JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
28 September 1995 *

In Case T-164/94,

Ferchimex SA, a public limited liability company incorporated under Belgian law, established in Antwerp (Belgium), represented by Alastair Sutton, of the Bar of England and Wales, and Aristotelis Kaplanidis, of the Thessaloniki Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

applicant,

v

Council of the European Union, represented by Ramon Torrent and Jorge Monteiro, of the Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe and Georg Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by Eric White, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

and

Association des Producteurs Européens de Chlorure de Potassium (APEP), an international association pursuing scientific objectives, established in Brussels, represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Marc Lucius, 6 Rue Michel Welter,

interveners,

APPLICATION for the annulment of Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine (OJ 1992 L 308, p. 41),

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

composed of: K. Lenaerts, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 3 May 1995,

gives the following

Judgment

The relevant provisions and the background to the dispute

1 This action seeks the annulment of Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports into the Community of potassium chloride originating in Belarus, Russia or Ukraine (OJ 1992 L 308, p. 41, hereinafter 'the Council regulation' or 'the contested regulation').

2 In June 1990 the Association des Producteurs Européens de Potasse ('APEP'), acting on behalf of the Community producers accounting for all potash production within the Community, submitted to the Commission a complaint against imports of potash originating in the Soviet Union. The product in question is available in the form of powder ('standard grade' potash) or granules ('granulated grade' potash) and is generally used as a fertilizer for agriculture.

3 The Commission initiated a proceeding on the basis of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports

from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'Regulation No 2423/88' or 'the basic regulation'), and officially notified the exporters and importers known to be concerned and the representatives of the exporting country.

4 Ferchimex SA ('the applicant' or 'Ferchimex'), a company incorporated under Belgian law, the majority of the shares in which are held by the producers concerned and by Agrochimexport, the Russian fertilizer export organization, officially imports potash from Russia and Belarus into the Community, and was involved in the proceeding in that capacity.

5 It is common ground between the parties that potash from the former Soviet Union was imported 'officially' and 'unofficially', imports of the first kind being channelled through the central export organization, Agrochimexport, and through importers in the Community and Switzerland associated with the Soviet exporters, including, in particular, the applicant, whilst imports of the second kind, also known as 'perestroïka potash', were sold by the producers to various clients in the former Soviet Union, who resold it through intermediaries to independent importers and traders in the Community.

6 Ferchimex maintains that, as an official importer operating on the European market for some twenty years, it had nothing to gain from adopting an aggressive commercial policy which might upset the Community market. Consequently, it was not involved in the 'perestroïka imports' which, it claims, gave rise to the anti-dumping proceeding in the present case.

7 The investigation into the dumping practices covered the period from 1 January 1990 to 30 June 1990 ('the investigation period').

8 During the course of the proceeding, the countries of origin of the product became the republics of Belarus, Russia and Ukraine.

9 The proceeding resulted in the adoption of Commission Regulation (EEC) No 1031/92 of 23 April 1992 imposing a provisional anti-dumping duty on imports of potassium chloride (potash) originating in Belarus, Russia or Ukraine (OJ 1992 L 110, p. 5, hereinafter 'the Commission regulation' or 'Regulation No 1031/92').

10 Article 2(5) of the basic regulation provides as follows:

'In the case of imports from non-market economy countries ..., normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country; or

(ii) to other countries, including the Community ...'.

11 In accordance with a proposal by the complainants, the Commission chose Canada as the reference country for the purposes of calculating normal value, on the grounds that it is the second largest potash producer, after the Soviet Union, and that prices there are the result of real competition. According to the preamble to the Commission regulation, neither the applicant, nor the exporters, nor the producers opposed the choice of Canada.

12 After several fruitless contacts, the Commission succeeded in finding a single Canadian producer, the Potash Company of Canada Ltd ('Potacan'), which, after likewise initially refusing to assist, finally agreed to cooperate and to supply the information requested.

13 Normal value was determined in respect of granulated grade potash on the basis of the average price on the Canadian domestic market, whilst in the case of standard grade potash the Commission, considering that the volume of sales on the Canadian market was too small to be representative, judged it necessary also to take into consideration the prices of exports to the United States of America. The Commission also compared those prices with production costs in order to be satisfied that they produced a profit. In making that comparison, however, the Commission deducted certain temporary and exceptional costs borne by Potacan (recitals (14) and (15) of Regulation No 1031/92).

14 According to Article 2(8)(b) of the basic regulation, 'where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party ..., the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer ...'.

15 Amongst the exporters, only those operating through the official channels cooperated in the proceeding. In accordance with Article 2(8)(b) of the basic regulation, the export price was determined on the basis of the prices actually paid by the first independent customer in the Community of the importers associated with the exporters, namely Ferchimex and Fersam (recitals (17) to (19) of Regulation No 1031/92).

16 With regard to injury, the Commission's conclusions were based mainly on the finding that imports of potash originating in the Soviet Union rose by 109% between 1986 and the first half of 1990, that Soviet imports increased their market share from 5.10% to 10.8% over that period whilst the Community industry's sale prices fell by 12%, and that the Soviet producers' prices undercut those of the Community producers by, on weighted average, about 3% (recitals (24) to (33) of Regulation No 1031/92).

17 Following the publication of the Commission regulation in the Official Journal, two importers of the product, Kemira and Ameropa, not associated with the exporters, sent their comments to the Commission by letters dated 21 and 27 May 1992 respectively, in which they contested, in particular, the choice of Potacan as the 'reference company' on the ground that it is owned by the complainant Community producers.

18 Following the imposition of the provisional anti-dumping duty by Regulation No 1031/92, the exporters, the Community producers and certain importers requested and obtained an opportunity of making their views known and of being heard by the Commission.

19 Since the Commission did not complete its examination of the facts within the prescribed period of four months, the Council extended the provisional anti-dumping duty by Regulation No 2442/92 of 4 August 1992 (OJ 1992 L 243, p. 1) for a period not exceeding two months.

20 By letter of 10 August 1992, the Commission informed the parties concerned, including the applicant, of the main facts and considerations on the basis of which it proposed to recommend to the Council the imposition of definitive duties.

21 By letter of 21 September 1992, the applicant submitted comments to the Commission.

22 On 23 October 1992, the Council, confirming the main points of the Commission's conclusions, adopted the contested regulation imposing a definitive anti-dumping duty in the form of a minimum price.

Procedure

23 It was in those circumstances that the applicant brought the present action before the Court of Justice, by application lodged at the Registry of the Court of Justice on 11 January 1993.

24 By applications lodged at the Registry of the Court of Justice on 18 May 1993, the Commission and APEP sought leave to intervene in support of the form of order sought by the defendant. The Commission and APEP were granted leave to intervene by orders of the President of the Court of Justice of 25 June 1993 and 15 November 1993 respectively, and lodged their observations on 11 October 1993 and 2 February 1994.

25 By order of 18 April 1994 the Court of Justice referred the case to the Court of First Instance pursuant to Article 4 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) and Council Decision 94/149/ECSC, EC of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC (OJ 1994 L 66, p. 29).

26 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 inquiry. The parties were requested, in the context of the measures of organization of procedure provided for in Article 64 of the Rules of Procedure, to answer various question in writing before 5 April 1995. In the light of the answers provided, the Court sent the parties a second series of questions, on which they were requested to express their views orally at the hearing.

27 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 May 1995.

Forms of order sought

28 The applicant claims that the Court should:

— annul the contested regulation;

— take all such further action as the Court may in its wisdom deem appropriate;

— order the Council to pay the costs.

29 The defendant contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

30 The Commission contends that the Court should:

— dismiss the action.

31 APEP contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including those incurred by APEP.

Admissibility

Arguments of the parties

32 The Council points out that the applicant is associated not only with Agrochimexport, the former sole official Soviet export-import organization, but also with several non-Russian companies. In non-market economy countries, only the State export organizations have the capacity to bring an action under Article 173 of the EC Treaty. The question therefore arises whether an import company which, as in the case of the applicant, is not wholly owned by the exporter or exporters can be regarded as an associated importer, within the meaning applied to that term by the Court of Justice (judgment in Joined Cases C-305/86 and C-160/87 *Neotype* v *Commission and Council* [1990] ECR I-2945).

33 The applicant maintains that the anti-dumping proceeding was of direct and individual concern to it from its initiation until the imposition of the definitive duty. It points out in that regard that it was one of the importers identified by the Commission when the proceeding was opened, that it received a questionnaire and was subject to verification at its premises, that it had a number of meetings with Commission officials, that it submitted written comments on 21 September 1992, and that it was named in Regulation No 1031/92 as an importer related to the exporters. It points out, lastly, that the Commission used the prices charged by it on the Community market in order to calculate the export price.

