JUDGMENT OF THE COURT (Sixth Chamber)

3 May 2001 *

In Joined Cases C-76/98 P and C-77/98 P,

Ajinomoto Co., Inc., established in Tokyo (Japan), represented by M. Siragusa, avvocato, T. Müller-Ibold, Rechtsanwalt, and V. Donaldson, solicitor, with an address for service in Luxembourg,

and

The NutraSweet Company, established at Deerfield (United States), represented by J.-F. Bellis, avocat, and F. Di Gianni, avvocato, with an address for service in Luxembourg,

appellants,

APPEALS against the judgment of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) of 18 December 1997 in Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet* v *Council* [1997] ECR II-2461, seeking to have that judgment set aside,

* Language of the case: English.

the other parties to the proceedings being:

Council of the European Union, represented by G. Houttuin and S. Marquardt, acting as Agents, assisted by H.-J. Rabe and G.M. Berrisch, Rechtsanwälte, with an address for service in Luxembourg,

defendant in the proceedings at first instance,

and

Commission of the European Communities, represented by N. Khan, acting as Agent, with an address for service in Luxembourg,

intervener in the proceedings at first instance,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris (Rapporteur), J.-P. Puissochet, R. Schintgen and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 May 2000, in the course of which Ajinomoto Co., Inc. was represented by T. Müller-Ibold, The NutraSweet Company by J.-F. Bellis and F. Di Gianni, the Council by G.M. Berrisch and the Commission by V. Kreuschitz, acting as Agent, assisted by N. Khan, barrister,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2000,

gives the following

Judgment

1 By applications lodged at the Registry of the Court of Justice on 20 March 1998, Ajinomoto Co., Inc. ('Ajinomoto'), in Case C-76/98 P, and The NutraSweet Company ('NutraSweet'), in Case C-77/98 P, each brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 18 December 1997 in Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet* v *Council* [1997] ECR II-2461 ('the contested judgment'), by which the Court of First Instance dismissed their action for annulment of Council Regulation (EEC) No 1391/91 of 27 May 1991 imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1991 L 134, p. 1).

2 By order of the President of the Court of Justice of 13 May 1998, Cases C-76/98 P and C-77/98 P were joined for the purposes of the written procedure, the oral procedure and the judgment.

Legal background

3 Article 2(1) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation') provides:

'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.'

4 Article 2(2) of that regulation is in the following terms:

'A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.'

5 Article 2(3)(a) and (b) of the basic regulation states:

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

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

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

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price; or

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

6 Article 2(6) of the basic regulation is worded as follows:

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

Facts giving rise to the dispute and procedure before the Court of First Instance

7 As stated in the contested judgment, aspartame, a sugar substitute, is a sweetener used mainly in foodstuffs. It was discovered in 1965 by a research scientist working at the American company G.D. Searle & Co., which subsequently became NutraSweet. Following that discovery, NutraSweet obtained use patents for aspartame in the United States and several Member States. Its patent was protected in Germany until 1986, in the United Kingdom until 1987, in other countries of the Community until 1988 and in the United States until 1991.

8 During the investigation period, running from 1 January to 31 December 1989, NutraSweet was the sole producer of aspartame in the United States. Ajinomoto, for its part, was the sole producer of aspartame in Japan. Except for a few direct sales by NutraSweet to independent customers in the Community or in the United

States for export to the Community, aspartame was distributed in the Community through the Swiss company NutraSweet AG, a jointly-owned subsidiary of NutraSweet and Ajinomoto.

9 On 3 March 1990, following the submission of complaints by Holland Sweetener Company vof, the sole producer of aspartame in the Community, the Commission published a notice (90/C 52/06) of initiation of an anti-dumping proceeding concerning imports into the Community of aspartame originating in Japan and the United States of America (OJ 1990 C 52, p. 12).

10 Following the establishment by the Commission that Ajinomoto and NutraSweet had been engaging in dumping practices, the imports in question were subjected to a provisional anti-dumping duty by the adoption of Commission Regulation (EEC) No 3421/90 of 26 November 1990 imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America (OJ 1990 L 330, p. 16).

