JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
19 November 1998 *

In Case T-147/97,

Champion Stationery Mfg Co. Ltd, a company established in Hong Kong, People's Republic of China,

Sun Kwong Metal Manufacturer Co. Ltd, a company established in Hong Kong, People's Republic of China, and

US Ring Binder Corporation, a company established in New Bedford, Massachussetts, United States of America,

represented by Richard Luff, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicants,

v

Council of the European Union, represented by Antonio Tanca and Eva Karlsson, of its Legal Service, acting as Agents, and by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg and Brussels, with an address for service in

* Language of the case: English.

Luxembourg at the office of Alessandro Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Viktor Kreuschitz and Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

Koloman Handler GesmbH, a company incorporated under Austrian law, established in Vienna,

and

Robert Krause GmbH & Co. KG, a limited partnership constituted under German law, established in Espelkamp, Germany,

represented by Rainer M. Bierwagen, Rechtsanwalt, Berlin and Brussels,

interveners,

APPLICATION for annulment of Council Regulation (EC) No 119/97 of 20 January 1997 imposing definitive anti-dumping duties on imports of certain ring binder mechanisms originating in Malaysia and the People's Republic of China and collecting definitively the provisional duties imposed (OJ 1997 L 22, p. 1) in so far as it concerns the applicants,

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

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J. D. Cooke, and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 1 July 1998,

gives the following

Judgment

Background to the dispute

1 Champion Stationery Mfg Co. Ltd ('Champion Stationery') and Sun Kwong Metal Manufacturer Co. Ltd ('Sun Kwong') produce ring binder mechanisms in the

People's Republic of China ('China'). Both companies sell the ring binder mechanisms they produce to a related company, US Ring Binder Corporation ('US Ring Binder'), which resells them into the Community.

2 In response to a complaint lodged on 18 September 1995 by Robert Krause GmbH & Co. KG ('Robert Krause') and Koloman Handler GesmbH ('Koloman Handler'), whose combined production is assumed to represent 90% of Community production of ring binder mechanisms, the Commission initiated, on 28 October 1995, an anti-dumping proceeding concerning imports of certain ring binder mechanisms originating in Malaysia and China (OJ 1995 C 284, p. 16).

3 The Commission sent a questionnaire to all the parties known to be concerned. The applicants replied to the questionnaire and verifications were carried out on their premises.

4 On 11 July 1996, the applicants were informed of the essential facts and considerations on the basis of which the Commission intended to impose provisional measures.

5 On 25 July 1996 the Commission adopted Regulation (EC) No 1465/96 imposing a provisional anti-dumping duty on imports of certain ring binder mechanisms originating in Malaysia and the People's Republic of China (OJ 1996 L 187, p. 47, 'the provisional duty regulation'). Having found there to be a dumping margin of 112.8% for China (recital 41 in the preamble to the provisional duty regulation), the Commission calculated the level of duty necessary to remove the injury caused to the Community industry by the dumping (recitals 82 to 86 in the preamble to the provisional duty regulation). For China, that calculation gave an injury elimination level of 35.4%. Since that figure was lower than the dumping margin as

provisionally established, the duty was provisionally fixed at that level in respect of all imports of ring binder mechanisms originating in China.

6 On 12 August 1996 the applicants submitted written comments to the Commission concerning the disclosure document of 11 July 1996.

7 On 29 October 1996 the Commission sent to the applicants, by fax and by post, the definitive disclosure document (hereinafter 'the disclosure document') in which it set out the essential facts and considerations on the basis of which it intended to recommend the imposition of definitive duties.

8 The covering letter accompanying the disclosure document gave the applicants until 8 November 1996 to submit their comments. The applicants did not respond to that invitation.

9 Point A.3.1 of the disclosure document explained that the Commission had concluded that one of the exporters in China, World Wide Stationery ('WWS'), could be granted the individual treatment it had requested. Point A.3.2 of that document states that '[WWS]'s individual dumping margin amounts to 96.6%. Following the decision to grant [WWS] the individual treatment requested, and therefore disregarding for the average calculation with respect to the Chinese exports the corresponding transactions, the dumping margin for ... China as a whole is 129.22%'. Point D of the same document, entitled 'Definitive measures', which begins with 'Considerations relating to the establishment of the injury elimination level', explains that: 'Under these conditions, the injury elimination level methodology as set out in recitals (83) to (86) of the provisional duty Regulation should be confirmed' (point D.1.1). Point D.2, entitled 'Injury elimination level', explains that, as regards China: 'The granting of individual treatment to [WWS] affects the provisional findings. The methodology described above has been applied to calculate the

individual injury elimination level of this company, and a 32.5% underselling margin was established for this company' (point D.2.2).

10 The covering letter accompanying the disclosure document stated that the total number of pages sent was nine ('9 pages total'). The applicants maintain that they received nine pages, including the covering letter. However, the Council explains that, as a result of an oversight, the applicants did not receive the final page of the disclosure document. On that final page, produced by the Council as Annex D.3 to its defence, the Commission explained that '[t]he reduced underselling margin for [WWS] result[ed] in an increase of the margin for all other exporters from ... China to 39.4% (previously 35.4%)'. Furthermore, it stated its intention to propose that the Council impose a duty of 32.5% for WWS and a residual duty of 39.4% for the other Chinese companies, as well as the definitive collection of the amounts secured under the provisional duty regulation in so far as the rate of the provisional duty did not exceed the definitive duty.