Findings of the Court

34 It is settled case-law that regulations imposing an anti-dumping duty, although by their nature and scope of a legislative character, are of direct and individual

concern *inter alia* to those importers whose resale prices for the products in question form the basis of the constructed export price, pursuant to Article 2(8)(b) of the basic regulation, where exporter and importer are associated (judgments of the Court of Justice in Case 75/92 *Gao Yao* v *Council* [1994] ECR I-3141, paragraphs 26 and 27, Case C-358/89 *Extramet* v *Council* [1991] ECR I-2501, paragraph 18, and Joined Cases C-304/86 and C-185/87 *Enital* v *Commission and Council* [1990] ECR I-2939, paragraph 18).

35 As is apparent from recital (9) of the contested regulation and recitals (17) to (20) of the Commission regulation, the exporters and the applicant are sufficiently closely associated for the Commission to consider, when examining the facts, that it had to apply to them the provisions of Article 2(8)(b) of the basic regulation in the calculation of the export price.

36 In those circumstances, the Court finds that the contested regulation is of direct and individual concern to the applicant, whose resale prices for the products in question formed the basis for the construction of the export price.

37 It follows from the foregoing that the action brought by the applicant is admissible.

Substance

38 The applicant advances nine pleas in support of its application. The first plea alleges infringement of Article 2(5) of the basic regulation and Article 190 of the EC

Treaty, in that the Council failed to determine normal value in an appropriate and not unreasonable manner and did not provide an adequate statement of reasons. By its second plea, the applicant submits that the assessment of injury was illegal, in that no account was taken of the role played by the complainants as importers, and the Community institutions used information which was out of date. The third plea alleges infringement of Article 4 of the basic regulation, in that imports from other countries were not taken into account when injury was determined. By its fourth plea, the applicant submits that the form in which the anti-dumping duty was imposed is contrary to the spirit of Article 13(3) of the basic regulation and has had the effect of removing it from the market. The fifth plea alleges illegal use of out-of-date information for the purposes of laying down protective measures. By its sixth plea, the applicant asserts that the Commission infringed Article 7(1)(b) and Article 7(4)(a) of the basic regulation by failing to notify the representatives of Russia, Belarus and Ukraine of the anti-dumping proceeding. The seventh plea alleges breach of the applicant's right to a fair hearing. The eighth plea alleges infringement of Article 7(9)(a) of the basic regulation, in that the length of the investigation was excessive. Lastly, by the ninth plea the applicant alleges that the selection of the investigation period was unfair and arbitrary and that no reasons were given for choosing it.

The first plea: wrong determination of normal value

Arguments of the parties

39 The applicant maintains that the way in which normal value was determined infringed Article 2(5) of the basic regulation and was against principles of natural justice. This plea falls into three parts. By the first part, the applicant contests the exclusive use of information emanating from a single undertaking, Potacan, which is associated with the complainants. The second part of the plea is that Potacan was not representative of the Canadian market. The third part concerns the

determination of the normal value of standard grade potash. The applicant also alleges insufficient reasoning in relation to all those points.

40 The applicant submits, first, that, by relying exclusively on information supplied by one Canadian company, Potacan, owned by the two main European complainants, the Commission did not determine normal value in an appropriate and not unreasonable manner in accordance with Article 2(5) of the basic regulation, and that it disregarded the principle of fairness, which, in the interests of transparency, objectivity and justice, requires the Commission to use neutral information supplied by companies having no link with the other parties in the matter, in particular the complainants. Those failures are all the more serious in that neither the applicant nor the Council nor the Court can know whether the information supplied by Potacan was given in good faith and was not influenced by the complainants.

41 The applicant points out, first, that recital (13) of the Commission regulation does not mention the fact that Potacan is a jointly owned subsidiary of the two main complainant Community producers, Société Commerciale des Potasses et de l'Azote ('SCPA'), a French producer, and the German company Kali und Salz ('Kali'). It further states that during the investigation some importers objected to the use of the information received from Potacan. In that regard, it mentions in particular the terms of the letter from Ameropa of 27 May 1992, which stated: 'It might be true that nobody opposed the choice of Canada as a reference country, but what is certain, is the fact that we were not informed that the reference company finally found was Potash Company of Canada, a producer which was recently in a state close to bankruptcy and is 100% owned by SCPA and Kali & Salz. Consequently we consider it as a surrogate reference'. It adds that the letter from

Kemira (Denmark) of 21 May 1992 and the observations contained in its own letter of 21 September 1992 also contested the use of the information supplied by Potacan.

42 Next, the applicant asserts that the Court of Justice has consistently emphasized that particular care must be exercised by the Commission in constructing prices on the basis of Article 2(5) of the basic regulation. Indeed, it is apparent from the previous practice of the Commission that, by contrast with the present case, it normally takes great care to justify its choice of reference country and to show that the normal value calculations are fair and transparent. The applicant considers that, following the manifest refusal by the other Canadian producers to cooperate, the Commission should have chosen a different reference country or should have used some other method laid down for determining normal value.

43 The Council observes that, upon being informed of the Commission's intention to use the method laid down in Article 2(5)(a) of the basic regulation for the determination of normal value and to take Canada as the reference country, neither the applicant nor the exporters objected to the Commission's choice. It points out that the Community institutions enjoy a wide discretion in the choice of reference country. The Council contends that in the light of the criteria generally applied in the previous practice of the institutions, as confirmed by the Court of Justice (judgment in *Neotype* v *Commission and Council*, cited above, paragraphs 31 to 33), Canada was in fact the only possible choice of reference country, since it is the only country where the production methods, the quantities produced and access to raw materials are comparable to those of the former Soviet Union.

44 The Council maintains that the Commission made every effort to obtain information relating to the Canadian market. It points out in that regard that the Commission twice approached the largest Canadian company engaged in the sale of potash, the Potash Corporation of Saskatchewan ('PCS'), but that that company

indicated that it refused to cooperate and that it would only provide information within the public domain. Consequently, the Commission was unable to use information from that source. It was also met with a refusal to cooperate by the Potash Company of America, established in New Brunswick. Lastly, the Council points out that following the initial refusal by PCS, the Commission contacted Potacan, which replied on 12 February 1991 that it would not cooperate either, and that it was only in consequence of the Commission's second letter of 12 September 1991 that Potacan replied, on 11 October 1991, to the questionnaire and indicated its willingness to cooperate.

45 As regards the shareholders of Potacan, the Council also seeks to make clear the following: Potacan is owned as to 50% by the German undertaking Kali and as to 50% by a French company, Entreprise Minière et Chimique, the parent company of SCPA. In 1980 Potacan and Denison Mines Ltd ('Denison') set up a joint venture, the Denison-Potacan Potash Company ('DPPC'), in which they respectively held 40% and 60% of the shares, and the object of which was to construct and develop a potash mine in New Brunswick; it commenced production in 1987. In April 1991 Denison sold its interest in DPPC to Potacan and the undertaking was renamed Potacan Mining Company ('PMC'). Pursuant to a marketing agreement, Potacan was the exclusive agent for the sale of the products of DPPC and subsequently of PMC. The Council observes that, whilst it is true that at the time of the Commission's investigation, Potacan, like DPPC or PMC, was controlled by the two Community producers, that was not yet the case during the period covered by the investigation, from 1 January 1990 to 30 June 1990, during which Denison, a company not associated with the Community producers, was the majority shareholder in DPPC.

46 The Council maintains that the link between Potacan and the two Community producers is in any event wholly irrelevant, for four reasons. First, the Potacan prices which were used were not transfer prices but arm's length sale prices charged on a wholly competitive basis to third parties. Next, in anti-dumping investigations the Community institutions always have to use information which is provided by

parties, such as exporters, that have an interest in the outcome of the proceeding. The Commission was thus entitled to use information from a source presumed to be 'partisan', once it had verified that it was correct. Third, given the existence of a very competitive primary product market and the fact that DPPC's production represents only about 10% of Canadian production and 8.15% of Canadian sales, Potacan was not in a position to influence prices on the Canadian market. Lastly, the Commission did not confine itself to verifying Potacan's sale prices but also compared them with prices quoted by Potacan's Canadian competitors and found them to be in line with such prices.

47 The Council maintains that Potacan was a reliable source of information and that there was, besides, no reasonable alternative.