11 A definitive anti-dumping duty was imposed in respect of those imports by Regulation No 1391/91. Article 2 of that regulation provided for the amounts secured by the provisional anti-dumping duty to be definitively collected at the rates of duty definitively imposed.

12 Both in Regulation No 3421/90 and Regulation No 1391/91, the normal value was determined on the basis of the weighted average domestic price net of any discount, in accordance with Article 2(3)(a) of the basic regulation, that is to say, on the basis of the price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the United States. Since the

aspartame originating in Japan had been imported into the Community not directly from Japan but from the United States, to which it had previously been exported, its normal value was likewise determined, in accordance with Article 2(6) of the basic regulation, on the basis of the price paid or payable on the domestic market of the United States.

13 Furthermore, the anti-dumping duty imposed by Regulations Nos 3421/90 and 1391/91 was calculated on the basis of the injury suffered by the Community industry and not according to the dumping margin.

14 It was in those circumstances that, on 6 September 1991, Ajinomoto and NutraSweet each brought proceedings for annulment of Regulation No 1391/91 and for the return of the provisional and definitive anti-dumping duties paid under that regulation and under Regulation No 3421/90.

15 In support of their actions before the Court of First Instance, the appellants put forward various pleas in law, consisting in essence of the following:

— first, the two appellants pleaded infringement of Article 2(3) of the basic regulation, in that the Community institutions had determined the normal value on the basis of patent-protected prices charged in the United States. Since those prices did not permit a valid comparison to be made with prices for export to the Community, where aspartame no longer enjoyed patent protection, the Community institutions were required to calculate the dumping on the basis of a constructed normal value pursuant to Article 2(3)(b)(ii) of the basic regulation. In addition, by failing to state the reasons for which the patent-protected prices were comparable to prices for export to the Community, the Council had committed a breach of its obligation to provide a statement of reasons;

— next, Ajinomoto pleaded infringement of Article 2(3) and (6) of the basic regulation, in that the Community institutions had calculated the normal value of the aspartame manufactured in Japan on the basis not of the price charged in that country but of that charged in the United States, which, on account of the patent protection, was not comparable with the Community market price;

— lastly, in the context of two pleas alleging infringement of essential procedural requirements and of Articles 7(4)(a) and (b) and 8(4) of the basic regulation, the two appellants pleaded, in particular, infringement of their right to a fair hearing, in that they were not informed, prior to the imposition of the provisional anti-dumping duties, of the essential facts and considerations on the basis of which it was proposed to impose those duties.

The contested judgment

16 In the contested judgment, the Court of First Instance dismissed the actions brought by the appellants. As regards, in particular, the first of the pleas referred to in paragraph 15 of this judgment, the Court of First Instance found as follows:

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

127 The criteria of the market structure or the level of competition are not in themselves decisive for the purposes of applying a constructed normal value rather than a normal value based on actual prices, where the latter are the result of market forces. As the Commission found in its regulation [No 3421/90] (point 16 in the preamble, confirmed by point 8 in the preamble to the Council regulation [No 1391/91]), a "difference in price elasticity between the US and Community markets" is "a prerequisite for price differentiation" and, if it had to be taken into account, "dumping could never be sanctioned". Since the applicants have not shown that the prices used to determine the normal value did not result from market forces or did not reflect the actual situation in the United States market, there was no reason to apply a constructed normal value rather than the prices actually paid on the United States market.

128 Lastly, the contested regulation has not in any way deprived the applicant [NutraSweet] of its United States patent, since it has not prejudiced its right to prevent any third party from producing and marketing aspartame in the United States until that patent expires, nor its right to maximise its prices in that market. In that regard, the production and marketing monopoly conferred by the patent enables its holder to recover research and development costs incurred not only for successful projects but also for unsuccessful ones. That factor constitutes an additional economic reason for relying, for the purposes of determining normal value, on prices charged in the context of a patent.

129 Consequently, the applicants have not shown that, by determining the normal value of imported aspartame on the basis of the patent-protected prices charged in the United States, the Community institutions committed an error of law or a manifest error of assessment of the facts.'

