it dismissed the actions they brought against Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America. [3]

I — Legal background

2. The law applicable to these proceedings is contained in Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community. [4]

3. Article 2(1) of that regulation provides: 'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury'.

4. Under Article 2(2) of that regulation, 'A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product'.

1 — Original language: French.

2 — Joined Cases T-159/94 and T-160/94 [1997] ECR II-2461 (hereinafter 'the contested judgment').

3 — OJ 1991 L 134, p. 1 (hereinafter 'the contested regulation').

4 — OJ 1988 L 209, p. 1 (hereinafter 'the basic regulation').

5. Article 2(3) of the basic regulation defines the 'normal value' of the like product as follows:

'For the purpose of this regulation, the normal value shall be:

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin ...

(b) where there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:

(i) the comparable price of the like product when exported to any third country ...; or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit ...'. [5]

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

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

II — Facts and procedure

Facts giving rise to the dispute

7. The product to which the contested regulation related was aspartame, a

5 — In this Opinion I shall use the term 'actual price' to mean the 'comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin' within the meaning of Article 2(3)(a) of the basic regulation.

sugar substitute used mainly in foodstuffs.

8. Aspartame was discovered in 1965 by a researcher with the American company G.D. Searle & Co., which subsequently became NutraSweet. Following that discovery, NutraSweet obtained use patents for aspartame in the United States and several Member States. The patent was protected in Germany until 1986, in the United Kingdom until 1987, in other Community countries until 1988, and in the United States until 1992.

9. During the investigation period, namely from 1 January to 31 December 1989, NutraSweet was the sole producer of aspartame in the United States. Ajinomoto for its part was the sole producer of aspartame in Japan. Except for a few direct sales to independent customers in the Community, or in the United States for export to the Community, aspartame was distributed in the Community through a jointly owned subsidiary of NutraSweet and Ajinomoto, the Swiss company NutraSweet AG.

10. Following a complaint filed by Holland Sweetener Company Vof, on 3 March 1990 the Commission initiated an anti-dumping proceeding concerning imports of aspartame originating in Japan and in the United States of America. [6]

11. On 26 November 1990, it imposed a provisional anti-dumping duty on the contested imports. [7] NutraSweet and Ajinomoto (hereinafter 'the appellants') submitted their observations on the provisional regulation by letters of 6 and 30 December 1990.

12. On 22 March 1991 the Commission informed them of the main facts and considerations on the basis of which it intended to propose that the Council impose a definitive anti-dumping duty.

13. On 27 May 1991 the Council adopted the contested regulation, which instituted definitive anti-dumping duties on the appellants' imports. [8] Article 2 of that regulation

6 — OJ 1990 C 52, p. 12.

7 — Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1990 L 330, p. 16, hereinafter 'the provisional regulation'). In this Opinion I shall also use the term 'provisional regulation' to mean, in general terms, any regulation by which the Commission institutes a provisional anti-dumping duty. Further, I shall use the term 'definitive regulation' to mean any regulation by which the Council institutes a definitive anti-dumping duty and orders definitive collection of provisional anti-dumping duties.

8 — The definitive anti-dumping duty was fixed at ECU 27.21 per kilogram for imports of aspartame originating in Japan and ECU 25.15 per kilogram for imports from the United States.

ordered definitive collection of the provisional anti-dumping duties at the rate of the duties definitively imposed. [9]

The contested regulations

14. In order to calculate the appellants' aspartame dumping margin, the Commission and the Council (hereinafter 'the institutions') compared the normal value of the product with its export price to the Community.

15. The normal value of aspartame from the United States was determined, in accordance with Article 2(3)(a) of the basic regulation, on the basis of actual prices on the American market.

16. The institutions also used actual American prices for Japanese aspartame. The Council observed that the Japanese product was not imported from Japan to the Community direct but was sold to NutraSweet in order to be re-exported to the Community market. Under Article 2(6) of the basic regulation, the Council therefore determined the normal value of Japanese aspartame on the basis of the price actually paid or payable on the domestic market of the country of export, namely the United States.

17. Lastly, the institutions, relying on Article 13(3) of the basic regulation, fixed the amount of anti-dumping duties not according to the dumping margin which they found, but at a level which was considered necessary in order to eliminate the harm suffered by the Community industry.

The proceedings at first instance

18. The appellants brought their action at first instance on 6 September 1991. [10] They requested annulment of the contested regulation in its entirety or, in the alternative, to the extent to which it concerned them.

9 — The contested regulation was repealed by Council Regulation (EC) No 1936/95 of 3 August 1995 (OJ 1995 L 186, p. 8).

10 — They lodged their application at the Court of Justice, which remitted the cases to the Court of First Instance by an order of 18 April 1994 in application of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), as amended by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29).