11 On 29 November 1996 the applicants' lawyer had a telephone conversation with Mr Knoche, one of the officials in the Directorate General for External Relations (DG I) responsible for the file.

12 On 12 December 1996 Mr Knoche made a file note concerning that telephone conversation. That note reads as follows:

'Mr Luff, legal counsel of US Ring Binders in this case, called on 29 November, alleging that his client was entitled to think that the duty applicable to its exports would remain unchanged (35.4%), as a consequence of paragraph D.1.1 of the disclosure letter confirming recitals 83 to 86 of the provisional duty regulation.

It was replied that the paragraph in question only confirmed the methodology set out in the provisional duty regulation, and that the last page of the disclosure was quite clear as far as the proposed duty applicable to US Ring Binders was concerned (39.4%).

Mr Luff then alleged not to have received this last page, and meant that it was then possible for him to request another disclosure.

It was replied that the receipt notification of the disclosure fax indicated the right number of pages, and that his office could check if the registered mail received by him in the meanwhile was also complete (in the other case, he would have had to make a prompt request).

Mr Luff's requests were not reiterated at a later stage.'

13 The applicants consider that summary of the telephone conversation to be incomplete and inaccurate. In their reply (p. 14, point 3(ii) and (iii)), they summarise the telephone conversation as follows: 'during the telephone conversation with Mr Luff, Mr Knoche made it clear that several versions of the disclosure document had been prepared. He added that, although the disclosure document would normally have been sent out by Directorate I.E (which is in charge of injury), this work had been handled by his colleagues in Directorate I.C (which is in charge of dumping) in this case. ... Mr Knoche started by confirming that the duty rate applicable to the Applicants had increased following the granting of individual treatment to [WWS]. However, when Mr Luff queried how it was possible that this information was not in the disclosure document he had received, Mr Knoche added that, in any event, the disclosure document mentioned the total number of pages ... and invited Mr Luff to check whether he had received all the pages. Mr Luff immediately replied that the disclosure document indicated on the first page that it contained nine pages in total and that he had indeed received the full nine pages. ... [Mr Luff then] invited Mr Knoche to contact his colleagues in Direc-

torate I.C in order to confirm which was the correct version and to ask them to check whether the version of the disclosure document which had been sent to Mr Luff was indeed the correct one. ... When Mr Knoche asked Mr Luff whether the disclosure document he had received confirmed the original duty rate for his clients, Mr Luff replied that this was the case as a result of the last paragraph under point D.1.1. ... Mr Knoche said very clearly that in the version he had received the last paragraph did not refer to recitals (83) through (86) [in the preamble to the provisional duty regulation] and that recitals (85) and (86) [in the preamble to that regulation] were specifically omitted.'

14 On 20 January 1997 the Council adopted Regulation (EC) No 119/97 imposing definitive anti-dumping duties on imports of certain ring binder mechanisms originating in Malaysia and the People's Republic of China and collecting definitively the provisional duties imposed (OJ 1997 L 22, p. 1; hereinafter 'the contested regulation'). The contested regulation fixed the definitive anti-dumping duty for imports originating in China at 39.4%, with the exception of imports by WWS, in respect of which a definitive duty of 32.5% was introduced.

Procedure and forms of order sought by the parties

15 By application lodged at the Registry of the Court of First Instance on 30 April 1997, the applicants brought the present proceedings.

16 By document lodged at the Court Registry on 4 August 1997, the Commission applied for leave to intervene in support of the forms of order sought by the Council. By decision of the Court of 10 November 1997, the Commission was granted leave to intervene. The Commission, which has not submitted any statement in intervention in this case, presented its arguments at the hearing.

17 By document lodged at the Court Registry on 26 September 1997, Koloman Handler and Robert Krause also applied for leave to intervene in support of the forms of order sought by the Council. By decision of the Court of 10 November 1997 they were granted leave to intervene. They submitted their statement in intervention within the time-limit fixed by the Registry.

18 The applicants claim that the Court should:

— annul the contested regulation in so far as it concerns them; and

— order the Council to pay the costs.

19 In their reply to the statement in intervention by Koloman Handler and Robert Krause the applicants also request that the interveners be ordered to bear their own costs.

20 The Council contends that the Court should:

— dismiss US Ring Binder's application as inadmissible;

— in any event, dismiss the application as unfounded;

— order the applicants to pay the costs.

21 The Commission supports the forms of order sought by the Council.

22 Koloman Handler and Robert Krause claim that the Court should:

— dismiss the action on the ground that it is inadmissible and/or unfounded;

— order the applicants to pay the costs of the interveners.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry. However, it asked the Council to reply to a written question before the hearing. The Council complied with that request within the time-limit.

24 The parties presented oral argument and their replies to the Court's questions at the hearing in open court on 1 July 1998.

Admissibility

Arguments of the parties

25 The Council, referring to the judgment in Case C-75/92 *Gao Yao* v *Council* [1994] ECR I-3141, paragraphs 28 to 30, expresses doubt as regards the admissibility of this action in so far as it was brought by the applicants Champion Stationery and Sun Kwong. It observes that the investigation in the present case was directed

against producers/exporters in China and Malaysia and not against producers/exporters in Hong Kong. For that reason, the questionnaires were not sent to Champion Stationery or Sun Kwong, which are established in Hong Kong. Furthermore, the Council points out, those two applicants are not named in either the provisional duty regulation or the contested regulation as producers/exporters but as Hong Kong companies related to the Chinese producers/exporters. The fact that the Commission accepted their replies to the questionnaires, exchanged correspondence with them and gave their representatives the opportunity to be heard does not mean that those companies are directly and individually concerned by the contested regulation (*Gao Yao* v *Council*, paragraph 30).