17 As to the complaint that insufficient reasons were given for basing the normal value on the prices charged in the United States, the Court of First Instance, after

observing that Regulation No 1391/91 confirmed the statements made in that regard in Regulation No 3421/90, found in paragraphs 131 to 133 of the contested judgment that the explanations given in point 18 of the preamble to the latter regulation were sufficient to indicate the requirements laid down by the case-law and, consequently, that Regulation No 1391/91 was adequately reasoned.

18 On the basis of those findings, the Court of First Instance rejected the first of the pleas referred to in paragraph 15 of this judgment.

19 The Court of First Instance proceeded to reject the second of those pleas, finding in particular, in paragraph 180 of the contested judgment, that, by merely asserting that the price charged on the United States domestic market could not be used because the product in question was covered there by a patent, Ajinomoto, for the reasons stated in paragraphs 126 to 129 of the contested judgment, had not shown that it was not comparable.

20 As to the alleged infringement of the appellants' right to a fair hearing, the Court of First Instance held in paragraph 87 of the contested judgment:

'Even if it is accepted, as the applicants maintain, that the principle of the right to a fair hearing requires exporters to be informed of the essential facts and considerations on the basis of which it is intended to impose provisional duties, a failure to respect that right cannot in itself have the effect of vitiating the regulation imposing definitive duties. Such a regulation is distinct from the regulation imposing provisional duties, even if it is so closely connected with the latter that it may, in certain circumstances, take its place (Case 56/85 *Brother* v *Commission* [1988] ECR 5655, paragraph 6, Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077, paragraph 12, and Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission*

and Council [1990] ECR I-2945, paragraph 13; order of 10 July 1996 in Case T-208/95 *Miwon* v *Commission* [1996] ECR II-635, paragraph 20); consequently, its validity must be assessed in relation to the rules applying at the time of its adoption. Where, in the course of the procedure leading to the adoption of a regulation imposing a definitive duty, steps are taken to remedy a defect vitiating the adoption of the corresponding regulation imposing a provisional duty, the illegality of the provisional regulation does not render the definitive regulation illegal. Only in so far as the defect has not been remedied, and in so far as the definitive regulation refers to the provisional regulation, will the illegality of the earlier regulation render the later one illegal.'

21 In stating the grounds for its decision, the Court of First Instance went on to find, in paragraphs 88 to 119 of the contested judgment, that the appellants' right to a fair hearing had been respected in the course of the procedure leading to the adoption of Regulation No 1391/91 imposing a definitive duty and ordering the definitive collection of the provisional duties. It thus held that that plea advanced by the appellants in support of their claim for annulment should be rejected.

The appeals

22 By their appeals, the appellants claim that the Court of Justice should set aside the contested judgment and that, adjudicating on the substance of the dispute, it should annul Regulation No 1391/91 in so far as it applies to each of them and order the Council to pay the costs of both sets of proceedings.

23 The Council and the Commission contend that the Court of Justice should dismiss the appeals and order the appellants to pay the costs.

24 In support of their appeals, the appellants advance two pleas in common. They complain that the Court of First Instance erred in law as regards:

— the interpretation of Article 2(3) of the basic regulation and of the scope of the obligation to provide a statement of reasons as laid down in Article 190 of the EC Treaty (now Article 253 EC);

— the effect on the legality of the regulation imposing the definitive anti-dumping duty of an alleged infringement of the rights of the defence at the time of the adoption of the regulation imposing the provisional anti-dumping duty.

25 Ajinomoto additionally raises a third plea, alleging that the Court of First Instance erred in law in its interpretation of Article 2(3) and (6) of the basic regulation.

The first part of the first plea

26 According to the appellants, the Court of First Instance erred in law in ruling in the contested judgment, first, that patent protection has no bearing on the

requirement in Article 2(3) of the basic regulation that, for the purposes of determining the normal value on the basis of actual prices, the prices on the exporter's domestic market must be comparable with those on the export market and, second, that it was compatible with the basic regulation to establish the normal value on the basis of United States patent-protected prices.