19. In support of their action, the appellants relied on various pleas in law including the following four: [11] (1) infringement of Article 2(3) of the basic regulation; (2) infringement of Article 2(3) and (6) of the basic regulation; (3) infringement of essential procedural requirements and of Article 7(4)(a) and (b) of the basic regulation; and (4) infringement of essential procedural requirements and of Articles 7(4)(b) and 8(4) of the basic regulation.

III — The contested judgment

20. By their *first plea*, the appellants argued that the Council committed a manifest error of assessment and infringed Article 2(3) of the basic regulation by determining the normal value of American aspartame on the basis of actual prices in the United States. [12]

They pointed out that, during the investigation period, the manufacture and distribution of aspartame were protected by a patent in the United States (which was in force until 1992), but that the patents covering the Member States had already expired (in 1988).

The appellants claimed that, in those circumstances, the prices charged on the United States market did not enable a proper comparison to be made within the meaning of Article 2(3)(a) and (b) of the basic regulation, and that they were not charged in the ordinary course of trade. Unlike the Community market, which is fully competitive, the American market was monopolistic because of the patent protecting aspartame. However, in a non-competitive market, the institutions have to calculate dumping on the basis of a constructed value pursuant to Article 2(3)(b)(ii) of the basic regulation. [13]

The appellants also claimed that the contested regulation did not contain sufficient reasons, having regard to the requirements laid down in Article 190 of the EC Treaty (now Article 253 EC). [14]

21. The Court of First Instance dismissed the first plea in law on the following grounds:

'126 There is nothing in the wording of the basic regulation which indicates that the imposition of anti-dumping duties is dependent on any factor other than an injurious price differentiation as between the prices charged in the domestic market (in this instance, the

11 — Only the pleas in law here referred to are relevant to these appeal proceedings.

12 — Paragraph 120 of the contested judgment.

13 — Paragraph 121 of the contested judgment.

14 — Paragraph 123 of the contested judgment.

United States market) and those charged in the export market (in this case, the Community market).

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

As regards the claim that sufficient reasons were not given, the Court of First Instance held that the explanations given in the contested regulations 'were sufficient to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to exercise its power of review'. [15]

22. By its *second plea in law*, Ajinomoto claimed that the institutions had infringed Article 2(3) and (6) of the basic regulation by establishing the normal value of Japanese aspartame on the basis of actual prices in the United States.

Ajinomoto argued that, under Article 2(6) of the basic regulation, the institutions were under a duty to establish the normal value of the product on the basis of a 'comparable price'. However, in this case, the sale price of aspartame in the United States was not 'comparable' with its export price because of the patent owned by NutraSweet on the American market. The institutions should therefore have established the normal value of Japanese aspartame on the basis of the price in the country of origin, namely Japan. [16]

23. On that point, the Court of First Instance found that:

'179 ... the Community institutions determined the normal value on the basis of the price paid or payable on the

15 — Paragraph 133 of the contested judgment.
16 — Paragraphs 169 to 175 of the contested judgment.

domestic market of the country of export (the United States market).

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

181 Moreover, the criteria which would have allowed the Community institutions to use the prices prevailing in the country of origin (in this instance, Japan) were not fulfilled in the present case ...

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

24. Finally, by their *third and fourth pleas in law*, the appellants claimed that the institutions had infringed Article 7(4)(a) and (b) of the basic regulation and the principle of *audi alteram partem*. [17]

17 — Paragraphs 57 to 79 of the contested judgment.

The institutions are under a duty to provide the interested parties with, first, the information available on the allegations and evidence submitted by the complainant(s) and, secondly, the correctness and relevance of the facts alleged and the evidence relied on. That obligation on the part of the institutions arises before provisional anti-dumping duties are imposed. However, in this case, the Commission failed to inform the appellants of the main facts and considerations on the basis of which it intended to impose provisional anti-dumping duties.

25. At paragraphs 87 and 88 of the contested judgment, the Court of First Instance held as follows:

'87 Even if it is accepted, as the applicants maintain, that the principle of the right to a fair hearing requires exporters to be informed of the essential facts and considerations on the basis of which it is intended to impose provisional duties, failure to respect that right cannot in itself have the effect of vitiating the regulation imposing definitive duties. Such a regulation is distinct from the regulation imposing provisional duties, even if it is so closely connected with the latter that it may in certain circumstances take its place...; consequently, its validity must be assessed in relation to the rules applying at the time of its adoption. Where, in the course of the procedure leading to the adoption of a regulation imposing a definitive duty, steps are taken to remedy a defect vitiating the

adoption of the corresponding regulation imposing a provisional duty, the illegality of the provisional regulation does not render the definitive regulation illegal. Only in so far as the defect has not been remedied, and in so far as the definitive regulation refers to the provisional regulation, will the illegality of the earlier regulation render the later one illegal.