48 In its reply, the applicant points out that the Commission's assertion that it ensured that Potacan's sale prices corresponded to the market is not borne out by anything in the contested regulation or the Commission's communications. It was unable, therefore, to contest the Commission's methodology.

49 For all the foregoing reasons, the applicant considers that the choice of Canada as reference country was inappropriate and unreasonable, and it maintains that it would have been more appropriate, having regard to the circumstances, to choose the United States market, as previously suggested by Ameropa in its response to the questionnaire dated 12 December 1990.

50 The applicant further asserts that, even if the prices of Potacan used by the Commission were 'arm's length prices', it was nevertheless essential to take into account

other company data, in particular sales costs, the presentation of which was dictated by Potacan and its shareholders. Normal value is not the same thing as the sale price; adjustments are necessary in order to produce an ex-factory price. Given the link which existed, it was impossible to know whether that data was neutral and objective. The applicant contends that, whilst the institutions may invariably have to use information provided by the parties concerned, it is nevertheless contrary to normal practice in dumping cases for companies in the same corporate group to provide information concerning both injury and normal value in the reference market.

51 In its rejoinder, the Council maintains its contention that the information supplied by Potacan was reliable and that it was verified during an on-the-spot investigation by agents of the Commission, who relied not on the documents specially produced for the investigation but on Potacan's accounting documents, which were prepared in accordance with the laws of Canada. The Council reiterates that Potacan's sale prices were compared with the prices quoted by its Canadian competitors and found to be in line with those prices. However, the details of that comparison cannot be disclosed as it concerns highly confidential information.

52 In the second part of its plea, the applicant maintains that Potacan was unrepresentative of the Canadian market, first, because of its location in New Brunswick and, second, because of the serious economic difficulties which it was going through.

53 The applicant observes that the study forming Annex 9 to the application shows that the Canadian potash market is located in two different areas. The first of these is the province of Saskatchewan, where there are seven companies operating, including, in particular, the largest Canadian producer, PCS. Saskatchewan is the

pre-eminent potash producing region of the world; production costs and capital expenses there are relatively low, and in view of its central location its products are sold principally in the Canadian domestic market. The other area is New Brunswick, located close to the east coast ports of Canada, the mines in which provide only a small proportion of Canadian production, and where producers such as Potacan concentrate their sales efforts on the export market. The applicant notes the Council's acknowledgement, in recitals (7) and (8) of the contested regulation, that, by reason of its location and the recent commencement of operations at the mine, Potacan's production costs were higher than Canadian and United States market prices. In those circumstances, the Commission's decision to rely solely on Potacan's prices on the Canadian market in order to establish normal value constituted a manifest error of judgment.

54 Lastly, the applicant maintains that the reasoning set out in the recitals in the preamble to the regulation is summary, confused, contradictory and contrary to normal practice. It states in particular that the Community institutions have thus not explained what is meant by the 'temporary and exceptional costs' or the 'special situation', nor how they calculated the adjustments needed in order to take those factors into account. It follows that Article 190 of the Treaty has been infringed (judgment of the Court of Justice in Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 25).

55 The Council states in reply that normal value was calculated on the basis of Potacan's sale prices. It points out that the Community institutions expressly stated that they had not taken Potacan's production costs into account, because of its special situation. For the same reasons, the fact that producers in New Brunswick have higher costs than those in Saskatchewan, or that they sell more to export markets, is irrelevant. The Council concludes that it correctly calculated normal value and that the method used by it is entirely consistent with the provisions of the basic regulation.

56 By the third part of its plea, the applicant submits that by using a combination of the prices charged by Potacan on the Canadian market and for exports to the United States in order to determine the normal value of standard grade potash, the Commission infringed the letter and spirit of Article 2(5) of the basic regulation.

57 It maintains, first of all, that the Commission did not suggest the use of such a method when the investigation was initiated, and further that the statement that the United States and Canada constitute one large competitive market comparable to the Canadian internal market is unfounded and unsupported by any evidence.

58 Next, the applicant contends that the fact of the addition of the United States market prices does not in itself render the Canadian prices representative, even if the American prices were.

59 Lastly, it maintains that Article 2(5)(a)(i) and (ii) of the basic regulation provides that the Commission may establish normal value on the basis either of sale prices on the domestic market of the reference country or of prices charged by that country on sales to other countries, but not by combining the two methods. The use of the conjunction 'or' between sub-subparagraphs (i) and (ii) of the provision in question clearly shows that those two methods are mutually exclusive.

60 The Council maintains that, by reason of the low volume of Potacan's sales of standard grade potash on the Canadian market compared with the quantities imported into the Community from the former Soviet Union, the institutions were entitled to combine Canadian domestic market prices and the prices charged on

exports to the United States, since that combination gave a more representative and reliable picture. This was a feasible step to take, since Canada and the United States form one large market by reason of the absence of customs barriers and the fact that potash is used in both countries for identical purposes. The Council adds, moreover, that the volume of Potacan's sales in Canada was so low compared with its sales to the United States that they had no influence on the outcome of the calculation of normal value.

61 The Commission asserts that there is no provision requiring it to inform interested parties of the method by which normal value is to be calculated when the proceeding is opened. It is not until the stage of notification of the main facts and considerations on the basis of which action is to be taken that it is bound to inform those parties, as was done in the present case. Next, it contends that Article 2(5)(a) of the basic regulation authorizes the combined use of the methods referred to in sub-subparagraphs (i) and (ii), since the word 'or' linking them must be taken to mean, as it usually does in most languages, 'and/or'. In the present case, the institutions considered that the combined use of the methods referred to in (i) and (ii) produced a more representative price.

62 In its reply, the applicant reiterates that the United States and Canada constitute separate markets, as is shown by the existence of an anti-dumping measure applied by the United States against the Saskatchewan industry in 1987.

63 As regards the giving of reasons, the applicant points out that the institutions have failed in particular to fulfil their obligation to justify the fact that Potacan was selected despite its links with Kali and SCPA, its regional character and the insufficiency of its sales in Canada, to explain how they verified actual market prices in Canada notwithstanding that their sole contact was with Potacan, to explain their assertion that Canada and the United States constituted one large competitive

market and to show why it was necessary, as regards standard grade potash, to combine United States and Canadian prices when Potacan was allegedly a representative Canadian company.

64 In its rejoinder, the Council states that sales to the United States were taken into account only in relation to standard grade potash and that this was necessary because sales on the Canadian market as a whole, and not just Potacan's sales, were relatively insignificant. The Council denies that the United States constituted a potential reference country, since the quantities produced there were much lower than those in Canada or the former Soviet Union. If the institutions had concluded that Canada did not constitute an appropriate reference country, they would have had no choice but to base the normal value calculation on prices paid in the Community, which would have produced a result which was clearly less favourable to the exporters.

65 According to the Council, the applicant's reference to an American anti-dumping measure applied in 1987 against the Saskatchewan producers is misleading and irrelevant, since it did not apply during the investigation period.

Findings of the Court

66 Article 2(5) of the basic regulation provides that: 'In the case of imports from non-market economy countries ..., normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria: ...'. It is thus apparent from the scheme and wording of that provision, and in particular the use of the phrase 'not unreasonable', that the determination of normal value falls

within the wide discretion enjoyed by the institutions in analysing complex economic situations.

67 The Court of Justice has consistently held that the Community judicature cannot intervene in assessments reserved to the Community authorities but must restrict its review to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based are accurate or whether there has been a manifest error of appraisal or a misuse of powers (see the judgment of the Court of Justice in Case C-16/90 *Nölle* [1991] ECR I-5163, paragraphs 12 to 13). It follows that, in reviewing this first plea, the Court must merely satisfy itself that the institutions took account of all the relevant circumstances and that they appraised the facts of the matter with all due care, so that normal value may be regarded as having been determined in an appropriate and not unreasonable manner.

68 It must be noted, first, that the institutions have maintained, without being contradicted by the applicant, that the choice of Canada as reference country could not be contested, having regard to the criteria normally applied in the previous practice of the institutions, as confirmed by the relevant case-law (judgment in *Nölle*, cited above, paragraphs 14 to 29). The parties are agreed that Canada is the second largest potash producer after the Soviet Union, that production methods and access to the relevant materials are wholly comparable and that prices there are the result of real competition.

69 It should be recalled, next, that, as is stated in recital (13) of Regulation No 1031/92, and as is apparent from the answers to the written questions put by the Court, Potacan was the only Canadian producer which finally agreed to reply to the Commission's questionnaire and to cooperate in the proceeding. In

particular, the largest Canadian producer, PCS, established in Saskatchewan, stated, despite the Commission's insistence, that it refused to cooperate and merely provided certain information within the public domain which was inadequate for the purposes of determining normal value. It should further be noted that the applicant does not deny that the Commission made every effort to obtain information relating to the Canadian market from sources other than Potacan.

70 Canada must therefore be regarded as an appropriate reference country, and it must be concluded that the Commission had no alternative but to use the information emanating from Potacan.

71 As regards the link between Potacan and the Community producers, the Court notes that the applicant has merely contended, in its application, that that link was in any event such as to render the information emanating from Potacan unreliable, but without adducing any concrete evidence whatever to show that the adjustments made by the Commission in order to bring the sale prices into line with normal value were not made in an appropriate and not unreasonable manner, nor even to explain how the link could have influenced the information provided.

72 The institutions have stated, without being contradicted by the applicant, that the information provided by Potacan was verified by the Commission in the course of on-the-spot checks, by reference to invoices and accounting documents of DPPC and Potacan which were prepared in accordance with Canadian accounting legislation at a time when Potacan and DPPC could not have surmised that the anti-dumping proceeding in question would be initiated nor, *a fortiori*, that they would be involved in it. It should be noted, moreover, that the information provided relates to a period — the investigation period — when the Community producers did not have a controlling interest in the mining undertaking DPPC. It should also be recalled, first, that, as the applicant acknowledges, the institutions determined normal value by using the prices charged by Potacan on a wholly competitive basis

to third parties on the Canadian market, not the transfer prices charged as between Potacan and its shareholders, and, second, that Potacan, whose production represented only 8.15% of sales on the Canadian market, was not in a position to influence the very competitive market prices of that primary product.

73 The Court also notes that the applicant did not at any time during the administrative procedure raise the slightest objection regarding the link between Potacan and the Community producers, despite the fact that the Commission had informed it, at the meeting on 5 November 1991, not only of the choice of Canada as reference country but also of the use of Potacan's prices for the determination of normal value (see document 19 in the administrative file lodged by the institutions at the hearing). Similarly, the applicant did not react following the adoption on 23 April 1992 of Regulation No 1031/92, recital (13) of which expressly stated that Potacan was the only Canadian producer which finally agreed to cooperate and that neither the importer given a hearing nor the exporters opposed the choice of Canada.

74 In those circumstances, the Court considers that, by establishing normal value on the basis of information supplied by the only producer to have cooperated in the proceeding and verified by the Commission, the institutions did not commit a manifest error of assessment, despite the association between that producer and the Community producers.

75 The Court also considers that recitals (13) to (20) of the Commission regulation and recitals (7) and (8) of the contested regulation, which explain precisely why Canada was chosen as the reference country and why the Commission was prompted, in the absence of cooperation from the other producers, to base its findings on the information supplied by Potacan, contain reasoning which adequately fulfils the requirements of Article 190 of the Treaty.

76 It follows that the first part of the first plea is unfounded.

77 As regards the submission concerning the allegedly unrepresentative character of Potacan, the Court finds, first, that it is transparently clear from recitals (7) and (8) of the contested regulation that the institutions specifically considered that Potacan's production costs should not, in the light of its particular situation, be taken into consideration, but instead determined normal value from its sale prices. It follows that the arguments regarding the exceptional costs which that company was bearing by reason of its geographical location or its particular economic situation are wholly irrelevant.

78 Next, the Court notes that, despite having been informed since its meeting with the Commission on 5 November 1991 of the methods used to calculate the dumping margin and of the fact that Potacan was the only undertaking in the reference country chosen which had agreed to cooperate, the applicant has failed to adduce, either during the administrative procedure or even in its pleadings or at the hearing before the Court, any evidence to show that Potacan's sale prices are not representative of the Canadian market.

79 Moreover, it must be recalled, first, that, as is explained in paragraph 72, Potacan was not in a position to influence prices in the highly competitive Canadian market and, second, that the institutions have confirmed, in their pleadings, that they verified that Potacan's prices were in line with those charged by its Canadian competitors. The institutions have stated, in reply to the written questions put by the Court, that they compared the prices charged by Potacan with the information concerning the prices of its competitors which was contained in the complaint against imports from the Soviet Union and in the partial response of PCS. Since PCS supplied only information which was in the public domain, the applicant must have had access to that information, and was thus in a position to contest the determination of normal value of which it was notified by the Commission in its letter of 10 August 1992. The fact remains that the applicant has at no time, either during the administrative procedure, or in its pleadings, or even at the hearing, called in question the prices on which the Commission based its findings, in particular from the standpoint of the comparison of those prices with the prices charged by Potacan's main competitors on the Canadian market.

80 It follows that the second part of the first plea must also be rejected.

81 In the third part of the first plea, the applicant complains that the Commission determined the normal value of standard grade potash by using a combination of the prices charged on the Canadian market and the prices charged for exports to the United States.

82 It should be recalled in that regard, first, that Article 2(5) of the basic regulation lays down the guiding principle that normal value is to be determined in an appropriate and not unreasonable manner. Consequently, that provision cannot be interpreted as precluding the institutions from determining normal value in a specific case by means of combined use of the methods provided for in Article 2(5)(a)(i) and (ii), if that combination does in fact make it possible to obtain a result which is more reliable and more representative.

83 It was the institutions' contention, which has not been contradicted by the applicant, that the volume of sales of standard grade potash on the Canadian market, taken as a whole and not only those of Potacan, was too small to be representative.

84 Next, the Court notes that recital (15) of the Commission regulation and recital (8) of the contested regulation state that the institutions considered that it was reasonable and appropriate to establish normal value on the basis of Canadian and US prices, on the ground that Canada and the United States form one large

competitive potash market which, by reason of the absence of customs barriers and the fact that the product is used in both countries for identical purposes, has the characteristics of a single market.

85 None of the applicant's objections to the method adopted by the institutions is well-founded. The applicant's statement that the two markets are distinct is not borne out by any evidence in its application and cannot, therefore, be upheld. Moreover, neither of the two points made in that regard by the applicant in its reply is such as to substantiate its contention. The applicant relies, with reference to the study of the potash market forming Annex 14 to the application, on differences existing not between the US and Canadian markets but between the different regions within each of those countries. Similarly, the anti-dumping measure applied in 1987 by the United States against Canada is irrelevant, since it was no longer applicable during the investigation period.

86 The applicant's objection that the notice of initiation of the anti-dumping proceeding did not mention the fact that the Commission intended to use a combination of Canadian domestic prices and export prices must also be rejected. No provision in the basic regulation, and in particular Article 7(1)(a), obliges the Commission, when the proceeding is opened, to choose and inform the parties of the method by which normal value is to be calculated. It is not until the subsequent stage of notification of the facts and considerations on the basis of which the Commission proposes to recommend the imposition of definitive duties, referred to in Article 7(4)(b), that the Commission is bound to inform the parties of the method chosen. In the present case, the Commission complied with that obligation in its letter to the applicant dated 10 August 1992.

87 Lastly, the applicant's contention that none of the parties was given an opportunity to challenge the statement regarding the large competitive market prior to publication of the contested regulation imposing the anti-dumping duties is also

incorrect. Not only did that statement appear in the Commission's letter of 10 August 1992, but it had also been explained in the interim regulation of the Commission of 23 April 1992.

88 The Court finds, moreover, that there are numerous documents in the case which confirm the fact that Canada and the United States must be regarded as one large competitive market. By way of example, the European Fertilizer Import Association suggested, in its letter to the Commission of 31 October 1991, that potash sales in Canada and the United States should be regarded as domestic sales. Similarly, it is apparent from the documentation that, for accounting purposes, the Canadian statistics treat both sales of potash in Canada and exports to the United States as domestic sales.

89 It follows from all of the foregoing that the method adopted by the institutions in order to determine the normal value of standard grade potash is in accordance with Article 2(5) of the basic regulation. Consequently, the arguments set forth in the third part of this plea must also be rejected.

90 Lastly, the Court finds that, contrary to the applicant's assertion, the institutions provided, in the contested regulation and the Commission regulation, an adequate statement of reasons for the way in which normal value was determined. Recitals (13) to (16) of the Commission regulation and recitals (7) and (8) of the contested regulation clearly justify the main factors involved in the determination of normal value and, in particular, the choice of reference country, the fact that the Commission was ultimately able to obtain information only from Potacan, the need to disregard Potacan's production costs by reason of its special situation and the reason why export prices to the United States for standard grade potash were also taken into account. In the absence of any specific challenge on the applicant's part in the course of the administrative procedure which might possibly have called for more detailed reasons, those explanations must be regarded as fulfilling the requirements

of Article 190 of the Treaty, according to which every act must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted it, in such a way as 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 supervisory jurisdiction (judgment of the Court of Justice in Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39).