27 The appellants argue that, according to Article 2(3) of the basic regulation, the normal value can be established on the basis of the prices actually charged on an exporter's domestic market only if a valid comparison can be drawn between those prices and prices on the export market. In order to assess whether that is the case, the Community institutions must take into consideration all the factors which determine the prices and which do not result from the existence of unjustified commercial obstacles in the country of export. The institutions must also consider whether those factors differ as between the country of export and the Community.

28 Where, as in the present case, the exporter's domestic market, unlike the export market, is covered by a patent, there can be no price comparability as required by Article 2(3) of the basic regulation. In that event, the Community institutions are obliged to establish normal value on the basis of a constructed value, in accordance with Article 2(3)(b)(ii) of the basic regulation.

29 It is alleged that in the contested judgment, however, the Court of First Instance wrongly held that the existence of patent protection solely on the exporter's domestic market was incapable in any event of affecting price comparability.

Although the Court of First Instance did not expressly rule on the meaning of the term 'comparable' or on that of the words 'permit a proper comparison' in Article 2(3) of the basic regulation, it necessarily follows from the findings in paragraphs 126 to 129 of the contested judgment that patent protection cannot constitute a factor capable of affecting price comparability.

30 It should be noted in that regard that, in paragraphs 127 and 129 of the contested judgment, the terms of which are set out in paragraph 16 of this judgment, the Court of First Instance held in essence that the decisive factor for the purposes of establishing the normal value on the basis of actual prices rather than on a constructed value is the very existence of such prices, which result from market forces and reflect the actual situation in the exporter's domestic market. Without formally excluding the possibility that the existence of a patent may affect the nature of the prices in question as actual prices, and thus the method of determining the normal value, the Court of First Instance merely found that the appellants had not shown that the patent had in fact had such an effect in the present case.

31 The arguments advanced by the appellants in the appeals seek to contest that interpretation by the Court of First Instance. According to the appellants, the decisive factor for the purposes of choosing one or other method of calculating the normal value is not the existence of actual prices on the exporter's domestic market but the comparability of those prices with the export prices. On the basis of that argument, they proceed to claim that the existence of a patent solely on the exporter's domestic market prevents the prices in that market from being comparable with the export prices, which therefore means that the normal value must be determined on the basis of a constructed value.

32 The appellants' argument is founded on a misinterpretation of Article 2(3) of the basic regulation.

33 That provision prescribes three separate methods for establishing the normal value. The first method, laid down in Article 2(3)(a), consists of determining the normal value on the basis of the actual price, that is to say, 'the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin'.

34 According to the second method, provided for in Article 2(3)(b)(i), the normal value is to be established on the basis of 'the comparable price of the like product when exported to any third country'.

35 Lastly, under the third method, prescribed in Article 2(3)(b)(ii), the normal value is to be calculated on the basis of a constructed value.

36 The opening words of Article 2(3)(b) of the basic regulation state that the Community institutions are required to have recourse to the latter two methods 'when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison'.

37 The Court has stated in that regard that, according to the wording and scheme of Article 2(3)(a) of the basic regulation, in order to establish the normal value regard must be had primarily to the price actually paid or payable in the ordinary

course of trade and that it is apparent from Article 2(3)(b) of the basic regulation that that principle can be derogated from only when there are no sales of the like product in the ordinary course of trade or when such sales do not permit a proper comparison (Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraph 12).

38 In paragraph 13 of the judgment in *Goldstar*, the Court stated that the ordinary course of trade is a concept which relates to the nature of the sales themselves. It is designed to exclude, for the determination of the normal value, situations in which sales on the domestic market are not made under conditions corresponding to the ordinary course of trade, in particular where a product is sold at a price below production costs or where transactions take place between parties which are associated or have a compensatory arrangement with each other.

39 Lastly, the requirement that sales on the exporter's domestic market must permit a proper comparison is concerned with the question whether those sales are sufficiently representative to serve as a basis for the determination of the normal value. Transactions on the domestic market must reflect normal behaviour on the part of purchasers and result from normal patterns of price formation (*Goldstar*, paragraph 15).