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

26. In the rest of its reasoning, [18] the Court of First Instance found that the appellants' right to be heard was in fact respected during the procedure leading to the adoption of the contested regulation. It therefore held the plea to be unfounded and dismissed the action in its entirety.

IV — The appeal

27. By this appeal, the appellants are asking that the Court annul the contested judgment and rule on the substance of the dispute. They accordingly request that the Court annul the contested regulation and order the Council to pay the costs at first instance and on appeal.

28. The institutions for their part request that the appeal be dismissed and that the appellants be ordered to pay the costs of the appeal.

29. In support of their appeal, the appellants rely on three common grounds of appeal:

— infringement of Article 2(3) of the basic regulation;

— infringement of Article 190 of the Treaty;

— infringement of essential procedural requirements.

18 — Paragraphs 89 to 118 of the contested judgment.

30. Ajinomoto relies on an additional ground, namely infringement of Articles 2(3) and (6) of the basic regulation.

31. I shall examine these four grounds of appeal in the order in which they are presented.

First ground: infringement of Article 2(3) of the basic regulation

Arguments of the appellants

32. The appellants claim that the Court of First Instance infringed Article 2(3) of the basic regulation by finding that the institutions were right to determine the normal value of American aspartame on the basis of actual prices in the United States.

33. The appellants emphasise that Article 2(3) of the basic regulation lays down a requirement of 'comparability' between actual prices and export prices to the Community. Under that provision, the normal value can only be determined on the basis of actual prices if those prices are sufficiently 'comparable' with export prices to the Community. In order to assess 'price comparability', the institutions are under a duty to take into account all the factors which influence the determination of prices on the exporter's domestic market [19] and, in particular, the structure of the market and the existence of intellectual property protection.

Where sales of a product are protected by a patent on the exporter's domestic market only (and not on the Community market), actual prices and export prices to the Community are no longer sufficiently 'comparable' for the purposes of Article 2(3). In such a case, the institutions can no longer rely on actual prices, but are bound to establish the normal value of the product on the basis of a constructed value, pursuant to Article 2(3)(b)(ii) of the basic regulation.

34. However, in this case the assessment of the Court of First Instance is based on a misinterpretation of the basic regulation.

19 — Albeit with the exception of factors resulting from the fact that there are illegal obstacles impeding access to the exporter's domestic market or factors which other provisions of the basic regulation such as Articles 2(9) and (10) expressly require be taken into account.

In the contested judgment the Court of First Instance found that in no circumstances can the fact there is a patent protecting sales of the product on the exporter's domestic market influence 'price comparability' within the meaning of Article 2(3) of the basic regulation.

The appellants acknowledge that the question of the interpretation of the terms 'comparable price' and 'proper comparison' in Article 2(3) was not expressly broached in the contested judgment. However, they argue that, by deduction,[20] the only possible conclusion is that the Court of First Instance decided that the existence of a patent was not a factor capable of affecting 'price comparability'.

35. In support of their own interpretation of Article 2(3) of the basic regulation, the appellants rely on various factors, namely: the wording of that provision and in particular the term 'comparable price'; the structure of the basic regulation; the objectives of Community anti-dumping legislation; the General Agreement on tariffs and trade and the Agreement on the implementation of Article VI of the General Agreement on tariffs and trade;[21] American law; and intellectual property law.

20 — See paragraphs 33 to 35 of the appeals.

21 — Agreement approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1).

Findings

36. In support of their first ground of appeal, the appellants essentially put forward two arguments. They claim:

(a) that the Court of First Instance erred in law in finding that a patent on the exporter's domestic market can never affect 'price comparability' within the meaning of Article 2(3) of the basic regulation; and

(b) that Article 2(3) of the basic regulation provides that, where actual prices are not sufficiently 'comparable' to export prices to the Community, the normal value must be established on the basis of a constructed value in accordance with Article 2(3)(b)(ii).

37. However, both those arguments are, in my view, based on a misreading of the contested judgment and the basic regulation.

38. *First of all*, the contested judgment, contrary to what the appellants allege, did

not hold that the existence of a patent on the domestic market could never influence the method for determining normal value.