26 In addition, the Council considers that the action is clearly inadmissible in so far as it was brought by US Ring Binder. It points out that there is no direct link between that applicant and the producers/exporters in China. There is not even any direct link between US Ring Binder, on the one hand, and Champion Stationery and Sun Kwong, on the other. The fact that the companies all belong to the same group is not in itself sufficient to allow the conclusion that US Ring Binder is directly and individually concerned by the contested regulation. The Council adds that the investigation did not concern exports from the United States. Nor was US Ring Binder charged with dumping. The mere fact that it submitted a reply to the Commission's questionnaires does not render it directly and individually concerned by the contested regulation.

27 The interveners concur with the arguments put forward by the Council concerning the admissibility of the present action.

28 The applicants contend that the action is admissible. First, they claim that Champion Stationery and Sun Kwong are producers/exporters in China. The production facilities which both companies own in China do not constitute separate legal enti-

ties. In the present case, the replies to the questionnaires could only have been submitted by the two applicants concerned, since they were acting as producers in China and exporters to the European Union. By the same token, since applications under Article 173 of the Treaty can be made only by natural or legal persons, the production departments of the applicants Champion Stationery and Sun Kwong in China could not legitimately have brought the present proceedings.

29 Next, referring to the judgments in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 12, and in Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraphs 34 to 36, the applicants submit that the action is also admissible in so far as it was brought by US Ring Binder. They point out that US Ring Binder is the exclusive exporter to the Community of the products manufactured by Champion Stationery and Sun Kwong. Furthermore, it was identified in the provisional duty regulation and was affected by the preliminary investigation (*Allied Corporation* v *Commission*, paragraph 12). It is, moreover, clear from the case-law that regulations imposing anti-dumping measures are of direct and individual concern to applicants whose resale prices for the products in question formed the basis for the construction of the export price (*Ferchimex* v *Commission*, paragraphs 34 to 36). In the present case, the export price used to calculate the dumping margins of Champion Stationery and Sun Kwong was obtained on the basis of the price charged by US Ring Binder to independent customers in the European Union.

Findings of the Court

30 According to Article 14(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, hereinafter 'the basic regulation'), 'provisional or definitive anti-dumping duties shall be imposed by Regulation'. Although it is true that in the light of the criteria set out in the fourth paragraph of Article 173 of the Treaty, such measures are in fact, as regards their nature and

their scope, of a legislative character, in that they apply to all the economic operators concerned taken as a whole, their provisions may none the less be of direct and individual concern to certain economic operators (judgments in *Allied Corporation and Others* v *Commission*, cited above, paragraph 11; Case 53/83 *Allied Corporation and Others* v *Council* [1985] ECR 1621, paragraph 4; *Gao Yao* v *Council*, cited above, paragraph 26; Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 45; and Case T-170/94 *Shanghai Bicycle* v *Council* [1997] ECR II-1383, paragraph 35).

31 The Court holds, first, that the three applicants are directly concerned by the contested regulation. That regulation imposes a definitive anti-dumping duty which the customs authorities of the Member States are obliged to collect and leaves them no discretion in that regard.

32 In order to establish whether the applicants are also individually concerned, it is necessary to consider the situation of Champion Stationery and Sun Kwong separately from that of US Ring Binder.

33 The applicants have submitted, without being contradicted by the Council or the interveners, that the premises of Champion Stationery and Sun Kwong situated in China, to which the Commission's questionnaires were sent and which, according to the Council, should have brought the application for annulment, are production facilities belonging to the two applicants established in Hong Kong. They are internal departments of those applicants. Furthermore, it is not disputed that the facilities of Champion Stationery and Sun Kwong in China do not have separate legal personality.

34 In those circumstances, Champion Stationery and Sun Kwong must be regarded as producers/exporters in China. The situation in the present case is therefore clearly

different from that in *Gao Yao* v *Council*. In that case, the Court held the application to be inadmissible because the applicant had intervened in the administrative procedure 'merely as a channel of transmission in Hong Kong set up to facilitate correspondence between the Commission and Gao Yao China' (*Gao Yao* v *Council*, cited above, paragraph 29).

35 It is clear from settled case-law that measures imposing anti-dumping duties are liable to be of individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission and the Council or were affected by the preliminary investigations (judgments in *Allied Corporation and Others* v *Commission*, cited above, paragraph 12; Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraph 14; Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 17; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 15; *Gao Yao* v *Council*, cited above, paragraph 27; *Sinochem Heilongjiang* v *Council*, cited above, paragraph 46, and *Shanghai Bicycle* v *Council*, cited above, paragraph 36).

36 Champion Stationery and Sun Kwong were referred to by name in recital 5(b)(2) in the preamble to the provisional duty regulation, entitled 'exporters/producers' in China. Furthermore, they were subject to on-the-spot investigations (recital 5(b)(2) in the preamble to the provisional duty regulation). They were also identified in the contested regulation (recital 26 in the preamble).

37 It follows that Champion Stationery and Sun Kwong are individually concerned by the contested regulation and their application is admissible.

38 Recital 5(b)(2) in the preamble to the provisional duty regulation also states that 'Champion Stationery Manufacturing Co. Ltd and Sun Kwong Metal Manufacturer Co. Ltd are owned by the same group of companies and both sell their

Chinese [ring binder mechanisms] to a related company located in the United States (US Ring Binder)'. For that reason, US Ring Binder is included amongst the undertakings referred to in the provisional duty regulation under the heading 'exporters/producers' in China and was subject to an on-the-spot investigation (recital 5(b)(2) in the preamble to the provisional duty regulation). US Ring Binder was thus identified in the measures adopted by the Commission and affected by the preliminary investigations within the meaning of the case-law cited at paragraph 35 above. Furthermore, in its reply to a written question from the Court, the Council acknowledged that the export price of Champion Stationery and Sun Kwong was calculated on the basis of the price charged by US Ring Binder to independent customers established in the Community. That fact also distinguishes that applicant, with regard to the measure at issue, in respect of all other economic operators (see, by analogy, the judgments, cited above, in *Gao Yao* v *Council*, paragraph 27, and *Ferchimex* v *Council*, paragraph 34).

39 It follows from all the foregoing that the three applicants have standing to bring the proceedings.

Substance

40 The applicants raise a single plea in law, alleging infringement of their rights of defence.

Arguments of the parties

41 The applicants claim that, in breach of the principles identified in the case-law, the Community institutions failed to make available to them, during the administrative procedure, all the information which would have enabled them effectively to

defend their interests (judgments in Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 30; Case C-49/88 *Al-Jubail Fertiliser and Saudi Arabian Fertiliser* v *Council* [1991] ECR I-3187, paragraph 18). They claim that the disclosure document did not state that the anti-dumping duty to be applied to them would increase from 35.4 to 39.4% at the final stage in the procedure. On the contrary, by confirming recitals 85 and 86 in the preamble to the provisional duty regulation, point D.1.1 of the disclosure document confirmed the injury elimination level of 35.4% for all Chinese exporters/producers other than WWS. Furthermore, it is striking that the contested regulation (recital 64 in the preamble) indicated that recitals 82 to 84 in the preamble to the provisional duty regulation were confirmed and specifically omitted recitals 85 and 86. That discrepancy between the disclosure document and the contested regulation demonstrates that, far from being incomplete, the disclosure document actually had a different content from that of the contested regulation.

42 Next, the applicants claim that the disclosure document did not indicate that the granting of individual treatment to WWS would result in that company's sales being excluded for the calculation of the average injury caused by the other Chinese exports. In any event, the granting of individual treatment to WWS need not necessarily have resulted in the imposition of a rate of duty different from that provided for in the provisional duty regulation for the applicants. The granting of individual treatment to a given exporter does not necessarily affect the injury elimination level of the other exporters. The applicants refer to the Japanese plain paper photocopiers case (Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12)) and to that of 'DRAM' electronic microcircuits originating in the Republic of Korea (Council Regulation (EEC) No 611/93 of 15 March 1993 imposing a definitive anti-dumping duty on imports into the Community of certain electronic mirocircuits known as DRAMs originating in the Republic of Korea and exported by companies not exempted from this duty, and collecting definitively the provisional anti-dumping duty (OJ 1993 L 66, p. 1)). Even if the applicants must have been aware of the fact that the level of duty applicable to them would increase as a result of the individual treatment granted to WWS, it was totally impossible for them to calculate the precise rate of the definitive duty.

43 According to the applicants, a comparison between the provisional duty regulation and the contested regulation makes it clear that the methodology used to calculate the injury elimination level changed during the course of the procedure. The mere fact that the provisional duty regulation determined a single injury elimination level based on exports made by all the Chinese exporters concerned while the contested regulation determined separate injury elimination levels for those exporters constitutes a clear change in methodology. The contested regulation therefore confirmed only the methodology set out in recitals 82 to 84 in the preamble to the provisional duty regulation and not that in recitals 85 to 86, which had set the same injury margin elimination level for all the Chinese exporters.

44 The applicants state that they would have submitted new arguments had they been aware during the administrative procedure that the rate of duty applicable to them was to be increased to a significant extent. They stress that the methodology adopted by the institutions in the present case is subject to criticism in that it is illogical to assess injury, in particular price undercutting, on a global basis for all exporters but to determine injury elimination levels on an individual basis. If the Commission had determined, at a provisional stage, that the price undercutting by exports from China was 11.5% (recital 54 in the preamble to the provisional duty regulation) and that a duty of 35.4% was sufficient to eliminate the injury for all exporters concerned (recital 85 in the preamble to the provisional duty regulation), there was no reason why a higher duty was necessary at the definitive duty stage to eliminate the injury whilst the price undercutting by exports from China was computed on a global basis at the same level in the definitive determination (point B.5 of the disclosure document and recital 34 in the preamble to the contested regulation).

45 Next, the applicants claim that during the administrative procedure they had no reason to believe that the disclosure document was incomplete, since they had received exactly the same version by fax and by post, since both versions clearly indicated on the first page that the disclosure document comprised nine pages and

since the writing on the last (ninth) page of the disclosure document stopped halfway down the page. In any event, the Commission infringed Article 20(4) of the basic regulation, which provides that 'final disclosure shall be given in writing'. A telephone conversation cannot be a substitute for written disclosure, especially when the definitive duty imposed is different from the provisional duty.

46 However, the applicants acknowledged at the hearing, in response to the Council's argument based on Article 20(3) of the basic regulation, that they had never requested final disclosure in writing. They nevertheless submit that, when the Commission gives final disclosure to a given party, that disclosure must be complete.

47 The Council and the interveners point out, first, that the applicants were aware of the change in the rate of the anti-dumping duty which would apply to them. It is clear from the note for the file concerning the telephone conversation of 29 November 1996 (see paragraph 12 above) that the applicants were informed, on that occasion, that the definitive duty proposed by the Commission to the Council would be higher than that imposed by the provisional duty regulation. They were also informed of the precise rate of the duty. The Council and the interveners also draw attention to the fact that the applicants have confirmed in their reply that Mr Knoche had informed their lawyer, during the telephone conversation on 29 November 1996, that the definitive duty proposed by the Commission was higher than the provisional duty and had explained the reasons for that increase (see paragraph 13 above). Nor have the applicants disputed that they were informed of the rate of the definitive duty which the Commission intended to propose. The Council and the interveners therefore conclude that the applicants should have been aware that they had not received the complete version of the disclosure document. In response to the applicants' argument that the disclosure document was not incomplete, but different, the Council claims that the document which the applicants should have received is the one they actually received, plus the missing last page. The Council produced that missing page as Annex D.3 to its defence. The

only differences between the disclosure document sent to the applicants and that sent to the other exporters concerned the replies to certain specific arguments relating to the dumping and/or business secrets. Because of those slight differences, the individual disclosure documents were of differing lengths and had different page breaks.

48 The Council and the interveners then submit that the increase in the rate of duties was also apparent from the wording of the disclosure document received by the applicants. They refer to point D.1.1 of the disclosure document, which states that 'the injury elimination level methodology as set out in recitals (83) to (86) of the provisional duty regulation should be confirmed'. They also point out that, at point D.2.2, the Commission stated, as regards the 'Injury elimination level', that '[t]he granting of individual treatment to [WWS] affects the provisional findings'. In their submission, the increase in the amount of duty applicable to the applicants in the definitive duty regulation was the logical result of the express confirmation of the methodology used in calculating the injury elimination figure and the granting of individual treatment to WWS, whose injury elimination level was below the average. The applicants could therefore have been in no doubt, had they read the disclosure document carefully, that the definitive duty which the Commission intended to propose to the Council would be higher than the provisional duty. The Council concedes, however, in its rejoinder that, on the basis of the information contained in the disclosure document, the applicants could not have calculated the precise rate of the duty which the Commission intended to propose. None the less, that document made it clear that the duty which the Commission intended to propose would be higher than the provisional duty imposed.

49 The Council disputes the applicants' argument that the methodology changed in the course of the administrative procedure, contending that the methodology used to calculate the injury elimination level, and consequently to calculate the anti-dumping duty, did not change at any time, either between the imposition of the provisional duties and final disclosure, or between final disclosure and the imposition of the definitive duties.

50 Next, the Council and the interveners claim that the disclosure document was visibly incomplete and, in those circumstances, the applicants should have contacted the Commission to ask whether there were parts missing. They point out that the disclosure document received by the applicants does not mention the level of duty which the Commission intended to propose to the Council, for WWS's exports, for exports from China as a whole, or for exports of ring binder mechanisms from Malaysia. Furthermore, it was clearly surprising that the disclosure document received by the applicants should refer to the injury elimination level for Malaysia and for WWS and not for the other Chinese producers/exporters. Finally, the disclosure document states that the 'provisional findings' were affected by the granting of individual treatment to WWS. The applicants could therefore have expected that the disclosure document would contain an explanation as to how the findings concerning the Chinese exporters other than WWS were affected. At the hearing, the Council and the interveners added that the incomplete nature of the disclosure document was also apparent from the fact that it made no reference to the collection of the provisional duties.

51 In the alternative, the Council submits that, even if the Court were to find that the Community institutions failed to inform the applicants that the definitive duties proposed by the Commission to the Council would be higher than the provisional duties imposed, that would not mean that the applicants' rights of defence had been infringed. In accordance with Article 20(2) to (4) of the basic regulation, the Commission disclosed to the applicants the essential facts and considerations for the calculation of the definitive duties, in particular the methodology applied in calculating the injury elimination level. The Council points out that the injury elimination level established for the applicants in the contested regulation is higher than the injury elimination level used in the provisional duty regulation as a result of simple arithmetic. The amount of the definitive injury elimination level is therefore not one of the 'essential facts and considerations' referred to in Article 20(2) of the basic regulation.

52 Furthermore, the Council and the interveners claim that the applicants could not have presented any additional arguments, even if they had been expressly informed of the level of the proposed duty and of the fact that it was higher than the

provisional duty (*Al-Jubail Fertiliser*, cited above, paragraph 18). There could therefore have been no different outcome to the administrative procedure.

53 In the further alternative, the Council relies on the fact that the applicants did not submit a written request for disclosure within the time-limit laid down by Article 20(3) of the basic regulation. They are consequently not entitled to final disclosure, nor are the Community institutions under an obligation to provide such disclosure. It follows that even if the Community institutions had provided insufficient disclosure, thus preventing the applicants from effectively defending their interests, such insufficient disclosure could not lead to the annulment of the contested regulation.

54 In its rejoinder the Council goes on to submit, in response to the applicants' argument that Article 20(4) of the basic regulation requires final disclosure to be given in writing, that failure to comply with a disclosure obligation can result in the annulment of an anti-dumping measure only if that failure prevented the party concerned from effectively defending its interests, which was not the case here.

Findings of the Court

55 Respect for the rights of the defence is a fundamental principle of Community law, observance of which is ensured by the Community judicature (*Al-Jubail Fertiliser*, cited above, paragraph 15; Joined Cases T-159/94 and T-160/94 *Ajinomoto and Nutrasweet* v *Council* [1997] ECR II-2461, paragraph 81). Pursuant to that principle, the undertakings affected by an investigation preceding the adoption of an anti-dumping regulation must be placed in a position during the administrative procedure in which they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence

presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (*Al-Jubail Fertiliser*, paragraph 17; Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, paragraph 84, and *Ajinomoto and Nutrasweet* v *Council*, paragraph 83). Those requirements were given more specific expression by Article 20 of the basic regulation. Article 20(2) provides that the complainants, importers and exporters and their representative associations, and representatives of the exporting country, 'may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures ..., particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures'. Article 20(5) also grants undertakings which have received such final disclosure the right to submit any representations within the period set by the Commission, which must be at least 10 days.

56 It is therefore necessary to consider, in the light of those principles, whether the applicants' rights of defence were infringed during the administrative procedure.

57 It is not disputed by the parties that the disclosure document received by the applicants on 29 October 1996 was incomplete. The Community institutions explain that the document which the applicants should have received is the one they actually received on 29 October 1996, plus the missing last page (see paragraph 10 above).

58 The applicants consider that the fact that the disclosure document was incomplete hindered the effective exercise of their rights of defence during the administrative procedure. They claim, in the first place, that they were not informed, between the date on which they received the disclosure document and the imposition of the

definitive measures, of the changes in the methodology used to calculate the definitive duty. Second, their rights of defence were infringed in that the disclosure document received by them confirmed the injury elimination level of 35.4% for China, whereas the contested measure uses a level of 39.4%. Third, the applicants consider that their rights of defence were infringed in that the disclosure document received by them did not mention either the fact that the Commission intended proposing that the Council adopt a definitive duty higher than the provisional duty, as a result of the individual treatment granted to WWS, or the precise rate of the definitive duty. Finally, the applicants submit in the fourth place that the contested regulation should be annulled on the ground that it infringes Article 20(4) of the basic regulation. Those various arguments must be examined separately.

The change in the methodology used to calculate the definitive duty

59 Pursuant to Articles 7(2) and 9(4) of the basic regulation, the amount of the provisional and definitive anti-dumping duties imposed must be less than the margin of dumping established, if such lesser duties are adequate to remove the injury to the Community industry. In accordance with that principle, the Community institutions fixed the level of the anti-dumping duty, both in the provisional duty regulation (recitals 85 and 86 in the preamble) and in the contested regulation (recital 66 in the preamble), at the injury elimination levels established.

60 Contrary to the applicants' assertion, the methodology applied to calculate the injury elimination level and the anti-dumping duty did not change after the adoption of the provisional duty regulation. The contested regulation even states expressly that 'the injury elimination methodology as set out in recitals (82) to (84) of the provisional duty regulation [is] confirmed' (recital 64 in the preamble). That methodology is as follows. The Community institutions determined the level of

duty necessary to remove the injury to the Community industry caused by the dumping (recitals 82 to 84 in the preamble to the provisional regulation and recitals 62 to 69 in the preamble to the contested regulation). For that purpose, it was considered that a price level based on the Community producers' costs of production together with a reasonable profit margin should be calculated. The Community institutions therefore established a 'non-injurious price' (recital 83 in the preamble to the provisional duty regulation and recital 64 in the preamble to the contested regulation) and subsequently stated that it was necessary to calculate the difference between that 'non-injurious price' and the actual selling prices of the exporters in the Community. That difference represented the injury elimination level, namely the price increases necessary to bring the selling prices of the exporters up to the level of the 'non-injurious price' (recital 84 in the preamble to the provisional duty regulation and recital 64 in the preamble to the contested regulation).

61 The applicants are wrong to claim, as they do in their reply, that the mere fact that the provisional duty regulation determined a single injury elimination level based on exports made by all the Chinese exporters concerned, while the contested regulation determined separate injury elimination levels for WWS and for the other Chinese exporters constitutes a clear change in methodology. The methodology applied, both in the provisional duty regulation and in the contested regulation, required the institutions to calculate the injury elimination level by establishing a 'non-injurious price' and by comparing that price to the actual selling prices of exporters in the Community. The application of that methodology for calculating the injury elimination level, combined with the granting of individual treatment to WWS — of which the applicants were informed by the disclosure document (points A.3.1 and D.2.2 of that document) — resulted in the determination of a definitive duty for the applicants of 39.4%.

62 It follows from the foregoing that the first argument put forward by the applicants lacks any factual basis and must therefore be rejected.

The claim that the disclosure document confirmed an injury elimination level of 35.4% for the Chinese producers/exporters other than WWS

63 The applicants claim that, by referring to recitals 85 and 86 in the preamble to the provisional duty regulation, point D.1.1 of the disclosure document confirmed the injury elimination level of 35.4% for Chinese producers/exporters other than WWS. They conclude that they did not receive an incomplete version of that document but, rather, the complete version of a different disclosure document. Unlike the disclosure document received by the applicants, the contested regulation (recital 64 in the preamble) and the alleged official disclosure document do not contain any express reference to recitals 85 and 86 in the preamble to the provisional duty regulation.

64 Point D.1.1 of the disclosure document states that 'the injury elimination level methodology set out in recitals (83) to (86) of the provisional duty regulation should be confirmed'.

65 The injury elimination level methodology is explained in recitals 83 and 84 in the preamble to the provisional duty regulation and the injury elimination levels were established, on the basis of that methodology, in recitals 85 and 86 in the preamble to that regulation, for China (35.4%) and for Malaysia (10.5%) respectively. It follows that at point D.1.1 of the disclosure document the Commission did not confirm the injury elimination level of 35.4% established in recital 85 in the preamble to the provisional dumping regulation for the Chinese exports. It confirmed only the injury elimination level methodology, which remained unchanged between the adoption of the provisional duty regulation and the contested regulation (see paragraph 60 above). Even if there had been another version of the disclosure document which did not contain any reference to recitals 85 and 86 in the preamble to the provisional duty regulation, the applicants' rights of defence could not have been affected by the failure to communicate that version, since point D.1.1 of the disclosure document communicated to them, like the supposed version of the disclosure document which was not sent, confirms only the methodology for

calculating the injury elimination level, and not the injury elimination level of 35.4% established in recital 85 in the preamble to the provisional dumping regulation for Chinese exports.

66 It follows that the second argument put forward by the applicants also lacks any factual basis and must therefore be rejected.

The absence of any reference in the disclosure document to the increase in the duty applicable to the applicants as a result of the individual treatment granted to WWS or to the precise rate of the definitive duty

67 The applicants submit that their rights of defence were infringed during the administrative procedure in that the disclosure document received by them did not mention either the fact that the Commission intended proposing that the Council adopt a definitive duty higher than the provisional duty as a result of the individual treatment which had been granted to WWS or the precise rate of the definitive duty.

68 It must be borne in mind that the provisional duty regulation (recital 85 in the preamble) had established an injury elimination level of 35.4% and a provisional anti-dumping duty of the same level, for all the Chinese producers/exporters of the product concerned. By contrast, the contested regulation (recital 68 in the preamble) states that 'the reduced injury elimination level for WWS resulted in an increase, from 35.4 to 39.4%, of the injury elimination level for all other exporters from ... China'. On that basis, the residual duty for Chinese producers/exporters other than WWS was increased to 39.4% (recital 69 in the preamble).

69 The definitive anti-dumping duty applicable to the applicants' imports to the European Union thus differs substantially from the duty provisionally imposed, because of the effect of granting individual treatment to WWS. As it is clear from the case-law of the Court that the amount of the definitive duty constitutes essential information (*Al-Jubail Fertiliser*, cited above, paragraph 23), it is necessary to examine whether the applicants were duly informed of that change during the administrative procedure.

70 First of all, it is clear that, by means of the disclosure document, the applicants were informed that individual treatment would be granted to WWS. Furthermore, the document indicated that such individual treatment would affect the provisional findings. Thus, point D.2.2. of that document states: 'The granting of individual treatment to [WWS] affects the provisional findings. The methodology described above has been applied to calculate the individual injury elimination level of this company and a 32.5% underselling margin was established for this company.' However, it is not stated expressly anywhere in the disclosure document that the rate of the anti-dumping duty applicable to the applicants would be increased as a result of granting individual treatment to WWS. Nor does that document state the precise rate of the definitive duty applicable to the applicants' exports. Those two pieces of information were, in fact, stated on the last page of the disclosure document, which was not communicated to the applicants during the administrative procedure (see paragraph 10 above).

71 However, the applicants have themselves acknowledged in their reply that, during their lawyer's telephone conversation with Mr Knoche on 29 November 1996, the latter 'started by confirming that the duty rate applicable to the applicants had increased following the granting of individual treatment to [WWS]'. Furthermore, in response to a question from the Court at the hearing, the applicants' lawyer stated that during that same telephone conversation he had been informed of the precise rate of the definitive duty which would apply to imports of the applicants' products into the European Union (39.4%).

72 Even though that telephone conversation on 29 November 1996 took place between the applicants' lawyer and the Commission official, the applicants themselves must be regarded as having been made aware of the information communicated in the course of that conversation. It is not disputed that the same lawyer also represented the applicants' interests during the administrative procedure.

73 The Court therefore concludes that, even though the disclosure document did not mention either the fact that the rate of the anti-dumping duty applicable to their products would be increased in the definitive regulation as a result of the individual treatment granted to WWS or the precise rate of that duty, the applicants none the less became aware of those facts in the course of the administrative procedure.

74 However, it is still necessary to establish whether the applicants were informed of those 'facts and considerations' in sufficient time, in the course of the administrative procedure, in order to prepare their defence.

75 Article 20(5) of the basic regulation provides that: '[r]epresentations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter'.

76 In the present case the Commission sent the disclosure document to the applicants, by fax and by post, on 29 October 1996. The latter had at least the minimum period of 10 days required by Article 20(5) of the basic regulation within which to submit any representations. That period expired on 8 November 1996.

77 The applicants only became aware on 29 November 1996 that the granting of individual treatment to WWS would result in an increase in the anti-dumping duty applicable to imports of their products into the European Union, and of the precise rate of that anti-dumping duty (39.4%). Since that essential information was not included in the disclosure document, it follows that the applicants did not receive sufficient information to enable them to ensure the defence of their rights before the expiry of the period set by the Commission for the submission of any representations.

78 Furthermore, following the telephone conversation between the applicants' lawyer and Mr Knoche on 29 November 1996, the Commission must have realised that the disclosure document was incomplete. However, it failed both to send the applicants a complete version of the disclosure document following that telephone conversation and to grant them a period of time within which to submit any representations, in accordance with Article 20(5) of the basic regulation.

79 However, the above findings do not, in themselves, make it possible to hold that the applicants' rights of defence were infringed in the course of the administrative procedure. There can be no question of any such infringement it if is established that, in spite of the passive attitude of the Commission, the applicants were in a position, during the administrative procedure, effectively to make known their point of view on the information brought to their attention in the course of the telephone conversation on 29 November 1996.

80 Article 20(5) of the basic regulation, which sets a minimum period for the submission of any representations, is clear and precise and does not leave any discretion to the Community institutions (see, by analogy, Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italian Republic* [1991] ECR I-5357, paragraph 19). An undertaking which receives notification, in the course of the administrative procedure, of the essential facts and considerations within the meaning of Article 20(2)

of the basic regulation can thus, in the absence of any indication by the Community institutions of the time-limit within which it must submit any representations, be regarded as having a minimum period of 10 days as a result of the direct effect of Article 20(5) of the basic regulation.

81 Consequently, in the present case the applicants had 10 days within which to submit any representations concerning the essential information which was not included in the disclosure document sent to them on 29 October 1996, and which came to their attention on 29 November 1996. That time-limit expired on 9 December 1996.

82 The applicants are wrong to claim, as they did at the hearing, that the notification of certain essential information in the course of the telephone conversation on 29 November 1996 took place at too late a stage. It is not disputed that the Commission adopted the proposal for the adoption of the contested regulation on 16 December 1996 and forwarded it to the Council later that day (OJ 1997 C 13, p. 2). Therefore, if the applicants had submitted their representations before 9 December 1996, the Commission could still have taken them into account when drafting its proposals.

83 It follows that the fact that the disclosure document fails to mention either the increase in the rate of anti-dumping duty applicable to their products as a result of the individual treatment granted to WWS or the precise rate of the definitive duty (39.4%) does not constitute an infringement of the applicants' rights of defence since it has been established that they became aware of those facts during a telephone conversation with a Commission official at a time when it was still possible for them effectively to make known their point of view in that respect before the Commission adopted its proposal for the adoption of the contested regulation.

84 The third argument put forward by the applicants in support of their plea must therefore also be rejected.

Alleged infringement of Article 20(4) of the basic regulation

85 The applicants submit that a telephone conversation does not relieve the Commission of the obligation to give accurate disclosure in writing, as required by Article 20(4) of the basic regulation. Failure to comply with that provision of the basic regulation constitutes a ground for the annulment of the contested regulation.

86 Although it is true that Article 20(4) of the basic regulation provides that 'final disclosure shall be given in writing', Article 20(3) also provides that requests for disclosure 'shall be addressed to the Commission in writing'. At the hearing the applicants' lawyer acknowledged that, in the present case, his clients had never submitted a written request to that effect. The applicants, which concede that they failed to comply with Article 20(3) of the basic regulation, cannot therefore criticise the Community institutions for having failed to provide written confirmation of the information provided to them during the telephone conversation on 29 November 1996.

87 Furthermore, Article 20 of the basic regulation is intended to protect the rights of defence of interested parties during the administrative procedure. It follows that, in the present case, the failure to comply with the requirements of Article 20(4) of the

basic regulation can result in the annulment of the contested regulation only if it is established that that fact affected the applicants' defence. Even if the Community institutions provide information orally, they could none the less experience difficulty in gathering 'evidence enabling them ... to prove that such information was actually communicated' (*Al-Jubail Fertiliser*, cited above, paragraph 20). In the present case, the applicants themselves have acknowledged that the Commission had informed them by telephone on 29 November 1996 both of the increase in the definitive anti-dumping duty applicable to their products as a result of the individual treatment granted to WWS and of the precise rate of the definitive duty. Furthermore, as it has been established that the applicants were in a position effectively to make known their point of view on those facts during the administrative procedure, it must be concluded that their defence was not affected by the failure to comply with the requirements of Article 20(4) of the basic regulation in respect of the facts and considerations which were brought to the attention of the applicants in the course of the telephone conversation on 29 November 1996.

88 The fourth argument put forward by the applicants in support of their plea must therefore also be rejected.

89 It follows from all the foregoing that the applicants have failed to establish that the fact that the disclosure document was incomplete prevented them from effectively exercising their rights of defence during the administrative procedure. In those

circumstances, the plea alleging infringement of the rights of the defence and, consequently, the application as a whole, must therefore be dismissed.

Costs

90 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 87(3) provides that the Court may order the parties to bear their own costs where the circumstances are exceptional. The first subparagraph of Article 87(4) provides that institutions which have intervened in the dispute are to bear their own costs. Furthermore, the second subparagraph of Article 87(4) provides that the Court may order a party which has intervened, other than a Member State or an institution, to bear its own costs.

91 Even though the application in the present case must be dismissed, the Court considers that the first subparagraph of Article 87(3) and the first and third subparagraphs of Article 87(4) of the Rules of Procedure should be applied and each of the parties should be ordered to bear its own costs. The Court considers that, following the telephone conversation on 29 November 1996 between the applicants' lawyer and a Commission official, the Commission should have sent the applicants a complete version of the disclosure document forthwith and given them a period of time within which to submit any representations. The present dispute could have been avoided had the Commission done so.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders each of the parties to bear their own costs.

Lindh García-Valdecasas Lenaerts

Cooke Jaeger

Delivered in open court in Luxembourg on 19 November 1998.

H. Jung P. Lindh

Registrar President