40 It follows that the two situations provided for in the opening wording of Article 2(3)(b) of the basic regulation, in which the Community institutions are authorised to depart from the method of establishing the normal value on the basis of actual prices, are exhaustive in nature and both relate to the characteristics of the sales effected rather than to the price of the product.

41 In the present case, the appellants do not claim that the patent protection existing in the United States was such as to affect the normal or representative character, within the meaning of the judgment in *Goldstar*, of the sales of aspartame on the United States market; nor do they complain that the Court of First Instance erred in law in that regard.

42 On the other hand, they argue that recourse must also be had to the calculation method based on a constructed normal value where the price of the product on the exporter's domestic market is not comparable with the export price. Thus, they purport to add to the two situations exhaustively set out in the opening words of Article 2(3)(b) of the basic regulation a further situation which that provision does not envisage.

43 It follows that the appellants' argument must be rejected.

44 In those circumstances, there is no need to consider whether the existence of patent protection solely on the exporter's domestic market constitutes a factor capable of affecting price comparability, or to consider the arguments in that regard on which the appellants base their criticism of paragraphs 126 to 129 of the contested judgment.

45 Having regard to the foregoing, the first part of the first plea must be rejected.

The second part of the first plea

46 The appellants assert that the Court of First Instance erred in law in ruling that the Council had provided a sufficient statement of reasons, in accordance with Article 190 of the Treaty, for its finding that the patent-protected prices in the United States were 'comparable' within the meaning of Article 2(3) of the basic regulation.

47 They argue that the institutions provided only one explanation in that regard, namely that injurious price discrimination is condemned by Community law and international law irrespective of the reasons and motives underlying such discrimination. Notwithstanding this, the institutions made no findings concerning price comparability; nor, by the same token, did they provide any explanation as to the reasons for which they considered that the price differentiation should, in the present case, be treated in the same way as price discrimination. Having regard to the circular nature of the reason put forward by the institutions — to the effect that the prices were comparable because they fell to be treated in the same way as discrimination, which presupposes a finding of price comparability —, that reason cannot constitute a valid statement of reasons within the meaning of Article 190 of the Treaty.

48 It is clear, first of all, that the second part of the first plea must be declared admissible, inasmuch as, in advancing it, the appellants complain that the Court of First Instance erred in finding that the requirements of Article 190 of the Treaty had been complied with.

49 Second, it should be noted that, in paragraph 132 of the contested judgment, the Court of First Instance cited point 18 of the preamble to Regulation No 3421/90, to which reference is made in point 8 of the preamble to Regulation No 1391/91. In point 18 the Commission states, in relation to the argument that, because of the existing patent protection, the United States prices were not really comparable, that injurious price discrimination is condemned by Community and international law irrespective of the reasons for such discrimination; that the United States patent does not as such determine the domestic price level; that, if an exporter uses its position as patent holder to charge higher prices domestically than for export sales, it must bear the consequences of its freely adopted decision; and that there is no reason why such price differentiation, to the extent that it leads to material injury to the Community industry, should escape from the application of the anti-dumping rules.

50 The Court of First Instance held in paragraph 133 of the contested judgment that those explanations were sufficient to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to exercise its power of review.

51 Contrary to the appellants' assertions, that legal assessment by the Court of First Instance is not vitiated by any error of law. In paragraphs 132 and 133 of the contested judgment, the Court of First Instance examined the statement of reasons for Regulation No 1391/91 and rightly held that it adequately complied with the requirements of Article 190 of the Treaty.

52 Consequently, the second part of the first plea must be rejected.

The second plea

53 The appellants maintain that paragraph 87 of the contested judgment, as reproduced in paragraph 20 of this judgment, is vitiated by an error of law and is inadequately reasoned, inasmuch as it wrongly states that the Commission's refusal to authorise any communication of its decisions prior to the imposition of the provisional anti-dumping duties constitutes a defect capable of being remedied after those duties have been fixed, and that the refusal in question does not therefore affect the validity of the definitive collection of the provisional duties.

54 They assert in that regard that, if the Commission is legally bound to respect the rights of the defence before adopting a regulation imposing an anti-dumping duty, a failure to comply with that obligation cannot logically be made good once that regulation has been adopted. A provisional anti-dumping duty which has been unlawfully imposed by the Commission cannot be definitively collected by the Council, since otherwise the illegality vitiating the provisional duty would not be penalised.