It is clear from paragraph 127 of the contested judgment that the Court of First Instance confined itself to considering the appellants' argument that '[i]n a non-competitive market, the Community institutions are required to calculate the dumping on the basis of a constructed value'. [22]

In that regard, the Court of First Instance held: 'The criteria of the market structure or the level of competition are not in themselves decisive for the purposes of applying a constructed normal value ...', provided that the actual prices 'are the result of market forces'. [23]

The Court of First Instance therefore required that the appellants prove a specific fact to be true. It asked them to show that, because of the patent owned by NutraSweet, the prices on the American market could no longer be considered to be 'the result of market forces', that is to say, the result of the normal interplay of supply and demand. But the appellants did not demonstrate that to be so in this case. The Court of First Instance dismissed their argument on the following basis:

'*Since the applicants have not shown that the prices used to determine the normal value did not result from market forces* or did not reflect the actual situation in the United States market, there was no reason to apply a constructed normal value rather than the prices actually paid on the United States market'. [24]

Contrary to the appellants' claim, rejection of that argument does not equate to a finding that the existence of a patent on the exporter's domestic market can never influence the way in which the institutions are to establish the normal value. On the contrary, the Court of First Instance indicated that it might do so if it is established that, because of the patent, the actual prices are no longer 'the result of market forces'.

39. *Secondly*, it must be remembered that Article 2(3) of the basic regulation provides for three distinct methods of establishing normal value.

22 — Paragraph 121 of the contested judgment.

23 — Paragraph 127 of the contested judgment.

24 — Idem (emphasis added).

Under the first method, the normal value is to be determined on the basis of the actual price, that is to say on the basis of the 'comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin' (Article 2(3)(a)).

Under the second method, the normal value is to be calculated by reference to the 'comparable price of the like product when exported to any third country' (Article 2(3)(b)(i)).

Finally, under the third method, the institutions are to determine the normal value on the basis of a 'constructed value' (Article 2(3)(b)(ii)).

40. Article 2(3)(b) of the basic regulation states that the institutions are to use the second two methods of calculation when 'there are no sales of the like product in the ordinary course of trade' or when 'such sales do not permit a proper comparison'.

41. In that regard, the Court of Justice and the Court of First Instance have consistently held that:

'... according to the wording and scheme of Article 2(3)(a) of the basic regulation, in order to establish the normal value regard must be had primarily to the *price actually* paid or payable in the ordinary course of trade.... It is apparent from Article 2(3)(b) of the basic regulation that *that principle can be derogated from only* when there are no sales of the like product in the ordinary course of trade or when such sales do not permit a proper comparison'. [25]

The Court of Justice and the Court of First Instance have also pointed out that:

'The ordinary course of trade is a concept which relates to the nature of sales themselves. It is designed to exclude, for the determination of the normal value, situations in which sales on the domestic market are not made under conditions corresponding to the ordinary course of trade, in particular where a product is sold at a price below production costs or where transactions take place between parties which

25 — Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraph 12 (emphasis added). See also Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 46.

are associated or have a compensatory arrangement with each other.' [26]

Furthermore, '[t]he requirement that domestic sales must permit a proper comparison relates to the question as to whether those sales are sufficiently representative to serve as a basis for the determination of the normal value. Transactions on the domestic market must reflect normal behaviour on the part of purchasers and result from normal patterns of price formation'. [27]

42. It follows from those cases that the two situations set out in Article 2(3)(b) of the basic regulation are *exhaustive*. The institutions may derogate from the principle that the normal value must be established on the basis of the actual price *only* when 'there are no sales of the like product in the ordinary course of trade' or when 'such sales do not permit a proper comparison'.

43. In order for their appeal to succeed, the appellants must therefore show that the Court of First Instance erred in law in refusing to hold that the situation in question falls within the scope of one of the two exceptions provided for by Article 2(3)(b) of the basic regulation.

44. However, the appellants do not in this case rely on either of those two possibilities. At no point in these proceedings have they claimed that, because there is a patent owned by NutraSweet, *sales* of aspartame on the American market did not take place 'in the ordinary course of trade' or did not allow a 'proper comparison'.

On the contrary, the appellants' argument is that Article 2(3) of the basic regulation requires '*price comparability*' in addition to the two abovementioned exceptions. They consider that the institutions are bound to use the constructed value where the actual prices are not 'comparable' to export prices to the Community. The appellants therefore purport to add to the text of Article 2(3) a derogation not provided for in that article. [28]

26 — *Goldstar* v *Council*, cited above, paragraph 13. See also *Thai Bicycle* v *Council*, cited above, paragraphs 47 and 48.

27 — *Thai Bicycle* v *Council*, cited above, paragraph 49. See also *Goldstar* v *Council*, cited above, paragraph 15.

28 — The issue of 'price comparability' must be examined in the context of Articles 2(9) and (10) of the basic regulation which provide: 'The normal value ... and the export price ... shall be compared as nearly as possible at the same time. For the purpose of ensuring a fair comparison, due allowance in the form of adjustments shall be made in each case, on its merits, for the differences *affecting price comparability* ...' (Article 2(9)(a), emphasis added). See in this regard Joined Cases 294/86 and 77/87 *Technomtorg* v *Commission and Council* [1988] ECR 6077, paragraph 34.