91 It follows that the first plea must be rejected in its entirety.

The second plea: the assessment of injury was illegal since no account was taken of the role played by the complainants

Arguments of the parties

92 The applicant's second plea is based on four arguments concerning an alleged failure to take account, in the analysis of injury, of the complainants' role as importers.

93 First, the applicant asserts that the institutions failed to apply Article 4(5) of the basic regulation, which provides that 'when producers are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product the term "Community industry" may be interpreted as referring to the rest of the producers ...'. In view of the considerable quantities of the product imported by Kali and SCPA, the applicant considers that the provision in question should

have been applied so as to exclude them from the 'Community industry' which was taken into account for the purposes of establishing the injury suffered. At the very least, the Council and the Commission should have mentioned the point in order to show that they had taken this aspect into consideration.

94 Second, the applicant maintains that the institutions failed, in their evaluation of injury, to take account of the extent to which the complainants contributed to their own injury ('self-inflicted injury') by their very extensive imports of potash. In its view, the institutions completely ignored the impact of the control exercised by Kali and SCPA over imports of potash into the Community. It points out that recital (17) of the contested regulation states, on the contrary, that the Community producers themselves did not contribute to the injury sustained. The applicant draws attention to the State monopoly enjoyed by SCPA in France as regards imports of potash from third countries and to the requirement for a visa, granted by SCPA on government authority, for all imports from the countries in question. On the strength of that legal monopoly, SCPA has concluded exclusive marketing agreements with Campotex in Canada, with the Arab Potash Company in the Middle East and with Ferchimex in relation to potash from the member countries of the Commonwealth of Independent States ('CIS'). Even imports into France of potash originating in Germany and Spain, whilst free from restrictions by virtue of the Community rules, are channelled through SCPA. The applicant also contends that Kali and SCPA have established, individually or jointly, import operations in key Western European markets. That collaboration between SCPA and Kali explains the minimal volume of trade between France and Germany, despite the fact that France is import-dependent for a significant proportion of its consumption and Germany produces a surplus. The applicant further states that, according to Eurostat statistics, no potash was imported into Spain or Germany from the Soviet Union in 1988, 1989 and 1990, and hardly any into the United Kingdom. The applicant points out that SCPA apparently doubled the volume of its imports of potash originating in Russia and Belarus, by purchasing 250 636 tonnes through Ferchimex, in the year following its submission of the anti-dumping complaint. The applicant also emphasizes the fact that on 27 July 1990, shortly before the opening of the anti-dumping proceeding but immediately after the expiry of the

reference period arbitrarily selected by the Commission, the French Government was authorized by the Commission, pursuant to Article 115 of the EC Treaty, to adopt measures restricting imports of potash originating in the Soviet Union, with the result that even imports of potash originating in third countries and placed in free circulation in other Member States were effectively excluded from France from 27 July 1990 until the end of 1990.

95 Third, the applicant asserts that the Commission and the Council were under a duty, when assessing injury, to weigh the effect of 'unofficial' imports against the volume of imports channelled through the European producers' extensive network of importing agreements, those producers having imported large quantities of potash from all sources. It alleges that the dumping and consequent injury, within the meaning of the anti-dumping rules, could only have been the result of 'unofficial' imports, and considers that the institutions were under a duty to explain the extent to which injury was caused by 'uncontrolled' exports, the volume of which is small by comparison with the 780 000 tonnes imported from the Soviet Union through the European producers' network. Even though the 'unofficial' exporters refused to collaborate, the Commission could, on the basis of the experience and documentation made available by Ferchimex and the complainants, have drawn a relatively precise distinction between official and unofficial imports and assessed injury accordingly. Since there is nothing to indicate that the Commission or the Council performed those calculations, the applicant concludes that the decision assessing injury is insufficiently reasoned.

96 Fourth, the applicant contends that the Community institutions failed to update the economic data on which they based their conclusions concerning injury. The only figures available in respect of Community potash consumption and Soviet potash imports are extrapolated figures for 1990, and no figures at all are given for 1991. Whilst acknowledging that the institutions have a measure of discretion in determining the period over which they assess injury, the applicant considers that in the present case they exceeded the limits of their discretion by failing to assess injury sustained during the course of the investigation.

97 The Council observes, first, that the applicant is wrong to suggest that the phenomenon of 'perestroïka potash' was limited to the investigation period; it still occurs, often with a false declaration of origin. The Council further contends that SCPA does not have a monopoly and does not control all imports of potash originating in third countries, because potash in free circulation in the Community can quite easily be imported into France.

98 In response to the applicant's first argument, the Council points out that, as is apparent from the wording of Article 4(5) of the basic regulation, and in particular the use of the word 'may', the Community institutions have a wide discretion when deciding whether or not to exclude from the 'Community industry' producers who are themselves importers of the dumped product. It maintains that, given the low volume of imports by Kali and SCPA, there was no reason to exclude them from the Community industry. Since the institutions are not bound to give detailed reasons for their every deliberation, the fact that neither the Commission regulation nor the Council regulation states the reasons why Kali and SCPA were not excluded does not mean that they did not appreciate the role of Kali and SCPA as importers.

99 The Commission adds that the exclusion of the two complainants would have made the 'Community industry' smaller, but the injury suffered would nevertheless have remained the same. Consequently, the fact that Article 4(5) was not applied does not support the applicant's argument, since the its application would not have led to any different result.

100 The Council maintains, second, that the imports of Soviet potash by Kali and SCPA cannot have contributed to the injury suffered by the Community industry ('self-inflicted injury'), since they imported, solely on the basis of long-term contracts, only 15% of the total imports from that country during the investigation

period, representing only 2.3% of all sales by the Community industry, and resold the product at normal market prices. The Council contends that it took account of those imports by the two European producers and that recital (17) of the contested regulation, which states that 'the Commission investigation, moreover, did not yield any findings proving or likely to constitute proof that the Community producers' management practices could have contributed to the injury sustained', refers to the practice of importing potash from the former Soviet Union.

101 APEP adds that the protection measures implemented pursuant to Article 115 of the Treaty were necessary in order to protect the French market, during the time between the initiation of the anti-dumping proceeding and the imposition of the duty, against the influx of substantial quantities of potash imported at extremely low prices from the CIS and bound for the French market via the ports of other Member States.

102 Third, the Council maintains that the relationship between 'official' imports and 'perestroïka potash' is irrelevant and that the Community institutions took into consideration all imports originating in the former Soviet Union, which rose by 109% between 1986 and the investigation period, and the market share of which increased from 5.1% to 10.8%.

103 The Commission confirms the Council's view and points out that, according to the case-law of the Court of Justice, particularly the judgment in *Nachi Fujikoshi* v *Council*, cited above (paragraph 46), 'the injury caused to an established Community industry by dumped imports must be assessed as a whole and it is not necessary (or, indeed, possible) to define separately the share in such injury attributable to each of the companies responsible'.

104 APEP considers that, following the political and economic changes occurring in the Soviet Union since 1990, and as a result of the transition from a system of State trading companies to a free enterprise regime, all exports were in practice 'uncontrolled'.

105 Fourth, the Council points out that the investigation covered the period from 1 January to 30 June 1990 and that all of the findings in relation to dumping, injury and causation are based solely on the events taking place during that period. The institutions never take account of events taking place after the investigation period because, were they to do so, they would be forced constantly to revise their findings. As regards injury, however, they do normally take into consideration information relating to events prior to the investigation period, so as to show trends in market shares and prices. The Council points out that, in so far as the applicant considers that the institutions' findings are based on outdated information, it has the right to request a review under Article 14 of the basic regulation.

106 The Commission states that the injury must have been caused by the dumping which is established and must relate to the period during which the dumping occurred. In the interests of objectivity, legal certainty and the expeditious conduct of the investigation, that period must be clearly and precisely defined.

107 In its reply, the applicant points out that the subsidiaries of SCPA and Kali in Belgium, the Netherlands and the United Kingdom imported potash from the former Soviet Union, *inter alia* through Ferchimex. Those imports were not even referred to in the regulations at issue, let alone discussed with reference to Article 4(5) of the basic regulation. Given the central role played by SCPA in the lodging of the complaint, the fact that, in France, imports from Ferchimex were effected solely through SCPA is of crucial importance. The issue here is not 'Community producers' management practices' but the fact that the Community anti-dumping rules

provide that where a complainant undertaking is also an importer (with clear responsibility for price negotiations) of the product which is alleged to be dumped, that factor requires careful analysis and explanation in the findings relating to injury. A company which is faced with anti-dumping duties consequent upon trade with a complainant company is entitled to know, in accordance with Article 190 of the Treaty, the Commission's reasons for penalizing such trade.

108 Next, the applicant submits that, since the Council acknowledges that the imports by Kali and SCPA did not contribute to the injury suffered by the Community industry and that it conducted the bulk of its trade in the Community with or through the complainants, the effect of its sales could not have been injurious. Consequently, the institutions should have tailored the measures imposing duties in such a way as to exempt its operations from those measures.

109 The Council responds to this, in its rejoinder, by stating that the investigation was directed not against the applicant but against imports of potash from the former Soviet Union, and that, whilst the institutions may in some cases treat certain exporters individually, they cannot treat each importer individually.

Findings of the Court

110 In the first two of its arguments, the applicant maintains in essence that the quantities of potash imported by the Community producers, principally Kali and SCPA, should have led the institutions to conclude, first, that they should be excluded from the term 'Community industry', as defined in Article 4(5) of the basic regulation, and, second, that the Community producers had themselves contributed to

the injury suffered. It also considers that the institutions should at the very least have mentioned the import phenomenon, in order to show that they had taken that factor into account, and should have provided reasons for their decision on that point.

111 It must be recalled that the effect of Article 4(5) of the basic regulation is that it is for the institutions, in the exercise of their power of assessment, to determine whether they should exclude from the Community industry producers who are themselves importers of the dumped product. That power of assessment must be exercised on a case-by-case basis, by reference to all the relevant facts (judgment of the Court of Justice in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 43).

112 The Court observes in that regard that the institutions considered it inappropriate to exclude SCPA and Kali from the Community industry on the ground that, during the investigation period, those two companies imported only 15% of the total potash imported from the former Soviet Union, and that the sales of the imported products represented only 2.3% of all sales by the Community industry.

113 Furthermore, although in its written pleadings before the Court the applicant merely described the volumes imported by the producers in question as considerable, without providing any figures whatever in that regard, it indicated its agreement during the hearing to the figures put forward by the institutions.

114 In those circumstances, the Court considers that the Council did not exceed the limits of the discretion conferred on the institutions by Article 4(5) of the basic regulation in deciding, in view of the small proportion which those imports by the Community producers represented, not to exclude them from the Community industry.

115 The Court also notes that the institutions have stated, without being challenged by the applicant, that the abovementioned producers effected those imports solely on the basis of long-term contracts and that they resold the product at normal market prices.

116 It follows that, in concluding that those producers did not contribute through their imports to the injury suffered by the Community industry, the institutions did not exceed the limits of their discretion.

117 As regards the objection concerning the alleged absence of any analysis or statement of reasons, it should be noted, first, that, contrary to the applicant's submission, the fact that the contested regulation does not state the reasons why the institutions did not exclude the abovementioned producers from the Community industry does not mean that they did not take into consideration their role as importers.

118 It is settled case-law that the statement of reasons need not give details of all relevant factual or legal aspects, and that the question whether it fulfils the applicable requirements must be assessed with particular regard to the context of the act and to all the legal rules governing the matter in question (judgment of the Court of Justice in Case 203/85 *Nicolet* [1986] ECR 2049, paragraph 10). For the reasons set out above, it must be stated that it was clearly inappropriate to exclude the two abovementioned companies from the Community industry; moreover, the applicant did not raise any request whatever in that regard throughout the entire administrative procedure — save in the observations contained in its letter of 21 September 1992, which, for the reasons given in paragraphs 160 to 163 below, cannot be taken into consideration in view of their late submission — despite the fact that it was well aware of the situation, having itself sold the product in question to those producers. Consequently, the applicant cannot complain that, by failing to give a detailed explanation of their position on that point in the regulation, the institutions infringed Article 190 of the Treaty.

119 Furthermore, and for the same reasons, the institutions were not obliged to explain in detail in the regulation why imports by the Community producers, which represented only 15% of imports from the former Soviet Union, and which were resold at normal market prices, could not have contributed to the injury suffered by the Community industry. Moreover, it should be noted that recital (17) of the contested regulation contains a statement of reasons which, although laconic, is none the less adequate, having regard to the circumstances of the case, since it states that 'the Commission investigation ... did not yield any findings proving or likely to constitute proof that the Community producers' management practices could have contributed to the injury sustained', and given that, as the institutions have pointed out, the Community producers' management practices included the importation of potash from the former Soviet Union. It follows that the regulation is not inadequately reasoned, for the purposes of Article 190 of the Treaty, as regards the alleged 'self-inflicted injury'.

120 As regards the third argument, alleging a failure to distinguish between 'official' imports and 'unofficial or perestroïka imports', it is sufficient to note that the anti-dumping proceeding concerned all imports of potash from the former Soviet Union, which rose by 109% between 1986 and the investigation period, and the market share of which increased from 5.1% to 10.8%. Whilst it may be normal practice to draw a distinction between the different producers within the same country and to determine, in respect of each of them, whether their products have been dumped or not, it is impossible to distinguish between the products of one and the same producer according to the different channels through which they are imported into the Community. In any event, in the present case dumping was specifically established on the basis of the resale prices charged by applicant, which was the 'official' importer of the product under consideration, and it cannot therefore claim that 'official' imports did not contribute to the injury suffered by the Community industry.

121 As regards the fourth argument, alleging a failure to update the data on which the findings in respect of injury were based, suffice it to say that the applicant has

submitted no concrete evidence whatever to show that the situation had altered to such an extent as to render the findings of the investigation inappropriate.

122 It follows from the foregoing that the second plea is wholly unfounded.

The third plea: failure to take into account imports from other countries

Arguments of the parties

123 The applicant maintains that, by limiting the scope of its injury investigation to imports originating in the Soviet Union, the Commission has infringed Article 4 of the basic regulation. It contends that, during the investigation period, substantial quantities of potash were imported from other countries, such as Israel, Jordan, Canada and the German Democratic Republic ('GDR'), and expresses surprise at the fact that the Commission dismissed, peremptorily and without justification, the possible effect of such other imports, given that it mentions in recital (35) of Regulation No 1031/92 'the possibility that the Community industry could have been affected by imports originating in other countries'. Even more surprisingly, in recital (17) of the contested regulation, the Council states that the reason for not taking into account those imports from other countries was 'the relatively small volume of imports from other sources'. The cumulative volume of imports of potash originating in Israel, Jordan, Canada and the GDR far exceeded the volume of imports from the former Soviet Union, as is apparent from the table appearing in Annex 13 to the application.

124 The applicant also considers that, in those circumstances, the Community institutions should, in accordance with their previous practice (Council Regulation (EEC) No 2907/83 of 17 October 1983 terminating the anti-dumping proceeding concerning imports of unwrought nickel, not alloyed, in the form of cathodes produced by

electrolysis, either uncut or cut into squares, originating in the Soviet Union, OJ 1983 L 286, p. 29), have commented in greater detail on that point.

125 The Council states in reply that the question whether other imports could have contributed to the injury involves the assessment of complex economic matters in respect of which the Community institutions enjoy a wide discretion. It also points out that the regulation states that the possible impact of such other imports was discounted.

126 The Council maintains, first, that it rightly referred to the volume and prices of imports from other sources, and observes that, although the volume of those other imports exceeded that of imports from the former Soviet Union, the volume of imports from each of the other countries was declining at the same time as imports from the former Soviet Union rose substantially.

127 Next, the Council maintains that the main reason why it discounted the possible effects of imports from other countries is because, by contrast with the nickel case relied on by the applicant, there was no evidence of price undercutting in relation to those imports, which were sold at normal market prices.

128 APEP maintains that the Community institutions are under no legal obligation to open anti-dumping proceedings against countries other than those referred to in the complaint. Since it was only imports of potash originating in the Soviet Union which rose substantially and which were effected at very low prices, there was no discrimination.

129 In its reply, the applicant observes that, at the time when the Commission took action in the present case, the fertilizer trade press had published reports of an anti-dumping complaint filed by the complainants against Canada. It infers from this that the institutions were in possession of evidence showing that potash imports from another country were being dumped and were causing injury to the complainant. The applicant observes that this is not mentioned in the contested regulation.

130 The Council answers this in its rejoinder by stating that the complaint against Canada was ultimately withdrawn and that it may thus be presumed to have contained no prima facie evidence of dumping or injury.

Findings of the Court

131 The question whether imports other than those forming the subject-matter of the anti-dumping investigation at issue contributed to the injury suffered by the Community industry involves the assessment of complex economic matters in respect of which the Community institutions enjoy a wide discretion.

132 It is apparent from recital (35) of the Commission regulation and recital (17) of the Council regulation that, having demonstrated the causal link between the rise in imports from the former Soviet Union and the increased losses suffered by the Community industry, the institutions explained that the Commission compensated for this by discounting the possible negative effects of imports from other sources, on the ground that the volumes imported were relatively small and had not been the subject of any price undercutting.

133 As regards the volume of imports from other sources, the Court finds it apparent from the table produced by the applicant (page 31 of the application) that imports from each of the four countries referred to fell appreciably during the period under consideration, whereas those from the former Soviet Union almost doubled. It is also clear that the volume of imports from the former Soviet Union during the investigation period was very much greater than that in respect of the four other countries.

134 As regards the prices at which the imports were sold, the Court notes that the applicant has provided no evidence whatever showing that the imports from other sources were also the subject of price undercutting. It appears, moreover, that the anti-dumping complaint against imports from Canada, to which the institutions referred in their answers to the Court's written questions, cannot be taken into consideration for the reasons that it was withdrawn, the information contained in it has not been verified in any way and, above all, it was based on a fall in the price of imports from Canada which did not start to occur until August 1991, that is to say, more than a year after the investigation period.

135 In those circumstances, the Court finds that, in concluding that imports from countries other than the former Soviet Union had not contributed to the injury suffered by the Community industry, the institutions did not exceed the discretion conferred on them.

136 It follows that the third plea is unfounded.

The fourth plea: imposition of the duty in the form of a minimum price

Arguments of the parties

137 The applicant maintains that the imposition of a duty in the form of a minimum price is contrary to the spirit of Article 13(3) of the basic regulation and runs counter to the Community institutions' own assertion, in recital (46) of the Commission regulation, that the imposition of anti-dumping measures should not remove products originating in the countries concerned from the Community market. It says that, since the imposition of the provisional duty in April 1992, its sales have fallen by about 60% throughout the Community markets (see the table in Annex 11 to the application). It points out that, in its observations of 21 September 1992, it clearly showed the perverse effects of a duty in the form of a minimum price on a volatile market such as that of potash, and observes that, shortly after the introduction of the minimum price, the Commission was forced to make an adjustment as a result of price fluctuations.

138 The Council observes, first, that in its judgment in *Neotype* v *Commission and Council*, cited above, the Court of Justice held that it was lawful to fix duties in the form of a minimum price. In its view, both recital (39) of the Commission regulation and recital (19) of the Council regulation provide an adequate statement of reasons for their choice of a duty in that form. It further points out that duties of that type are generally more favourable to exporters, as they enable them to avoid paying any duty at all, provided that they raise their prices accordingly.

139 Next, the Council observes that the applicant is not in fact contesting the form of the duty but merely its level. If that level proved to be too high because of changed circumstances, it was always open to the applicant to request a review under Article 14 of the basic regulation.

140 Lastly, the Council states that neither of the two adjustments made to the minimum price by the institutions before arriving at their final determination was caused by changes in the price of potash; instead, they were made in order to take account of the exporters' submissions regarding consumer perception and to correct the wrong exchange rate which had previously been used.

Findings of the Court

141 It is apparent from the very wording of Article 13(2) of the basic regulation that the institutions are free to choose, within the limits of their discretion, between the different types of duty, whilst the relevant case-law has recognized the lawfulness of fixing an anti-dumping duty in the form of a minimum price (judgment in *Neotype* v *Commission and Council*, cited above, paragraph 58).

142 As is pointed out in recital (19) of the contested regulation, the institutions considered that the margin of manoeuvre available to exporters in the republics of the former Soviet Union, which still had no market economy, and the adverse effect on the entire potash market of even slight price undercutting, meant that neither a fixed-rate nor an *ad valorem* duty would be certain to remove the injury caused by the dumping.

143 In proceeding in that manner, the Council did not exceed the limits of its discretion, particularly since a variable duty is generally more favourable to the economic operators concerned, because it enables them to avoid paying anti-dumping duties altogether.

144 As the Council has observed, the applicant is in fact contesting not the form of the duty as such but its level, which, it claims, is such as to prevent it from continuing to sell on the Community market. It suffices in that regard to state that the

applicant has not shown that the duty exceeded the dumping margin, nor that it was higher, at the time of its imposition, than was necessary in order to remove the injury. The Court also notes that the fact that the applicant's sales of potash in the Community have decreased does not in itself mean that the level of the duty is excessive and such as to deprive exporters from access to the Community market. Moreover, it is, on the contrary, apparent from the Eurostat statistics that imports of potash from the former Soviet Union as a whole remained more or less stable during the two years following the adoption of the contested regulation.

145 In any event, Article 14 of the basic regulation, which confers on the operators concerned the right to require the Commission to review regulations imposing duties, puts at the applicant's disposal an appropriate means of challenging the duties in the event of their proving unwarranted.

146 It follows from the foregoing considerations that the fourth plea must be rejected.

The fifth plea: use of out-of-date information

147 The applicant maintains that, in basing their findings solely on information which had been overtaken by exchange rate movements and other market developments, the Commission and the Council committed a serious procedural error and acted in breach of the principle of sound administration. More particularly, it contests the establishment of a minimum price on the basis of a normal value calculated over a period which terminated 28 months prior to the imposition of the protection measures, resulting in the imposition of the duty at a level which, by reason of the great sensitivity of the potash market to price levels, made it impossible for the applicant to continue normal trade.

148 The Council points out that the institutions base their findings in respect of dumping and injury solely on information relating to events taking place during the investigation period, and that it is impossible for them constantly to update their findings. Moreover, the information obtained by the Commission showed that the minimum price corresponds to the market price, and no evidence has been adduced to show that the alleged fall in the applicant's sales was not due to other factors.

149 It is apparent from the examination of the fourth plea, and from the considerations set forth in paragraph 121, that the fifth plea must also be rejected.

The sixth plea: failure to notify the authorities in Russia, Belarus and Ukraine

Arguments of the parties

150 The applicant maintains that, by failing to advise the representatives of Russia, Belarus and Ukraine of the proceeding, the Commission infringed Article 7(1)(b) and Article 7(4)(a) of the basic regulation. That failure deprived them of an opportunity to 'inspect all information made available to the Commission by any party to an investigation' and to defend their interests (judgment of the Court of Justice in Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187). The applicant points out that the investigation, which commenced on 31 October 1990, concerned imports of potash originating in the Soviet Union, and that the new States of Russia, Belarus and Ukraine which succeeded it were recognized by the Community as independent States in December 1991. Since the provisional anti-dumping duty was imposed on 23 April 1992, the applicant maintains that the Community institutions were under a duty to inform those new independent States.

151 The Council contends, first, that that plea must be rejected on the ground that the applicant is pleading a breach not of its own right to a fair hearing but merely that of a third party.

152 Next, the Council states that none of the provisions contained in the basic regulation required the Commission formally to notify the authorities of the newly independent States of the proceeding, which was already under way. Article 7(1)(b) of the basic regulation merely requires that the representatives of the exporting country be advised of the opening of a proceeding; it does not require that notification to be repeated to the States which succeed it. The Council adds that the right of certain parties, including 'the representatives of the exporting country', to inspect information made available to the Commission pursuant to Article 7(4)(a) is clearly enjoyed by those new States, but that it is for them to obtain information about anti-dumping investigations pending against the State which they succeed.

153 The Council also points out that numerous meetings took place during the investigation, which were attended in particular by the representatives of the central export organization, Agrochimexport, and producers from Russia and Belarus. All of those companies were State-owned, and their representatives referred in the course of the meetings to their State authorities. The Council further states that members of the Mission of the Soviet Union to the European Communities and the Soviet trade representation in Belgium continued to represent the interests of the producers following the break-up of the Soviet Union.

154 It follows, in the Council's view, that the State producers and exporters concerned were not only in a position fully to defend their interests but in fact did so.

Findings of the Court

155 As the Council rightly submits, although Article 7(1)(b) of the basic regulation requires the Commission to inform the representatives of the exporting country of the opening of an anti-dumping proceeding, there is nothing in the basic regulation, nor any general principle, which obliges the Commission to repeat that notification to States which may succeed it. In assuming the rights and obligations of the State which they succeed, those States must take the anti-dumping proceeding as they find it, and they have the right, in particular, to inspect the information made available to the Commission and the right to be heard pursuant to Article 7(4) and (5) of the basic regulation.

156 The Court finds, moreover, that it is apparent from the various meetings held during the administrative procedure that the representatives of the exporting country were given the opportunity to defend their interests.

157 It follows from the foregoing that the sixth plea must be rejected.

The seventh plea: breach of the right to a fair hearing

Arguments of the parties

158 The applicant maintains that the statement in recital (21) of the Council regulation that 'the parties have presented no further facts or arguments concerning Community interest to the Commission' is incorrect. It points out that in its letter of 21 September 1992 (Annex 8 to the application) it drew the Commission's attention to most of the issues involved in the present action. It considers that those observations, which were prepared at the request of the Commission, were sent to

it in good time for the issues raised to be fully considered and that the institutions failed to have regard to natural justice and infringed Article 190 of the Treaty by failing to explain the reasons why they were not taken into consideration.

159 The Council maintains that the letter of 21 September 1992 was sent too late. It points out that the Commission informed all the parties, by letter of 10 August 1992, of the main facts and considerations on the basis of which it intended to recommend the imposition of a definitive duty and requested them to reply in writing within three weeks. The Council adds that the applicant's advisers promised, during a meeting with the Commission on 7 September 1992, to provide a written submission before 9 September 1992. In view of the imminent expiry of the provisional regulation, the Commission had to submit its proposal to the Council by no later than 25 September 1992, and was in the circumstances no longer obliged, nor in a position, to take account of all the arguments in that letter. The Council maintains, moreover, that the institutions dealt with most of those arguments.

Findings of the Court

160 Article 7(4)(c)(iii) of the basic regulation provides that: 'Representations made after the information 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'.

161 In the present case, the information letter sent by the Commission on 10 August 1992 to the parties concerned, including the applicant, allowed a period of three weeks in which to reply, which was subsequently extended to 9 September 1992. The period thus granted was not only in accordance with the basic regulation but was, moreover, justified in view of the fact that the Commission had to submit a proposal for a definitive measure to the Council before 25 September 1992.

162 Consequently, the applicant's observations contained in its letter of 21 September 1992 were submitted too late and the Commission was not obliged to take them into consideration.

163 The seventh plea must therefore be rejected.

The eighth plea: failure to respect the time-limits for the investigation

Arguments of the parties

164 The applicant maintains that the period of nearly two years between the opening of the investigation on 31 October 1990 and the imposition of the definitive anti-dumping duty on 23 October 1992 was excessive and that it constitutes an infringement of Article 7(9)(a) of the basic regulation. It states that, as the investigation dragged on, the prospect of finally remedying the economic situation which had been engendered by the abnormal imports of 'perestroïka potash' and which had given rise to the complaint became more and more remote. In its view, the Commission and the Council cannot found any argument on the volume and complexity of the information gathered, given the details provided to them by the two main complainants regarding the Community potash market and the degree of control which those complainants exercised over it.

165 The Council and the Commission assert that the period fixed by the aforementioned provision is not mandatory, since it provides that the investigation should 'normally' be concluded within one year. Moreover, the two complainants' knowledge of the market did not absolve the Commission from its duty to verify the information provided by them. Lastly, the Council acknowledges that the problem

of finding a Canadian producer willing to cooperate caused some delay, but maintains that there was no reasonable alternative enabling it to determine normal value more quickly.

Findings of the Court

166 The period provided for in Article 7(9)(a) of the basic regulation is a guide rather than a mandatory period (judgment of the Court of Justice in Case 246/87 *Continentale Produkten-Gesellschaft* [1989] ECR 1151, paragraph 8). It follows from that provision, however, that the anti-dumping proceeding should not be extended beyond a reasonable period, which falls to be assessed according to the particular circumstances of each case.

167 In the present case, the period of nearly two years does not appear excessive, having regard, in particular, to the difficulties encountered by the Commission in finding undertakings willing to cooperate in the reference country. It should also be noted that the recitals in the Commission regulation and the contested regulation describe those circumstances in sufficient detail.

168 The Court notes, for the sake of completeness, that the applicant has not in any event adduced any evidence in support of its allegation that the circumstances had altered to such an extent that they no longer justified the imposition of an anti-dumping duty.

169 It follows from the foregoing that the eighth plea must be rejected.

The ninth plea: unfair and arbitrary selection of the investigation period

Arguments of the parties

170 The applicant states that, by selecting an investigation period ending three months before the opening of the proceeding, the institutions infringed Article 7(1)(c) of the basic regulation. It maintains that, whilst the institutions may legally choose an investigation period other than the six months immediately prior to the opening of the proceeding, they may only do so 'in exceptional circumstances and only when such a choice is justified'. In the present case, the absence of justification was contrary both to previous practice (see, for example, Commission Regulation No 3798/90 of 21 December 1990 imposing a provisional anti-dumping duty on imports of espadrilles originating in the People's Republic of China, OJ 1990 L 365, p. 25) and inconsistent with Article 190 of the Treaty. The applicant contends that the Commission chose an investigation period which was particularly unfavourable to the exporters, because it coincided exactly with the period when economic turbulence in the disintegrating Soviet Union was at its height. That period finally came to an end in June 1990, so that, if the Commission had chosen the period of six months immediately prior to the opening of the proceeding, the bulk of 'unofficial' exports would have been excluded and the result of the investigation would have been different. It should also be noted, according to the applicant, that, in choosing an investigation period ending on 30 June 1990, the Commission prevented the effects of the import restrictions applied by France from 1 July 1990 pursuant to its decision under Article 115 of the Treaty from being taken into account.

171 The Council explains that the institutions exercise the right, recognized by the aforementioned provision, to choose a different investigation period where the circumstances are such that the immediately preceding period would not provide an adequate picture, or in order to take account of normal accounting practice. In the present case, because the potash business is a seasonal activity with two peak periods, one of which occurs immediately before the summer and the other at the beginning of autumn, it would have been unreasonable to choose a six-month investigation period including both peak periods. A further reason was the decision

of the French Republic to impose import restrictions from 1 July 1990. Consequently, if the institutions had included the months of July, August and September in the reference period, the results would have been unrepresentative, particularly since those restrictions were only temporary.

172 The Council further states that the institutions could not have known for certain, when fixing the investigation period, that it would coincide with such economic turbulence. Moreover, it is incorrect to state that imports of 'perestroïka potash' took place only in the six months covered by the investigation period.

173 Finally, the Council maintains that it was not obliged to give express reasons for the choice of the investigation period, since the slight time-lag of three months corresponds to normal practice, by contrast with the case of the espadrilles from China, in which the period ended eleven months before the opening of the investigation. Moreover, no objection to the period chosen was raised during the proceeding by any of the parties.

Findings of the Court

174 First, it follows from the very wording of Article 7(1)(c) of the basic regulation that that provision does not preclude the Commission from choosing an investigation period other than the six months immediately prior to the opening of the proceeding.

175 Next, the Court finds that the applicant did not contest the correctness or relevance of the explanations provided by the Council in its defence to justify its choice of a slightly different period. Furthermore, as has already been pointed out, the

applicant has adduced no concrete evidence in support of its allegation that the disturbance in the economy of the former Soviet Union came to an end in June 1990.

176 In those circumstances, the Commission does not appear to have exceeded the limits of its discretion in opting for a slight displacement of the investigation period.

177 Lastly, the Court finds that, having regard to the fact that that displacement was minimal and the fact that the applicant raised no objection to it throughout the administrative procedure, the Council did not fail to fulfil its obligation under Article 190 by not stating in the contested regulation the reasons for selecting the investigation period chosen.

178 It follows that the ninth plea must be rejected.

179 It follows from all of the foregoing that the action must be dismissed in its entirety.

Costs

180 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 if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and since the Council and the intervener, APEP, have applied for costs, the applicant must be ordered to pay, in addition to its own costs, the costs of the Council and of APEP.

Since Article 87(4) of the Rules of Procedure provides that institutions which intervene in the proceedings are to bear their own costs, the Commission must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and to pay the costs of the Council and of the Association des Producteurs Européens de Chlorure de Potassium;

3. Orders the Commission to bear its own costs.

Lenaerts Schintgen Briët

García-Valdecasas Lindh

Delivered in open court in Luxembourg on 28 September 1995.

H. Jung K. Lenaerts

Registrar President