55 According to the appellants, the case-law cited in paragraph 87 of the contested judgment is irrelevant. It relates to the conditions governing the admissibility of an action for annulment in respect of a regulation imposing a provisional duty and not, as in the present case, to a violation of the fundamental right to a fair hearing prior to the imposition of such a duty and the effects of such violation as regards the legality of the definitive collection of that duty pursuant to the regulation imposing the definitive anti-dumping duty.

56 In addition, it follows from Article 12(2)(a) of the basic regulation that a decision to proceed with the definitive collection of a provisional duty can only be taken

where 'a provisional duty has been applied'. Since the adoption of a regulation imposing a provisional duty is a precondition for the definitive collection of that duty by the Council, the unlawfulness of the provisional duty can only mean that its definitive collection is likewise unlawful.

57 The appellants put forward various arguments in support of their assertion that the Commission is required, in accordance with a fundamental principle of Community law, to permit exporters to exercise their right to be heard before a provisional anti-dumping duty is imposed. The Court of First Instance erred in law by failing entirely in its duty to address that point in its judgment.

58 The Council questions the admissibility of the second plea advanced by the appellants, on the ground that, in the proceedings before the Court of First Instance, they neither put forward nor presented adequate grounds in support of their argument concerning the legality of the definitive collection of the provisional duty. In the proceedings at first instance, they merely asserted, in a single sentence, that 'in the light of the resulting illegality of the Commission regulation imposing provisional duties, Article 2 of the Council regulation (No 1391/91) should be annulled', without indicating the reasons justifying such annulment.

59 As to the substance of the plea, the Council maintains that the alleged unlawfulness of the regulation relating to the provisional duties cannot in any event render the definitive collection of the provisional duties unlawful. This, it maintains, is clear from the settled case-law of the Court of Justice concerning the relationship between regulations imposing provisional anti-dumping duties and those imposing definitive duties (*Brother*, *Technointorg* and *Neotype Techmashexport*, cited above).

60 The Commission contends that the only argument raised in the appeals, in the context of that second plea, in opposition to the contested judgment is that, following the adoption of the regulation imposing the provisional duties, it was no longer possible to remedy the alleged defect in respect of non-disclosure.

61 With reference to paragraph 70 of the judgment in *Neotype Techmashexport*, the Commission states that the appeals do not explain how the present case differs from that determined in that judgment, or why that judgment was wrong. It therefore regards that plea by the appellants as inadmissible, inasmuch as it is not in accordance with Article 112(1)(c) of the Rules of Procedure of the Court of Justice, which provides that an appeal must set out the legal arguments relied on.

62 As regards the substance of the plea, the Commission adopts the argument advanced by the Council.

63 In their appeals, the appellants set out not only the plea on which they rely in opposition to paragraph 87 of the contested judgment but also the arguments intended to support that plea, as is clear from paragraphs 53 to 57 of this judgment. Moreover, it is not disputed that, in the proceedings at first instance, the appellants put forward a plea alleging that the definitive collection of the provisional anti-dumping duty was unlawful on account of non-disclosure and that the plea advanced in their appeals is directed against the response given in that connection by the Court of First Instance in paragraph 87 of the contested judgment.

64 In those circumstances, the second plea must be declared admissible.

65 As to the substance of that plea, it should be borne in mind that, according to paragraph 69 of the judgment in *Neotype Techmashexport*, the legality of a definitive regulation providing for the collection of the provisional anti-dumping duty may be affected by any illegality of the provisional regulation only in so far as that illegality is reflected in the definitive regulation.

66 In paragraph 70 of the judgment in *Neotype Techmashexport*, the Court of Justice held that the submissions put forward by the applicant in that case to challenge the provisional regulation could not be relied on as against the definitive regulation. The fact that the applicant in that case had not been informed in due time of the imposition of the provisional duty could not affect the definitive collection of that duty, since it had had the opportunity of making known its arguments before the definitive regulation was adopted. The Court also held that the pleas alleging that, at the stage of the provisional regulation, the wrong country had been chosen as a reference country and that the wrong method had been used to calculate the provisional duty could not be relied on to challenge the definitive regulation, since those points had been rectified on the adoption of the latter regulation.