Furthermore, the 'comparable price' within the meaning of Article 2(3)(a) of the basic regulation is the normal value established on the basis of the first sale to an independent buyer (see Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 19; C-171/87 *Canon* v *Council* [1992] ECR I-1237, paragraph 12; and C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 18).

45. It seems to me that that argument presents the Court with a choice. It may decide to dismiss the first ground of appeal solely on the basis of the principles referred to earlier. Or it may equally well decide to interpret that ground of appeal as being intended to show that the existence of a patent protecting sales of the product on the domestic market of the country of export is a factor which falls within the scope of one of the two derogations provided for by Article 2(3)(b) of the basic regulation.

46. I am inclined to recommend that the Court adopt the first approach.

In my view, Article 177 of the EC Treaty (now Article 234 EC), which authorises the Court on occasion to infer what is the real issue in a reference for a preliminary ruling under the principle of judicial cooperation instituted by that article,[29] Article 168(a) of the EC Treaty (now Article 225 EC) and Article 51 of the EC Statute of the Court of Justice do not authorise the Court to compensate for any deficiencies in an appeal, *inter alia*, by substituting any particular argument for one relied on by the appellant.

Furthermore, I would point out that the appellants in this case constructed their argument in full knowledge of the facts since the Council was careful to recall in its defence[30] the principles laid down in Article 2(3) of the basic regulation and by the Court's decision in *Goldstar* v *Council*.

47. However, in the event that the Court decides that it is unable to follow that course, I would propose, in the alternative, that it find that this situation does not fall within the scope of Article 2(3)(b) of the basic regulation.

48. From an economic point of view, 'dumping' is traditionally defined as 'price discrimination between national markets'.

In that regard, economists generally consider that it is necessary that three conditions be fulfilled in order for there to be such discrimination.[31] They are as follows: (1) a certain economic power — a monopoly or an oligopoly — on the part of the person dumping the goods on the market where prices are high; (2) 'separability' of the various markets in question; and (3) different price elasticity in the markets.

29 — See *inter alia* Case 16/65 *Schwarze* [1965] ECR 1081 and 1/71 *Cadillon* [1971] ECR 351, paragraph 4.

30 — See in particular paragraphs 7 to 12 of the defence.

31 — See *EC Anti-Dumping Law and Practice*, E. Vermulst and P. Waer, Sweet & Maxwell, London, 1996, p. 179.

In *Anti-Dumping and Anti-Subsidy Law*, [32] Beseler and Williams explain those three conditions as follows:

'To the economist, dumping is traditionally defined only as price discrimination between national markets... A necessary condition for price discrimination is that the total market for a product can be broken down into two or more sub-markets and that at least one of the sub-markets is isolated from the others. In addition, *the seller has to have a certain degree of monopoly power* in one or more of the isolated sub-markets. In these circumstances, price discrimination is profitable *if there is a difference in the elasticities of demand in the separate sub-markets*, thus enabling a higher price to be charged for the product in the sub-market in which the demand is less elastic'. [33]

49. It follows that, from a strictly economic point of view, a monopoly on the exporter's domestic market and a difference in price elasticity between the domestic market and the export market are regarded as factors inherent in price discrimination. I therefore find it difficult to see why, legally, the fact that there is such a monopoly and such a difference in price elasticity should be sufficient to preclude following the method of determining normal value based on actual prices.

50. Indeed, the institutions have applied the same reasoning in their regulatory practice. They have taken the view that the fact that there was a monopoly or that there was no competition on the domestic market did not deprive them of the option of calculating the dumping on the basis of actual prices. [34]

Thus, in some anti-dumping proceedings, the institutions have determined the normal value of the product on the basis of actual prices, even though competition on the domestic market on the country of export was limited by a system of price control by the public authorities. [35] In the 'Freezers

32 — Sweet & Maxwell, London, 1986, p. 41 (emphasis added).

33 — For more detail see in particular *The Economics of Imperfect Competition* by J. Robinson, MacMillan & Co. Ltd, London, 1961, p. 179 et seq. (particularly pp. 184 and 185).

34 — See, *inter alia*, *Anti-Dumping and other Trade Protection Laws of the EC*, by I. Van Bael and J-F. Bellis, CCH Europe, Bicester, 1996, 3rd edition, p. 71 and *EC Anti-Dumping Law — A Commentary on Regulation 384/96*, by W. Müller, N. Kahn and H-A. Neumann, John Wiley & Sons, Chichester, 1998, p. 69.

35 — See, in particular, Commission Decision (EEC) 83/360/EEC of 18 July 1983 terminating the anti-dumping proceeding in respect of imports of certain pears in syrup originating in Australia, the People's Republic of China and the Republic of South Africa (OJ 1983 L 196, p. 22, especially paragraph 8 of the recitals).

from the Soviet Union' case,[36] the Commission even indicated that it:

'does not consider that the term "in the ordinary course of trade" presupposes conditions of perfect competition. *Even where competition is limited by the existence of a cartel, a monopoly or a system of minimum prices,* the selling price may be considered to be in the ordinary course of trade provided that it is generally available to all real or potential customers and that it covers all costs of production'.[37]

51. As academic writers have rightly pointed out,[38] the Commission's reasoning in those cases is the logical corollary of the economic conception of dumping.

52. There is another factor which leads me to the view that the existence of a patent on the exporter's domestic market is not a reason to derogate from the principle laid down in Article 2(3)(a) of the basic regulation.

53. As we have seen, Article 2(3)(b) only authorises the institutions to establish normal value on the basis of actual price if domestic sales enable a 'proper comparison' to be made.

Pursuant to the case-law of the Court, that requirement concerns the question whether domestic sales are sufficiently representative to serve as a basis for determining normal value. It is intended to ensure that transactions concluded on the domestic market reflect '*normal behaviour on the part of purchasers*' and result from '*normal patterns of price formation*',[39] in other words, the normal interplay of supply and demand.

54. In my view, even where competition on the domestic market is restricted by the existence of a patent, domestic sales none the less continue to reflect and to be the result of 'normal patterns of price formation'.

36 — Commission Regulation (EEC) No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep freezers originating in the USSR, accepting the undertakings in connection with the investigation of imports of certain deep freezers originating in Yugoslavia and the German Democratic Republic and terminating the investigation, and terminating the procedure concerning imports of certain deep freezers (OJ 1986 L 259, p. 14).

37 — Paragraph 7 of the recitals (emphasis added). See also Decision 83/360, cited above, paragraph 8 of the recitals.

38 — E. Vermulst and P. Waer, cited above, p. 179.

39 — According to the case-law, that requirement is satisfied where the volume of sales realised by the manufacturer concerned on the domestic market exceeds 5% of the volume of sales for export to the Community (see *Goldstar* v *Council*, paragraph 16 and *Thai Bicycle* v *Council*, paragraph 50). However, it is possible to derogate from that 5% criterion where there are exceptional circumstances (see *Goldstar* v *Council*, paragraphs 17 to 25).

Even if there is a monopoly, a patent-holder still determines his prices on the basis of his own commercial strategy. Thus he may decide to charge high prices if he wishes to maximise profits on his invention quickly or to present his product as a luxury article.[40] Conversely, he may, notwithstanding his monopoly, decide to charge relatively modest prices if he wishes to make rapid inroads into the market or to acquire a larger customer base.

But, above all, a patent-holder remains to some degree subject to normal market forces, that is to say to the law of supply and demand. In determining his prices, he must take account of factors such as whether or not there is any demand for his product, whether or not there is any competition from substitutable products, and the conduct of purchasers who may or may not accept his price levels, and indeed turn to other products if they regard those prices as excessive.

55. That being so, the fact that there is a patent protecting sales of the product on the exporter's domestic market does not in itself seem to me to constitute sufficient grounds for concluding that domestic sales do not enable a 'proper comparison' to be made within the meaning of Article 2(3)(b) of the basic regulation.

40 — See on this point the Opinion of Advocate General Van Gerven in *Goldstar* v *Council*, point 12.

56. I therefore propose that the Court dismiss the first ground of appeal as unfounded.

Second ground of appeal: infringement of Article 190 of the Treaty

57. By their second ground of appeal, the appellants maintain that the Court of First Instance infringed Article 190 of the Treaty.

They maintain that it was wrong to find, at paragraphs 130 to 133 of the contested judgment, that the contested regulation was adequately reasoned, given that the Council did not state the reasons why the actual prices on the American market were 'comparable' to export prices to the Community.

58. It must be observed that, under Article 51 of the EC Statute of the Court of Justice, an appeal may only be brought on points of law. Furthermore, Article 112(1)(c) of the Rules of Procedure of the Court of Justice provides that an appeal must specify the pleas in law and legal arguments relied on by the appellant before

the Court. The Court has consistently held that:

'[I]t follows from those provisions that an appeal must clearly state which aspects are criticised in the judgment which the Court is requested to set aside and the legal arguments which specifically support the request'. [41]

In *Bergaderm and Goupil* v *Commission*, [42] the Court of Justice held as follows:

'That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake'. [43]

59. However, the appellants here confine themselves to rehearsing the arguments they submitted at first instance without specifically identifying the error in law allegedly vitiating the contested judgment.

Before the Court of First Instance they claimed that, 'by failing to state the reasons for finding that the patent-protected prices were comparable to prices for export to the Community, the defendant ... committed a breach of its obligation to provide a statement of reasons (Article 190 of the Treaty).' [44]

And, by virtue of this ground of appeal, the appellants allege that the Court of First Instance erred in law because 'the failure by the Council to give any relevant reasons for the conclusion that US aspartame prices were comparable to Community prices notwithstanding the existence of a patent in the United States amounted to an

41 — Order in Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041, paragraph 9. See also the Orders in Case C-26/94 P X v *Commission* [1994] ECR I-4379, paragraph 12; Case C-19/95 P *San Marco* v *Commission* [1996] I-4435, paragraph 37; the judgments in Cases C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 25; C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 49; C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 23; C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 113; and the order in Case C-171/99 P *Clauni and Others* v *Commission*, not published in the ECR, paragraph 15.

42 — Case C-352/98 P [2000] ECR I-5291, paragraph 35.

43 — The Court of Justice thereby nuanced its earlier case-law. See in that regard the wording used, *inter alia*, in the orders in Cases C-62/94 P *Turner* v *Commission* [1995] ECR I-3177, paragraph 17; C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 30; C-148/96 P(R) *Goldstein* v *Commission* [1996] ECR I-3883, paragraph 24; C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraph 25; and C-341/98 P *Proderec* v *Commission*, not published in the ECR, paragraph 31.

44 — Paragraph 123 of the contested judgment.

infringement of Article 190 [of the Treaty] ...'.[45]

60. To the extent that the appellants are simply asking for the arguments they submitted at first instance to be reheard, the second ground of appeal must be dismissed as manifestly inadmissible.

Third ground of appeal: infringement of essential procedural requirements

Arguments of the appellants

61. By their third ground of appeal, the appellants claim that the Court of First Instance infringed essential procedural requirements.

They criticise the Court of First Instance for having held, at paragraph 87 of the contested judgment, that any breach of the rights of the defence during the course of the procedure which led to the adoption of the provisional regulation is not a defect which affects the validity of the definitive regulation where it has been remedied during the procedure leading to the adoption of the definitive regulation.[46]

62. The appellants point out that it is a fundamental principle of Community law that the rights of the defence be observed. They claim that that principle requires the Commission to inform the interested parties, before adopting a provisional regulation, of the principal facts and considerations on the basis of which it intends to impose provisional anti-dumping duties.

63. However, contrary to the finding of the Court of First Instance, a breach of that obligation in the course of the procedure leading to the adoption of the provisional regulation would irreversibly affect the legality of the definitive collection of the provisional duties.

64. In support of their theory, the appellants essentially rely on two arguments.[47]

45 — Paragraph 113 of the appeals.

46 — The appellants also claim that the contested judgment is not sufficiently reasoned on this point (see paragraph 119 of Ajinomoto's appeal and paragraph 114 of NutraSweet's appeal). However, they do not present any arguments in support of that ground of appeal.

47 — Their other arguments are directed solely at establishing that the principle of the rights of the defence requires the Commission to inform the interested parties *prior to adopting the provisional regulation* of the main facts and considerations on the basis of which it intends to impose provisional anti-dumping duties. However, as the appellants themselves acknowledged: 'The existence of a fundamental right to be heard prior to the imposition of provisional anti-dumping duties is not at issue [in this case] because, as correctly stated by the Council, the Court of First Instance considered it unnecessary to pronounce itself on this matter' (paragraph 12 of the replies). Those arguments are therefore irrelevant.

First of all, the case-law cited by the Court of First Instance at paragraph 87 of the contested judgment is irrelevant. It relates to the conditions of admissibility of an action for annulment of a provisional regulation and not, as in this case, to an infringement of the principle of the rights of the defence.

Secondly, it follows from Article 12(2)(a) of the basic regulation that the existence of provisional anti-dumping duties is a prerequisite for definitive collection of those duties. Definitive collection of provisional duties can only be ordered if the provisional duties have already been imposed by the Commission. Therefore, any illegality vitiating the provisional regulation must necessarily entail the illegality of definitive collection of the provisional duty.

Findings

65. The appellants essentially submit that an infringement of the rights of the defence during the course of the procedure leading to the adoption of the provisional regulation necessarily means that definitive collection of the provisional anti-dumping duties is illegal.

66. It seems to me that the Court of Justice has already ruled on that kind of argument in *Neotype Techmashexport* v *Commission and Council*. [48]

In that case, Neotype was asking for annulment of a provisional regulation and of a definitive regulation both of which were adopted following an investigation procedure. The applicant considered that the provisional regulation was unlawful on the ground that the Commission (1) had only informed it very late that the investigation procedure was being reopened and (2) had adopted the provisional regulation on a date when its observations could not reasonably have been considered. [49] Neotype claimed that, because the provisional regulation was illegal, the provision in the definitive regulation collecting definitively the provisional anti-dumping duties should be annulled.

67. The Court of Justice, in deciding that plea in law, found as follows: [50]

'... Neotype contends that the definitive collection under Article 2 of the definitive regulation of the amounts secured as provisional duties is unlawful, inasmuch as the provisional regulation was null and void

48 — Joined Cases C-305/86 and C-160/87 [1990] ECR I-2945.

49 — See the Report for the Hearing in *Neotype* (paragraph III.2(a)(i)).

50 — Paragraphs 68 to 70 of the judgment in *Neotype* (emphasis added).

and was therefore not capable of being confirmed by the definitive regulation.

In that connection it should first be stated that the legality of the definitive regulation providing for the collection of the provisional anti-dumping duty may be affected by any illegality of the provisional regulation *only in so far as that illegality is reflected in the definitive regulation.*

The submissions put forward by Neotype against the provisional regulation cannot be relied on against the definitive regulation. Neotype's first submission that the provisional regulation is unlawful owing to an irregularity occurring in the hearing procedure does not affect the definitive collection of the provisional duty. Even if Neotype was not informed in due time of the imposition of the provisional duty, *that could not affect the definitive collection of that duty, since Neotype had the opportunity of making known its arguments before the definitive regulation was adopted.*'

68. It is clear from the judgment in *Neotype* that an illegality in a provisional regulation does not affect the legality of the definitive collection of provisional duties unless that illegality is reflected in the definitive regulation.

69. Contrary to the appellants' claims,[51] the principles laid down in the *Neotype* judgment are to my mind fully transposable to this case.

Just as in *Neotype*, the appellants argue that the provisional regulation is illegal because their right of defence was infringed in the course of the procedure leading to the adoption of that regulation. Just as in *Neotype*, the appellants argue that the fact that the provisional regulation is illegal means that the definitive collection of the provisional anti-dumping duty must also be legal. However, just as in *Neotype*, the Community judicature found that the appellants were afforded an opportunity to submit their arguments prior to adoption of the definitive regulation.[52]

51 — The appellants claim that the 'defects' relied on by Neotype relate to 'minor aspects' of the investigation procedure and 'cannot be equated with the infringement of a fundamental principle of Community law, such as a failure to provide any information regarding the imposition of extremely severe anti-dumping measures' (paragraph 103 of Ajinomoto's reply and paragraph 101 of NutraSweet's reply). However, the appellants do not explain why the Court is asked to distinguish between irregularities relating to 'minor aspects' of the investigation procedure and those relating to 'fundamental principles'. Furthermore, the appellants do not explain what is to be understood by 'minor aspects' and 'fundamental principle'. The other arguments advanced by the appellants (at paragraphs 104 and following of the reply filed by Ajinomoto and paragraphs 102 and following of the reply filed by NutraSweet) in reality serve to demonstrate that the Commission is bound to communicate to the interested parties, before it adopts the provisional regulation, the main facts and considerations on the basis of which it is contemplating imposing provisional duties. For the reasons set out in footnote 46 of this Opinion, those arguments are irrelevant.

52 — See paragraphs 89 to 118 of the contested judgment.

70. In the light of the judgment in *Neotype*, the Court of First Instance did not, to my mind, err in law in finding that any infringement of the appellants' right of defence in the course of the procedure leading to the adoption of the provisional regulation only affects the legality of the definitive regulation where that illegality is reflected in the definitive regulation.

71. I therefore propose that the Court dismiss the third ground of appeal as unfounded.

Fourth ground of appeal: infringement of Article 2(3) and (6) of the basic regulation

72. Finally, Ajinomoto claims that the Court of First Instance infringed Articles 2(3) and (6) of the basic regulation by finding that the institutions were right to determine the normal value of Japanese aspartame on the basis of prices charged in the United States.

73. However, the appellant does not invoke any separate argument in support of this ground of appeal. It confines itself to stating that, *for the reasons set out in the context of the first ground of appeal*,[53] the prices charged on the American market could not serve as a basis for calculating the normal value of Japanese aspartame.

74. I would therefore refer the Court to the observations made at points 36 to 56 of this Opinion.

75. For the foregoing reasons, I propose that the Court should dismiss the appeal in its entirety.

Costs

76. Under Articles 69(2) and 118 of the Rules of Procedure of the Court of Justice, 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 appellants have been unsuccessful, they must be ordered to pay the costs in accordance with the application to that effect made by the institutions in their pleadings.

53 — See paragraph 118 of Ajinomoto's appeal.

Conclusion

77. In the light of the foregoing considerations, I therefore propose that the Court:

(1) dismiss the appeal;

(2) order the appellants to pay the costs of this appeal.