67 It follows that the Court of First Instance rightly held in paragraph 87 of the contested judgment that even if, as the applicants maintain, the principle of the right to a fair hearing requires exporters to be informed of the essential facts and considerations on the basis of which it is intended to impose provisional duties, a failure to respect that right cannot in itself have the effect of vitiating the regulation imposing definitive duties where, in the course of the procedure for the adoption of the latter regulation, the defect vitiating the procedure for the adoption of the corresponding regulation imposing provisional duties was remedied. Moreover, the appellants do not contest the findings made by the Court of First Instance in paragraphs 89 to 118 of the contested judgment, from which it is apparent that the Community institutions fulfilled their disclosure obligations under the basic regulation and that the appellants' right to a fair hearing was respected during the procedure leading to the adoption of the definitive regulation.

68 The appellants maintain, however, that the present case differs from that considered in *Neotype Techmashexport*. The defects with which that judgment was concerned related to minor aspects of the investigation procedure, such as notification of the resumption of the procedure and the interval which elapsed between the submission of observations and the adoption of measures, whereas the present case concerns the violation of a fundamental principle of Community law, namely the obligation to communicate information relating to the adoption of extremely stringent anti-dumping measures.

69 It is clear that, contrary to the appellants' assertion, the irregularities at issue in *Neotype Techmashexport* did not concern minor aspects of the procedure leading to the adoption of the regulation imposing provisional duties. First, the applicant in that case had maintained, like the appellants in the present case, that the failure to inform it in due time of the imposition of the provisional duty constituted a violation of its right to a fair hearing (see point III.2(a)(i) of the Report for the Hearing in that case). Second, the applicant in *Neotype Techmashexport* had also put forward other pleas concerning important aspects of the procedure leading to the adoption of the regulation imposing provisional duties, such as the choice of reference country and the method used to calculate the provisional duty.

70 It follows that the present case should not be distinguished from that which gave rise to the findings made in paragraphs 69 to 71 of the judgment in *Neotype Techmashexport* and that the Court of First Instance did not, therefore, make an error of law in paragraph 87 of the contested judgment.

71 As regards the complaint that the reasoning contained in paragraph 87 of the contested judgment is inadequate, suffice it to say that the appellants have not specified how that complaint differs from the complaint alleging that the Court of First Instance erred in law.

72 In those circumstances, the second plea relied on by the appellants must be rejected.

The third plea

73 Ajinomoto maintains that the Court of First Instance erred in law by ruling that the determination by the Community institutions, on the basis of domestic prices in the United States, of the normal value for its products originating in Japan was compatible with Article 2(3) and (6) of the basic regulation.

74 It claims that, contrary to the finding made by the Court of First Instance in paragraph 180 of the contested judgment, those prices were not 'comparable' within the meaning of Article 2(6) of the basic regulation, because they were protected by a patent. It merely refers in that regard to the arguments advanced by it in the context of the first part of the first plea, without putting forward any separate argument in support of the present plea.

75 Since the arguments relied on by the appellants in relation to the first part of the first plea have been rejected for the reasons set out in paragraphs 30 to 44 of this judgment, Ajinomoto's third plea must also be rejected.

76 In view of the foregoing, the appeals must be dismissed in their entirety.

Costs

77 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. Since the appellants have been unsuccessful and the Council has requested that they be ordered to pay the costs, the appellants must be ordered to bear their own costs and to pay the costs incurred by the Council in these proceedings.

78 Article 69(4) of the Rules of Procedure provides that institutions which intervene in the proceedings are to bear their own costs; consequently, it is appropriate to order the Commission to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeals;

2. Orders Ajinomoto Co., Inc. and The NutraSweet Company to bear their own costs and to pay the costs incurred by the Council of the European Union in these proceedings;

3. Orders the Commission of the European Communities to bear its own costs.

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 3 May 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber