OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 April 2002 [1]

1. This appeal arises out of the dismissal by the Court of First Instance [2] of the applications of two Romanian producers of seamless pipes and tubes of iron or non-alloy steel for the partial annulment of a Council Regulation [3] imposing definitive anti-dumping duties on, *inter alia*, their products. The two actions were joined before the Court of First Instance and the two producers have brought a joint appeal in which they both allege that that Court erred in law in its interpretation and application of the requirement to state adequate reasons for a measure. None the less, it is preferable to deal with the arguments of each appellant separately, since they concern separate portions of the judgment under appeal.

Petrotub

The underlying issue

2. Although the appeal concerns the obligation to state reasons and must be decided on that basis, it may be helpful to set out first the underlying issue, that of the calculation of dumping margins by the 'asymmetrical method', with the concomitant practice of 'zeroing' — a matter of some controversy in world trade.

3. In 1995, the basic Community rules governing anti-dumping measures were enacted afresh in Council Regulation No 384/96 [4] ('the basic regulation'). The essence of those rules, similar to that of anti-dumping laws worldwide, is to be found in Article 1. Under Article 1(1), 'an

1 — Original language: English.

2 — By judgment of 15 December 1999 in Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, hereinafter 'the judgment under appeal'.

3 — Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia, OJ 1997 L 322, p. 1 ('the contested regulation').

4 — Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56, p. 1.

anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury' and, under Article 1(2), 'a product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country'.

4. The 1995 reenactment was prompted both by inadequacies in the previous legislation [5] and, perhaps more importantly, by the establishment of the '1994 Anti-dumping Code' as part of the Uruguay round of multilateral trade negotiations. [6]

5. Article 2 of that code concerns determination of dumping. Article 2.4 requires that a fair comparison be made between the export price and the normal value (which is in principle the price normally charged in domestic trade but may also be, where no such price is available, constructed on the basis of specified rules). Article 2.4.2 provides that '... the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.'

6. Article 2(10) of the basic regulation embodies the same requirement of a fair comparison and, under Article 2(11), 'the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction

5 — See recitals 32 to 34 in the preamble to the basic regulation.

6 — Uruguay Round of Multilateral Trade Negotiations (1986-1994) — Annex 1 — Annex 1A — Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO-GATT 1994), OJ 1994 L 336, p. 103; see recitals 3 to 5 in the preamble to the basic regulation.

basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised....'

7. Those provisions are thus substantially the same, each providing for the same three possible methods of calculation, although the definition of the circumstances in which the third method may be used differs — 'if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of [the first two methods]' as opposed to 'if the [first two methods] would not reflect the full degree of dumping being practised'. It may therefore be worthwhile considering what the three methods involve.

8. For that purpose, it is helpful to look at some actual (though totally fictional) figures. A simple example [7] might involve a third-country producer exporting two models of his product to the Community, model A and model B:

— For model A, the weighted average normal value is calculated to be 100, from a number of domestic transactions at prices ranging from 95 to 105. Two export transactions are made at a dumped price [8] of 80, and 10 at an undumped price of 110.

— For model B, the weighted average normal value is calculated to be 90, from a number of domestic transactions at prices ranging from 85 to 95. Ten export transactions are made at a dumped price of 70, and five at an undumped price of 100.

9. A comparison of the weighted average normal value with the weighted average of

7 — Further explanations may be found in, for example, Ivo Van Bael and Jean-François Bellis, *Anti-Dumping and other Trade Protection Laws of the EC* (3rd ed., 1996), paragraphs 338-340, or Clive Stanbrook and Philip Bentley, *Dumping and Subsidies — The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community* (3rd ed., 1996), Chapter 3.4.

8 — In a real calculation, it would be necessary to distinguish between the ex-works and the c.i.f. prices, since dumping margins are calculated on the basis of a comparison between ex-works prices, but expressed as a percentage of the export price c.i.f. Community frontier; however, the illustration will be simpler, and will not be impaired, if the c.i.f. price is for the moment ignored.

prices of all exports to the Community (the 'first symmetrical method') gives the following results:

— For model A, the weighted average export price is as follows:

$(2 \times 80) + (10 \times 110) = 160 + 1\,100 = 1\,260$

1 260 divided by 12 (total number of export transactions) = 105

Compared to the weighted average normal value of 100, this shows no dumping; there is in fact a 'negative dumping margin' of -60 [9] for all 12 transactions, averaging at -5 per transaction.

— For model B, the weighted average export price is as follows:

$(10 \times 70) + (5 \times 100) = 700 + 500 = 1\,200$

1 200 divided by 15 (total number of export transactions) = 80

Compared to the weighted average normal value of 90, this shows a ('positive') dumping margin of 150 for all 15 transactions, averaging at 10 per transaction.

— If an overall margin is calculated for both models, the negative dumping margin of -60 is offset against the positive margin of 150 to give a total positive dumping margin of 90, or 3.33 per transaction.

10. Leaving to one side for the moment the rarely-used method of comparing prices on a transaction-to-transaction basis (the 'second symmetrical method'), I turn to the

9 — I shall leave dumping margins in absolute terms, although they are normally expressed as a percentage of c.i.f. prices, which I am omitting from these examples.

comparison between the weighted average normal value and individual export prices (the 'asymmetrical method'). If that method is used, the calculations are as follows:

— For model A (normal value = 100), the two transactions at 80 show a positive margin of 20, the 10 at 110 show a negative margin of 10. The total margin is:

$(2 \times 20) + (10 \times -10) = 40 + -100 = 40 -100 = -60$ (average -5).

— For model B (normal value = 90), the 10 transactions at 70 show a positive margin of 20, the five at 100 show a negative margin of 10. The total margin is:

$(10 \times 20) + (5 \times -10) = 200 + -50 = 200 -50 = 150$ (average 10).

— If an overall margin is calculated for both models:

$(12 \times 20) + (15 \times -10) = 240 + -150 = 240 -150 = 90$ (average 3.33).

11. It thus appears that the two methods achieve the same result if, as I have assumed, the same export transactions, both dumped and undumped, are all taken fully into account. However, the transactions used need perhaps not be the same in both cases, since the first symmetrical method is stated to apply to 'all comparable transactions' whereas the asymmetrical method compares average normal prices with 'individual' export transactions, which does not appear to preclude a selection by the investigating body. In the event of any such selection, it might seem plausible that the aim and effect would be to exclude certain undumped exports and thus increase the resulting positive dumping margin, rather than the contrary.

12. Moreover, calculations may be affected by a further technique known as 'zeroing'. This involves reducing all negative dumping margins to zero, instead of offsetting

them against the positive dumping margins. All undumped exports are thus treated as if they were made at normal value. [10] When 'zeroing' is applied, the results produced by the two methods may differ. I shall again assume that the calculations apply to all the transactions for each model.

13. If 'zeroing' is applied when using the first symmetrical method:

— For model A, the total negative margin of -60 becomes 0.

— For model B, the total positive dumping margin of 150 remains 150.

— If an overall margin is established for both models on the basis of the separate margins established for each, it is now

0 + 150 = 150, instead of 90 (an average of 5.56 per transaction, instead of 3.33)

14. If 'zeroing' is applied when using the asymmetrical method:

— For model A,

(2 × 20) + (10 × -10) = 40 + -100 = 40 + 0 = 40 (average 3.33)

— For model B,

(10 × 20) + (5 × -10) = 200 + -50 = 200 + 0 = 200 (average 13.33).

— For both models together,

(12 × 20) + (15 × -10) = 240 + -150 = 240 + 0 = 240 (average 8.89).

10 — If an anti-dumping duty is applied, however, it applies equally to undumped exports, although there is a (cumbersome) procedure, under Article 11(8) of the basic regulation, whereby importers may request a refund of anti-dumping duties if they can show that the dumping margin has been reduced or eliminated.

15. Thus, it appears, where 'zeroing' is not applied, the two methods produce the same result if the same transactions are all taken fully into account but, where it is applied, the asymmetrical method will always produce a higher result, since the first symmetrical method, by averaging export prices, is bound to take negative dumping margins into account to a certain extent while the asymmetrical method will never take any into account. (Obviously, the issue will arise in any event only when there is a mixture of dumped and undumped exports; if all exports are dumped, there will be no negative margins and no 'zeroing'.)

16. 'Zeroing' is a practice which is not mentioned in either the 1994 Anti-dumping Code or the basic regulation, but is commonly used by importing countries or customs unions, including the Community. Unsurprisingly, since it produces higher dumping margins, it is criticised by exporting countries. Importing countries defend it on the ground that without it dumping might be totally concealed (as with model A above) or partly masked (as with model B above) if there is 'targeted' dumping — that is to say if an exporter sells at a loss in a particular region or during a particular period because he believes he can increase his sales locally or periodically without endangering sales in other regions or during other periods. [11]

17. The controversy over 'zeroing' has been considered by the Dispute Settlement Body of the World Trade Organisation (WTO) in cases involving the European Community. In 1995, in the *Cotton Yarn* case, that body's predecessor appeared to accept the validity of the technique used in conjunction with the asymmetrical method. [12] In 1997, however, in *Bed Linen*, the reports of both the panel and the appellate board roundly condemned the practice in a case involving the first symmetrical method, [13]

11 — The need to use specific methodology to deal with such situations has been accepted by the Court in Case 240/84 *Toyo and Others* v *Council* [1987] ECR 1809, paragraph 23 of the judgment.

12 — GATT Committee on Anti-dumping Practices, panel report ADP/137 of 4 July 1995 (EC — Imposition of anti-dumping duties on imports of cotton yarn from Brazil), in particular at paragraphs 240-252 and 498-502. However, the arguments considered seem to have turned on issues of inflation rather than the justification for the technique itself. (The case concerned a previous version of the Anti-dumping Code.)

13 — European Communities — Anti-dumping duties on imports of cotton-type bed-linen from India, Panel report WT/DS141/R of 30 October 2000, in particular at paragraphs 6.102 and 6.117, and appellate body report WT/DS141/AB/R of 8 February 2001, especially at paragraph 55.

and it appears that the Community no longer uses it in conjunction with that method. [14]

18. It must be stressed at this point that the practice of 'zeroing' is not itself an issue in the present proceedings, although it may still be an integral part of the asymmetrical method as applied by the Community and neither the Council nor the Commission has denied that it was in fact used in this case. What is in issue is whether adequate reasons were given by the Council in the contested regulation for its choice of the asymmetrical method and, more particularly, whether the Court of First Instance was right to find that adequate reasons had been given. Nevertheless, those matters can be more reliably assessed if the consequences entailed by the choice of method are borne in mind.

19. There remains to be considered the 'second symmetrical method' — a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis. This method is less easy to illustrate — and, as the Council and Commission have stressed, to apply — because it involves identifying individual domestic transactions which are comparable to individual export transactions. Thus, it is necessary to take into account factors such as quantity, date and so forth. The dumping margin revealed for each export transaction will differ depending on the domestic transaction with which it is compared, so close comparability is extremely important. If that condition can be met, however, it might seem likely that the second symmetrical method would present a truer picture of the dumping practised than either of the other methods.

20. The results obtained from individual comparisons would presumably be treated in much the same way as the individual results obtained by the asymmetrical method and, of course, it would be possible to apply 'zeroing' here too — though perhaps with less justification, since a comparison between truly comparable transactions should not lead to any dumping being masked. However, it appears that this method is never used by the Community, so the details must to that extent remain conjectural.

14 — See, with regard to that case, Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, OJ 2001 L 219, p. 1; reassessment in line with the WTO rulings revealed a lower level of dumping — see recital 4 of the preamble. The same original regulation has very recently been further amended with regard to imports from Pakistan; applying the same considerations as in the case of India, the revised calculation shows no dumping at all for exports from Pakistan (Council Regulation (EC) No 160/2002 of 28 January 2002 amending Council Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, and terminating the proceeding with regard to imports originating in Pakistan, OJ 2002 L 26, p. 1; see in particular recitals 5, 6 and 13 in the preamble).

The case at first instance

21. On 31 August 1996 the Commission initiated an anti-dumping proceeding concerning imports of certain seamless pipes and tubes of the types in issue originating in Russia, the Czech Republic, Romania and the Slovak Republic. In Regulation No 981/97 ('the provisional regulation'), [15] it imposed a provisional anti-dumping duty on imports from, *inter alia*, Petrotub and Republica, on which the rate of duty was calculated by the asymmetrical method. The findings were confirmed, and a definitive anti-dumping duty was imposed, by the Council in the contested regulation.

22. In Case T-33/98, Petrotub sought the annulment of Article 1 of the contested regulation in so far as it was concerned. In one of its pleas it alleged that the Council had infringed Article 2(11) of the basic regulation by, *inter alia*, failing to provide justification for its choice of the asymmetrical method in order to determine the anti-dumping margin. The Court of First Instance dealt with that aspect in paragraphs 104 to 115 of the judgment under appeal, as follows:

'104 In its application, the applicant complains that the Community institutions failed to explain why a comparison of the weighted average normal value with the prices of individual exports reflected the real extent of the dumping better than the symmetrical methods, a failure which, was *inter alia*, in breach of Article 2.4.2 of the 1994 Anti-dumping Code.

105 Although, according to settled case-law, the provisions of the basic regulation must be interpreted in the light of the 1994 Anti-dumping Code (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 30 to 32), the rules governing anti-dumping measures are contained in that regulation alone. The obligation referred to in Article 2.4.2 of the 1994 Anti-dumping Code to explain why the symmetrical methods of comparison cannot show the real extent of the dumping does not therefore, as such, constitute a rule which is to be applied, and Article 2(11) of the basic regulation clearly does not mention any specific obligation to give such an explanation.

106 However, in so far as this plea can be understood as meaning that the applicant alleges that the statement of reasons given for the contested regu-

15 — Commission Regulation (EC) No 981/97 of 29 May 1997 imposing provisional anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Russia, the Czech Republic, Romania and the Slovak Republic, OJ 1997 L 141, p. 36.

lation is inadequate, it should be borne in mind that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to inform the persons concerned of the justification for the measure adopted and thus enable them to defend their rights and the Community judicature to exercise its powers of review. The extent of the obligation to state reasons must be assessed in the light of the context and the procedure in which the contested regulation was adopted and the body of legal rules governing the field concerned (see, most recently, Case T-48/96 *Acme Industry* v *Council* [1999] ECR II-3089, paragraph 141).

107 In this case, the statement of reasons for the contested regulation must be appraised having regard, in particular, to the information disclosed to the applicant and to its observations concerning the method of comparison to be applied with a view to determining the dumping margin during the administrative procedure.

108 In recital 28 of the provisional regulation the Commission stated:

"The weighted average normal value for each product group was compared with the adjusted individual export prices in accordance with Article 2(11) of the basic regulation. This was necessary in order to reflect the full degree of dumping being practised and because there was a pattern of export prices which differed significantly between different customers and regions."

It maintained that view in the provisional disclosure of 2 June 1997.

109 In its provisional submissions on dumping dated 1 July 1997 and at the hearing on 9 July 1997, the applicant challenged that view, contending that the Commission should have used the symmetrical method which consists in comparing the weighted average normal value with the weighted average of the prices of all Petrotub's exports to the Community. In its letter of 11 July 1997 it also claimed that a comparison of the weighted average normal value with the weighted average of the prices of all its exports to the Community in fact yielded a dumping margin significantly lower than that obtained by the method used by the Commission.

110 The Commission stated in its final disclosure of 19 August 1997 that, as regards Petrotub, the pattern of export prices differed considerably as between the periods (from August 1995 to April 1996 and from May 1996 to August 1996 respectively). It indicated that, for all Romanian companies taken together, the difference in the dumping margin obtained by applying the methods of comparison of weighted average to weighted average or of weighted average to individual transactions was such that it could be concluded that the first of those methods did not enable the real extent of the dumping to be reflected.

111 In its final observations on dumping of 8 September 1997, the applicant contended that the dumping margin should be determined by applying the weighted average to weighted average method of comparison.

112 In recital 22 of the contested regulation, the Council stated:

"One company claimed that the calculation of the dumping margin should not be made on the basis of a comparison of weighted average normal values with the adjusted export price of each corresponding group on a transaction-by-transaction basis, but on a weighted average to weighted average basis.

This claim was rejected after the methodology used for all Romanian companies was reconsidered and it was found that:

— for one company, there was no difference in dumping margin between both methods as all export transactions were made at dumped prices;

— for three companies, a pattern of export prices which differed significantly by destination or time period was found.

In view of the above, and in accordance with Article 2(11) of the basic regulation, the method comparing the weighted average normal value by time period to individual adjusted export prices on a transaction-by-transaction basis was retained for the purposes of the definitive determination."

113 The contested regulation thus sets out the reasons for which the Community institutions decided to apply the criterion of comparison of weighted average normal value with the prices of individual exports.

114 In those circumstances, and 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 (see Case T-164/94 *Ferchimex* v *Commission* [16] [1995] ECR II-2681, paragraphs 90 and 118), the contested regulation cannot be regarded as vitiated by an inadequate statement of reasons regarding the application by the Community institutions of Article 2(11) of the basic regulation.

115 As regards the applicant's complaint that the Community institutions confined themselves to considering the first symmetrical method (namely that of the weighted average to weighted average comparison) and failed to verify whether the second of the symmetrical methods referred to in Article 2(11) of the basic regulation (namely the method consisting in comparing individual normal values with individual export prices) might not reflect the real extent of the dumping engaged in, the Court finds that this is a separate plea in law which was not raised until the stage of the reply. This plea must therefore be rejected as inadmissible pursuant to Article 48(2) of the Rules of Procedure.'

16 — This should read *Ferchimex* v *Council*.

The appeal

23. Petrotub asks the Court to set aside the judgment under appeal and annul the contested regulation, in so far as those acts relate to it. It submits, principally, that the Court of First Instance erred in law in paragraph 114 of its judgment and, to the extent that such subsidiary grounds may be necessary for the main ground of appeal, that it erred in law also in paragraphs 105 and 115 of the judgment. Before setting out its main arguments, Petrotub makes two preliminary remarks.

24. First, an adequate statement of reasons need not include all the details of the relevant factual or legal aspects but must be assessed with regard to its context and all the relevant legal rules. However, it is

insufficient merely to refer to a provision or repeat its wording when the provision or wording involves a legal or factual assessment which is essential for the decision to be taken; the institution must at least indicate the logical link between the provision and the assessment, so that the Court can verify that the assessment was made on a correct basis and that the institution has not merely referred to the text as a self-justifying argument.

25. Second, a mere reference to the existence of a pattern of export prices which differs significantly by region or time period is not itself an adequate statement of reasons. Before using the asymmetrical method, the institutions must also satisfy themselves that the symmetrical methods would not reflect the full degree of dumping, and adequate reasons must be given to establish the logical link between Article 2(11) of the basic regulation and the institution's decision.

26. The first of Petrotub's main arguments is essentially that, in finding that the Council had stated adequate reasons, the Court of First Instance erred in law by ignoring the absence of any consideration of the second symmetrical method.

27. Article 2(11) allows the asymmetrical method 'if the methods' — in the plural — 'specified in the first sentence of this paragraph would not reflect the full degree of dumping'. The Council should thus have given reasons for discarding both symmetrical methods before applying the asymmetrical method. Although that issue came to the fore at the stage of the reply at first instance, it was implicit in the use of the plural 'methods' in the application and should in any event have been dealt with by the Court of First Instance pursuant to its obligation to apply Article 2(11) correctly. The Court of First Instance was therefore wrong to dismiss the argument as inadmissible at paragraph 115 of the judgment under appeal and to find that the statement of reasons was adequate.

28. Petrotub's second, third and fourth arguments concern the finding in paragraph 114 of the judgment under appeal that the decision to use the asymmetrical method was adequately reasoned, in so far as that conclusion was based on the circumstances set out in paragraphs 108 to 113.

29. Paragraph 108 refers to the statement that the asymmetrical method was necessary to reflect the full degree of dumping. Without further explanation, that is merely self-justifying and thus an inadequate statement of reasons.

30. Paragraph 110 refers to the statement that, as regards Petrotub, the pattern of export prices differed considerably as between the two periods considered and that, for all the Romanian companies taken together, the difference between the results of the first symmetrical method and the asymmetrical method was such that it could be concluded that the former did not reflect the full extent of the dumping. In recital 22 of the contested regulation, cited at paragraph 112 of the judgment under appeal, the Council implicitly based its reasoning on the fact that the asymmetrical method produced an arithmetically greater result. That was not, however, an adequate statement of reasons.

31. Since 'zeroing' is practised only under the asymmetrical method, it will always produce an arithmetical result equal to or greater than the first symmetrical method. If the intention of the basic regulation had been simply to apply the method which gave the highest arithmetical result, either that would have been stated or the first symmetrical method would not have been provided for at all.

32. The meaning of the words 'would not reflect the full degree of dumping' is not given in the basic regulation but implies some assessment other than a simple arithmetical comparison. The asymmetrical method is appropriate for 'certain manœuvres in which dumping is disguised by charging different prices, some above the normal value and some below it' [17] — implying conduct chosen specifically to disguise dumping or at least having no other reasonable explanation. Yet price differences are often caused by changes in market conditions or differences in bargaining power *vis-à-vis* different customers, and the asymmetrical method is not justified. Targeted dumping, however, would justify use of that method, with 'zeroing' so that negative dumping margins on other sales do not disguise the positive margins on the dumped sales.

33. Moreover, Article 2.4.2 of the 1994 Anti-dumping Code allows the asymmetrical method to be used only 'if an explanation is provided' as to why price differences cannot be taken properly into account by either of the symmetrical methods. In 1996, the European Communities stated to the WTO that any departure from the latter 'will be explained both to the parties concerned and in regulations imposing anti-dumping measures', [18] implying that the explanation in question fell under the obligation to state adequate reasons laid down in Article 253 EC. The

17 — Case 240/84 *Toyo and Others* v *Council*, cited above in note 11, paragraph 23 of the judgment.

18 — 4 March 1996, World Trade Organisation G/ADP/W/301, G/SCM/W/309 (Annex V to the Appeal).

Court of First Instance thus erred in law in paragraph 105 of the judgment under appeal by failing to take account of Article 2.4.2 of the 1994 Anti-dumping Code.

34. In the same 1996 communication to the WTO, the European Communities stated that the term 'full degree of dumping', used in the basic regulation but not in the 1994 Anti-dumping Code, simply refers to targeted dumping. The reasons given in the parts of the contested regulation on which the Court of First Instance relied do not provide any explanation of how the alleged dumping was 'targeted'.

Admissibility of the appeal

35. Before looking further at the substance of Petrotub's arguments, it is necessary to consider the objections of the Council and the Commission — which, as at first instance, has been granted leave to intervene in support of the Council — to the admissibility of the appeal.

36. The emphatic objections with which those institutions have peppered their pleadings may be summarised as follows. First, Petrotub presents a challenge to the substance of the contested regulation in the form of a challenge to its reasoning. Second, in several regards it fails to specify the rule of law which the Court of First Instance is alleged to have infringed. Third, it merely reproduces arguments already raised at first instance without challenging the legal assessment in the judgment under appeal. Fourth, it raises again an argument — as to the need to provide reasons for not using the second symmetrical method — which was already inadmissible at first instance because it was raised too late in the proceedings. Fifth, it bases a new argument on evidence — the 1996 statement to the WTO — which was not adduced at first instance, without providing any justification for that omission.

37. I disagree with those submissions.

38. Essentially, Petrotub makes two main claims. They concern the decisions taken in the contested regulation (i) not to apply the second symmetrical method but rather (ii) to apply the asymmetrical method. On both points, it is alleged that an essential step in reasoning was omitted from the contested regulation, but that the Court of First Instance found the statement of reasons to be adequate despite the absence of that essential step. Thus, it is alleged, the Court of First Instance itself failed to state adequate reasons for the conclusions it reached. In addition, there are two sub-

sidiary pleas, that the Court of First Instance erred in law by finding (i) that Article 2.4.2 of the 1994 Anti-dumping Code was not a rule which had to be applied and (ii) that Petrotub's plea concerning the second symmetrical method could not be entertained because it was out of time.

39. I have no difficulty in seeing those arguments as identifying specific aspects of the judgment under appeal which are contested, together with the legal grounds on which they are contested, as errors in law. Admittedly the appellant's arguments are not set out as clearly as they might have been for that purpose, but the Court is not thereby unduly hampered in its task. In so far as the Council claims that the appellant is disputing the reasons themselves rather than the adequacy of their statement — thus in fact challenging the substance of the measure — I consider it preferable to examine the reasoning in detail before forming a view on the nature of the challenge.

40. As regards the allegation of 'mere repetition' of arguments already raised at first instance, it is true that the Court has consistently held that an appeal which simply repeats or reproduces verbatim the pleas in law and arguments already submitted to the Court of First Instance is inadmissible. [19] However, that does not seem to be the case here. Moreover, that ruling has been applied above all where the arguments put forward do not identify the contested aspects of the judgment under appeal but merely make an imprecise claim of illegality coupled with a blanket reference to, or reproduction of, the submissions made at first instance. In the present case, there is a clear allegation that the Court of First Instance erred in specific aspects of its assessment. The justifiable concern to ensure that an appeal is not merely a 'second bite at the cherry' should not blind us to the fact that there must of necessity be considerable overlap between the arguments advanced at first instance and those raised on appeal. [20]

41. With regard to the need to state reasons for not applying the second symmetrical method, and in particular the admissibility of the plea at first instance, Petrotub advances a two-pronged argument: first, the plea was already present in the application and thus not raised too late and, second, the Court of First Instance should have examined it in any event because it relates to an essential procedural requirement and is thus a question of public policy.

19 — See, most recently, the Order of the Court in Case C-351/99 P *Eridania and Others* v *Council* [2001] ECR I-5007, paragraph 36.

20 — See also paragraphs 29 and 30 of my Opinion in Case C-154/99 P *Politi* v *ETF* [2000] ECR I-5019, with which the Court apparently agreed at paragraph 12 of its judgment.

42. Whatever the correct view as to the first prong, the second prong is inseparably bound up with the substance of the argument. On the substance, that argument cannot succeed unless it is established that the Council is indeed required to state its reasons for not using the second symmetrical method before the asymmetrical method can be applied. If that is established, the issue is one of infringement of an essential procedural requirement within the meaning of Article 230 EC; involving a matter of public policy, it may be raised by the Community judicature of its own motion [21] and the Court of First Instance should therefore have examined it regardless of the stage at which it was raised — although I do not consider that there would have been any error in law if that Court had not raised the matter of its own motion in the absence of any relevant plea. In those circumstances, I propose to examine the substance of the argument below.

43. Finally, I consider that the 1996 communication to the WTO is a document to which the Court's attention may be drawn without thereby rendering any argument of the appellant inadmissible. The argument raised on appeal is that the Court of First Instance was wrong to consider that Article 2.4.2 of the 1994 Anti-dumping Code was not a rule to be applied; the Court of Justice may decide that issue, if necessary, by reference to that article alone.

The obligation to state reasons

— In general [22]

44. Petrotub's arguments turn on the nature and extent of the Council's obligation to state the reasons for which it decided to impose a definitive anti-dumping duty. It is common ground that essential reasons must be given but that detailed reasoning may be omitted if the circumstances permit. The issue concerns in part the dividing line between those two categories and in part that between a claim that reasoning is formally inadequate and a claim that it is substantively incorrect.

45. Article 190 of the EC Treaty (now Article 253 EC) provides:

'Regulations, directives and decisions... shall state the reasons on which they are based...' The obligation therefore applies equally to a decision — which is, according to Article 189 of the EC Treaty (now Article 249 EC), 'binding in its entirety upon those to whom it is addressed' — and to a regulation — which has 'general application' and is 'binding in its entirety

21 — See Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67 of the judgment, and Case C-265/97 P *VBA* v *Florimex* [2000] ECR I-2061, paragraph 114.

22 — For an excellent and thoughtful review of the subject in a comparative context, see Martin Shapiro, 'The giving reasons requirement', *University of Chicago Legal Forum* 1992, p. 179.

and directly applicable in all Member States'.

46. The Court has in that regard taken a differentiated approach in defining the extent of the obligation, while stressing the need for a minimum standard in all cases: the statement of reasons must be 'appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the institution which enacted the measure, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review. It is not necessary, however, for details of all relevant factual and legal aspects to be given, in so far as the question whether the statement of grounds for a measure meets the requirements of Article [253 EC] must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'. [23]

47. From an early stage, the Court has held that the statement of reasons for an individual measure such as a decision must be particularly comprehensive, [24] whereas that for a legislative measure such as a regulation may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve. [25] It is commonly acknowledged that anti-dumping regulations are of a hybrid nature and possess many features of an individual decision, in particular in that they normally affect individual named parties who have often (as here) been involved in the administrative procedure leading to the adoption of the measure. [26] Where that is so and parties have been thereby made aware of the reasons underlying the measure, the Court has held that to be a factor to be taken into account when assessing the adequacy of the statement of reasons. [27]

48. An anti-dumping regulation concerns not only the exporters on whose goods duties are imposed and their associated importers, who are commonly involved in the administrative procedure, but also independent importers or potential importers and other third-country producers, of the same or other goods, who need to know what pricing strategies are permissible — and, on the other side, operators in the injured Community industry, who wish to be sure that the extent of dumping has not been underestimated. The way in which the Community applies its anti-dumping legislation is of considerable importance to the trading world at large, and it is only with adequate knowledge of the approach taken that exporters or Com-

23 — See, most recently, the judgment of 7 February 2002 in Case C-328/00 *Weber* ECR I-1461, paragraph 42; cf. also paragraph 106 of the judgment under appeal and, for a recent instance with regard to anti-dumping measures, Case T-87/98 *International Potash Company* [2000] ECR II-3179, paragraph 65.

24 — See, for example, Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69.

25 — Case 5/67 *Beus* [1968] ECR 83, at p. 95.

26 — See, for example, Case C-75/92 *Gao Yao* v *Council* [1994] ECR I-3141, paragraph 26 of the judgment.

27 — See, in a slightly different context, Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraphs 49 and 50 of the judgment.

munity undertakings can decide whether a challenge is called for. The Court has moreover held, with regard to decisions, that the obligation to state reasons is imposed, *inter alia*, to give an opportunity to Member States and all interested nationals of ascertaining the circumstances in which the Community institution has applied the law, so that the participation of Member States or addressees in the preliminary procedure (and hence their awareness of the reasons) will not necessarily mean that the obligation has been discharged. [28]

49. Furthermore, the procedure for adopting anti-dumping measures is set out in considerable detail in the basic regulation, which lays down a series of steps to be followed in the normal course of events, together with alternative steps which may be taken in specified circumstances where a departure from that normal course is warranted.

50. That procedure derives moreover in a large measure from the 1994 Anti-dumping Code, which is both binding on the Community and specifically referred to in the preamble to the basic regulation as containing 'new and detailed rules, relating in particular to the calculation of dumping... the establishment and treatment of the facts...'. The basic regulation and any regulation adopted under it must comply with the Community's international obligations under the Code and must therefore be interpreted in conformity with its terms. [29]

51. The duty to state reasons in the present case must thus also be viewed in the light of Article 2.4.2 of the 1994 Anti-dumping Code, which allows the use of the asymmetrical method only 'if an explanation is provided' why differences appearing in a pattern of export prices cannot be taken into account appropriately using the first or second symmetrical methods. In the context of such an instrument of public international law, I find it difficult to conceive that the explanation in question can have been intended to allow the investigating authority merely to state its reasons privately — still less implicitly — to those interested parties who were involved in the investigation.

52. Such factors increase rather than limit the extent to which reasons must be stated for any contested steps in the procedure or any departure from the normal procedure.

28 — Case 24/62 *Germany* v *Commission*, cited above in note 24, and Case 294/81 *Control Data* v *Commission* [1983] ECR 911, paragraphs 14 and 15.

29 — See the judgment in *Nakajima*, paragraphs 30 and 31, cited in paragraph 105 of the judgment under appeal.

53. To set a high standard for the reasoning required in an anti-dumping regulation does not run counter to the Court's case-law concerning the lesser standard required where parties have been involved in the preliminary procedure and have been given full reasons at that stage. Nor does it mean that, as the Council and the Commission have suggested in the present case, an exporter may simply 'sit back', making no objections, then challenge the reasoning of the regulation adopted. In the event of judicial review, it is necessary that the Court be informed in the regulation why, for example, objections were rejected or why the normal procedure was not followed in certain regards; such information may be considerably less detailed than the explanations which must be given to the parties in response to their claims, provided that it is sufficient for the Court to determine whether there is or is not a manifest error of assessment.

54. Moreover, not all the detailed rules set out in the basic regulation will be relevant in every case. Certain steps are always essential, the need for others will depend on the circumstances. It is for example essential that the Community institutions determine the existence both of dumping and of injury to the Community industry, since those, together with the causal relationship between them, are the fundamental conditions for the imposition of a duty, and it must be clear from the regulation that their existence and extent were in fact established on reasonable grounds. It would be excessive however to demand that each step in each calculation be supported by all the figures used or that the omission of steps unnecessary in a particular case be justified simply because they are envisaged as possibilities in the basic regulation.

55. Article 2 of that regulation concerns determination of dumping, under four headings — A. Normal value, B. Export Price, C. Comparison and D. Dumping margin ('comparison' here refers essentially to the adjustment of figures to ensure comparability, and 'dumping margin' to the actual operation of comparison and its result). Those headings are commonly used in anti-dumping regulations and were used in the contested regulation in the present case. They represent the essential stages in the necessary determination and it is not disputed that the results of each stage must be justified by adequate reasoning.

56. Where a standard procedure is thus laid down with alternative procedures to be followed only in certain specified circumstances, it seems reasonable to require no specific statement of reasons when following the standard procedure [30] but a rather fuller one when departing from it. The

30 — See, for example, Case C-315/90 *Gimelec* v *Commission* [1991] ECR I-5589, paragraph 27 of the judgment.

latter situation seems comparable to that referred to in *Delacre*,[31] where 'although the reasons on which a decision following a well-established line of decisions is based may be given in a summary manner, for example by a reference to those decisions, the Community authority must give an explicit account of its reasoning if the decision goes appreciably further than the previous decisions'. Finally, it might be thought reasonable that the obligation to state reasons, in a measure of general application, should be heightened when, as in the present case, the method of calculation applied is one which is known to be controversial.

57. However, the adequacy of the reasoning will depend on the whole context. For example, Article 2(10) on 'comparison' sets out 10 types of factor in respect of which adjustments may be made, including such items as quantity discounts or differences in transport or credit costs. Where no such factors are present, it would clearly be excessive to require an explanation for the absence of any adjustment in their regard, unless they have been alleged to be present in the course of the investigation. (Thus, recital 21 in the preamble to the contested regulation gives reasons for rejecting claims of differences in credit terms, commissions and level of trade.)

31 — Case C-350/88 *Delacre* v *Commission* [1990] ECR I-395, paragraph 15 of the judgment; see also Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 31, and, for a recent confirmation, the judgment of 8 November 2001 in Case C-228/99 *Silos e Mangimi Martini*, paragraph 28.

— The present case

58. Article 2(11) of the basic regulation lays down a normal basis for comparison (one or other of the symmetrical methods) and an exceptional basis (the asymmetrical method) if two conditions are fulfilled. If the normal basis is used, I agree that no explanation is required unless one has been requested during the course of the preliminary procedure. Where the exceptional basis is used, however, it is in my view necessary to explain the departure from the normal procedure, in particular by establishing that the two conditions are met. This is so — in order at least to enable the Court to exercise its power of review — even when no objections have been made to the choice of method, but the reasoning to be given may obviously be more succinct in such cases than where there is a need to reply to objections.

59. I agree moreover with Petrotub that something more than a mere repetition of the terms of the conditions — that there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and that the symmetrical methods would not reflect the full degree of dumping — is required as a minimum. Such a repetition is fundamentally uninformative and in fact states no verifiable reasons for the choice of method. It allows neither the Court to exercise any review nor any other inter-

ested party to ascertain the circumstances in which the rules have been applied. [32]

60. The reason for choosing the asymmetrical method given in the provisional regulation is that it 'was necessary in order to reflect the full degree of dumping being practised and because there was a pattern of export prices which differed significantly between different customers and regions'. In the contested regulation, the reasons given for not acceding to the request that the first symmetrical method be used are that 'for one company, there was no difference in dumping margin between both methods as all export transactions were made at dumped prices' and that 'for three companies, a pattern of export prices which differed significantly by destination or time period was found'.

61. Is such reasoning adequate with regard to the context and to all the legal rules governing the matter?

62. The provisional regulation contains no information as to the factual basis on which the Commission founded its choice, and thus cannot elucidate the scarcely more informative statements in the contested regulation. The only additional indication which may be *inferred* from the latter — and which seems clear from the Commission's final disclosure referred to in paragraph 110 of the judgment under appeal — is that the first symmetrical method was judged inadequate to reveal the full extent of dumping because it produced a lower margin. (It may be noted here that the only new reason given *explicitly* in the contested regulation — that the choice of method made no difference to the result in the case of one company — should in fact be a reason for *not* departing from the normal basis of comparison.)

63. At first sight, therefore, the contested regulation does not contain any statement from which the Court or any interested party could ascertain the reasons for which the asymmetrical method was used. It is however necessary to examine the three specific points on which adequate reasoning was or may have been required. To what extent must reasons be stated on those points and, in the light of the whole context, were such reasons given?

(a) Consideration of the second symmetrical method

64. The contested regulation gives no reason for not applying the second symmetri-

32 — 'The famous parental reason of last resort, "Because I say so", does not render the parental command reasonable to the child or to anyone else'; Shapiro, op. cit., p. 192-3.

cal method. Furthermore, it appears to be undisputed that no reasons were either given or requested during the preliminary procedure. The question is whether reasons should none the less have been stated for discarding it since the terms of both Article 2(11) of the basic regulation and Article 2.4.2 of the 1994 Anti-dumping Code imply that the asymmetrical method may be used only if both the symmetrical methods are unsatisfactory.

65. In my view, a statement of reasons was required.

66. The Council and the Commission have argued that, because there is no indication as to which of the symmetrical methods is to be used in which circumstances, they may choose freely between them. To that extent I agree. I do not however accept their conclusion that it is sufficient to explain why the symmetrical method chosen was unsatisfactory in order to proceed to the use of the asymmetrical method. That is simply not consistent with the scheme or wording of the provisions, which clearly allow use of the asymmetrical method only if neither symmetrical method would 'reflect the full degree of dumping' or allow differences in the pattern of export prices to be 'taken into account appropriately'.

67. The institutions have also submitted that the second symmetrical method is never used — and there was no question of using it here — because it is generally considered to be impractical and arbitrary, as noted at paragraph 101 of the judgment under appeal. That may be so, and it may be a clearly unsatisfactory method in many cases, but it has been provided for both in the 1994 Anti-dumping Code and in the basic regulation, and there must thus be circumstances in which it is to be considered appropriate. At the hearing, the Commission indicated that a small number of countries, including New Zealand, consistently or traditionally use the second symmetrical method. If that is so, it seems to me that it cannot be discarded without an explanation, however obvious that explanation may be in the minds of the Community institutions — if indeed any thought is ever given, as it should be, to the question.

68. Nor is it relevant that Petrotub did not ask for any explanation in the course of the preliminary procedure. Determination of the dumping margin is an essential step in the procedure, and it is necessary to give the reasons for any departure from the normal basis of comparison for that purpose. In the circumstances, the relevant explanation could have been succinct, but it could not be omitted.

69. I therefore take the view that, by not explaining why the second symmetrical method was not appropriate, the Council failed to state adequate reasons for depart-

ing from the normal basis of comparison laid down in Article 2(11) of the basic regulation. Since the statement of such reasons is an essential procedural requirement, the Court of First Instance should have examined the question regardless of the stage in the proceedings at which it was raised.

(b) Existence of a significant pattern of export prices

70. Under the basic regulation, one of the two necessary conditions for departing from the normal basis of comparison is that there must be a 'a pattern of export prices which differs significantly among different purchasers, regions or time periods'. In order to enable the Court to exercise its power of review, and to give all interested parties (in world trade) an opportunity of ascertaining the circumstances in which the Community applies its anti-dumping rules, it is in principle necessary for a regulation imposing a duty on the basis of a dumping margin calculated by the asymmetrical method to state the reasons for concluding that such a pattern exists. As I have indicated above, I do not consider a mere statement of its existence to be sufficient.

71. In the contested regulation however, no explanation is given beyond such a statement. Moreover, the statement that 'for three companies, a pattern of export prices which differed significantly by destination or time period was found' is not the same as the statement in the provisional regulation that 'there was a pattern of export prices which differed significantly between different customers and regions'. The apparent discovery of significant differences by time period between the provisional and the final regulation calls, prima facie, for an explanation.

72. It is therefore my view that the statement of reasons in the contested regulation was inadequate on this point too. However, Petrotub did not raise the issue of inadequate reasoning in this context at first instance [33] nor has it done so on appeal. In those circumstances, and because the statement of reasons is in my view inadequate in other regards, I do not consider it necessary for the Court to rule on this aspect. [34]

(c) Reflection of the full degree of dumping

73. The second of the two necessary — and cumulative — conditions for departing from the normal basis of comparison is that the normal basis 'would not reflect the full degree of dumping being practised'.

33 — It raised instead a plea of manifest error of appraisal (see paragraph 55 of the application at first instance and paragraphs 122 to 128 of the judgment under appeal).

34 — However, see paragraph 79 below.

74. From what the Council has stated in its pleadings and at the hearing, the fact that the first symmetrical method produced a significantly lower dumping margin than the asymmetrical method seems to have been the decisive reason for concluding that the former did not reflect the full degree of dumping, and no other reason appears to have been given at any stage.

75. That reason is not stated explicitly in the contested regulation, but it may be inferred from the statement that 'for one company, there was no difference in dumping margin between both methods' as justification for rejecting the claim that the first symmetrical method should have been used and, more clearly, from the Commission's statement in its final disclosure that the difference in dumping margin obtained by the two methods was such that it could be concluded that the first symmetrical method did not enable the real extent of the dumping to be reflected.

76. It is moreover apparent that both the Council and the Commission consider the existence of a difference between the dumping margins obtained by the two methods to be a valid justification. Thus, in their view, a complete — and therefore by definition adequate — statement of reasons was given in that regard. And what Petrotub is challenging is in fact, they say, the validity rather than the adequacy of that reasoning.

77. On a purely formal level, that view is perhaps defendable. However, the borderline between the adequacy of a statement of reasons and the validity of the assessment which it embodies cannot be entirely clear-cut in a formal manner. Where no reasons at all are given for departing from the normal basis of calculation, there is clearly a failure to fulfil the obligation imposed by Article 253 EC. But simply to state, for example, that the Commission's computer program determined that the asymmetrical method was necessary would fall in the same category, since it would again give no indication from which to ascertain whether the departure from the normal basis was justified. In those circumstances, even though a formal reason has been given, the proper challenge would be to its adequacy as a statement of reasons and not to its validity as a correct assessment.

78. In my view, the mere assertion that the first symmetrical method produces a significantly lower result than the asymmetrical method is of the same order. Certainly, if one method reveals the 'full degree of dumping being practised' and the other does not, it is clear that the result produced by the latter will be lower. The converse, however, is not automatically true; the higher of two results is not necessarily the more accurate (and the term 'full degree' must in my view be taken to mean 'true degree') since the method might simply be inappropriate in the specific circumstances.

79. In that regard, it may be relevant that if — as is apparently systematically the case — 'zeroing' is used with the asymmetrical method, it seems to lead automatically to a higher result whenever some transactions with a negative dumping margin are included in the calculation. [35] However, the mere fact that some transactions show a negative margin does not necessarily mean that there has been targeted dumping and it is therefore necessary to indicate, for this purpose also, the grounds on which it was concluded that such targeting existed.

80. Be that as it may, a mere assertion that the method producing the higher result was used does not in any event enable the Court or anyone else to decide whether there might have been a manifest error of assessment. Thus, the proper challenge is not, as the Council argues, that the wrong test was used, but that insufficient reasons were stated in order to determine whether the right test was used.

81. Since no further reason is given in the contested regulation (or indeed elsewhere), I therefore take the view that the statement of reasons is defective in that regard also.

35 — See paragraphs 8 to 20 above.

82. It may consequently be unnecessary to consider specifically whether, in addition to being inadequate in the light of Article 2(11) of the basic regulation, the statement of reasons was also inadequate in the light of Article 2.4.2 of the 1994 Anti-dumping Code in that no explanation was given as to why the differences found in the pattern of export prices could not be taken into account appropriately by the use of either of the symmetrical methods. That requirement is in my view in practice very much the same as the obligation, when departing from the normal basis of comparison, to state why that normal basis would not reveal the full — true — extent of dumping. None the less, the fact that the reasons which must be stated flow not only from the basic Community regulation but also from an international instrument binding on the Community can only strengthen the obligation.

— Conclusion

83. I am therefore of the opinion that the contested regulation did not contain an adequate statement, such as to enable the Court to exercise its power of review and interested parties to ascertain the circumstances in which the Community anti-dumping rules were applied, of the reasons for departing from the normal basis of comparison to be used in accordance with Article 2(11) of the basic regulation, in particular by not providing any reasons whatever as to why the second symmetrical method could not be used and by not

providing any verifiable reasons as to why the symmetrical methods would not have revealed the full extent of dumping being practised.

Republica

Background, proceedings at first instance, judgment under appeal

84. Republica's appeal concerns the calculation of normal value on the domestic market, prior to comparison with export prices for the purpose of determining dumping margins. Under Article 2(1) of the basic regulation, normal value is normally based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. However, under the third subparagraph:

'Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.'

85. The provisional regulation makes no reference to compensatory arrangements in the context of calculating normal value for Romanian products. It appears that, following the adoption of that regulation on 29 May 1997, a hearing was held at the Commission on 9 July 1997, at which Republica made representations explained in paragraphs 68 and 69 of the judgment under appeal:

'68 The applicant maintains that its domestic sales made on the basis of compensatory arrangements accounted for some 24% of domestic sales of the product concerned during the investigation period. The compensation system is imposed on the applicant by major clients, such as Romanian utilities companies, and the prices charged under that system, which are non-negotiable, are considerably lower than normal market prices. Those sales ought therefore to have been excluded for the purposes of determination of normal value in accordance with the third subparagraph of Article 2(1) of the basic regulation.

69 The applicant made no reference to those sales in its reply to the questionnaire because it was never asked to do so. It admits raising the question of sales under compensatory arrangements for the first time during the

hearing on 9 July 1997, and in the summary of arguments on dumping produced on that occasion. Moreover, a document entitled "Total Value of Compensatory Arrangements", listing those arrangements, was submitted to the Commission as an annex to the summary mentioned above. The contents of that document were then explained by the applicant in a fax sent to the Commission on 21 July 1997....'

86. It might be wondered at this point what motivated Republica to argue that sales made on the basis of compensatory arrangements should be excluded from the calculation since, as stated in the extract just cited, the sales in question, some 24% of domestic sales, were at considerably lower than normal market prices. If they had been excluded, that should have led to a higher normal value and thus a higher dumping margin, contrary to Republica's apparent interest. The issue underlying Republica's claim is thus far from being as clear as that underlying Petrotub's claim.

87. However, a possible explanation was suggested by the Council at the hearing: exclusion of those sales might have meant that there were insufficient sales in the ordinary course of trade to calculate normal value, in which case a constructed normal value would have had to be established in accordance with Article 2(3) of the basic regulation, which might have been advantageous to Republica. In any event, the Council has not contended that the appeal is inadmissible on the ground that Republica has no interest in seeking the exclusion of the disputed transactions.

88. In the preamble to the contested regulation then adopted, the Council stated:

'One company claimed only at a very late stage in the proceeding (at the hearing for comments on provisional disclosure) that... all sales made using compensation as means of payment should... be excluded as not being in the ordinary course of trade. [That claim was] not made in an opportune manner, having been made neither in the response to the questionnaire, nor on-the-spot, nor at any subsequent stage of the proceeding when the company was invited to make comments.... during the course of the investigation, it was found that sales made using compensation were indeed made in the ordinary course of trade. Consequently, [the claim was] rejected.'

89. In Case T-34/98, Republica sought annulment of the contested regulation in

so far as it concerned the applicant. It argued, as explained in paragraphs 69 to 71 of the judgment under appeal, that:

'69 ... The request for exclusion, for the purposes of determining normal value, of sales made on the basis of compensatory arrangements was not... made out of time, having regard to the time-limit laid down by Article 20(5) of the basic regulation. [36]

70 Moreover, under the third subparagraph of Article 2(1) of the basic regulation, it is for the Community institutions to establish, by means of checks during the investigation, whether domestic sales involved compensatory arrangements. If that is the case, there is a presumption that they were not made in the ordinary course of trade unless the Community institutions can establish that the prices applied were unaffected by the relationship.

71 By merely stating in recital 19 of the contested regulation that "during the course of the investigation, it was found that sales made using compensation were indeed made in the ordinary course of trade", without indicating whether the Community institutions had examined whether the prices for sales based on those arrangements were affected by them, as required by the third subparagraph of Article 2(1) of the basic regulation, the contested regulation is vitiated by inadequacy of the statement of the reasons on which it is based.'

90. The Council maintained that Republica's claim had been made too late and was unsubstantiated.

91. The Court of First Instance found, at paragraphs 74 and 75 of the judgment under appeal:

'74 It is plain that the applicant has produced no evidence to show or any reason to conclude that the compensatory arrangements to which it refers, mentioned in the document entitled "Total Value of Compensatory Arrangements" relating to sales made

36 — 'Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter'; final disclosure in the present case took place on 19 August 1997 (see paragraph 16 of the judgment under appeal).

on the basis of compensatory arrangements made during the investigation period, affected the prices charged in such transactions, as required by the third subparagraph of Article 2(1) of the basic regulation.

75 Moreover, in the absence of any contrary indication from the applicant, the Council gave, in the contested regulation, an adequate statement of the reasons for its refusal to exclude compensatory sales from the determination of normal value, by stating that "it was found that sales made using compensation were indeed made in the ordinary course of trade".'

The appeal

92. Republica asks the Court to set aside the judgment under appeal and annul the contested regulation, in so far as those acts relate to it. It makes the same preliminary remarks as Petrotub [37] and puts forward a single plea to the effect that the Court of First Instance erred in law at paragraph 75 of its judgment by holding that the statement of reasons for the contested regulation was adequate as regards the refusal to exclude sales made using compensation from the determination of normal value.

93. Once it had accepted that it was dealing with 'sales made using compensation' and thus with 'prices between parties which appear to be associated or to have a compensatory arrangement with each other', the Council was not free to use such prices to establish normal value without the proof required by the basic regulation that such prices were 'unaffected by the relationship'. The Court of First Instance therefore erred in finding that, because '... the applicant has produced no evidence to show or any reason to conclude that the compensatory arrangements... affected the prices charged in such transactions...', the Council's statement of reasons was adequate.

94. The only statement given in the contested regulation and relied upon by the Court of First Instance, that 'during the course of the investigation, it was found that sales made using compensation were indeed made in the ordinary course of trade', merely reproduces the words of the provision in question, and cannot be an adequate statement of reasons. The Council should have explained, at least briefly, why those sales were 'indeed made in the ordinary course of trade', but it did not even go as far as the 'laconic' statements of

37 — See paragraphs 24 and 25 above.

reasons approved of in *Nicolet* and *Ferchimex*. [38]

Admissibility of the appeal

95. The Council and the Commission both consider that Republica's appeal is inadmissible essentially because it (i) does not identify any errors of law made by the Court of First Instance (but addresses the substance of the assessment in the contested regulation) and (ii) merely repeats arguments already put at first instance.

96. For essentially the same reasons as those I have set out with regard to Petrotub, [39] I disagree with those objections. At first instance, Republica argued that the contested regulation failed to state adequate reasons for finding that the transactions in issue were made in the ordinary course of trade; the Court of First Instance accepted that the reasoning was adequate in that it stated that 'it was found that sales made using compensation were indeed made in the ordinary course of trade', having also found as a fact that the applicant had produced no evidence to contradict that statement. In the appeal, Republica does not take issue with that finding of fact but is entitled in my view to argue that the Court of First Instance failed to give proper reasons for finding the statement of reasons adequate.

Substance of the appeal

97. The Council, supported by the Commission, considers that the statement of reasons in the contested regulation was adequate; the aspect in question was not challenged during the administrative procedure, and Republica is wrong in its contention that the logical link between the text and the assessment must be explained. There was no need to add the reasons for concluding that the sales in question took place in the ordinary course of trade. In addition, recital 19 indicates that Republica's claim was rejected both because it was not justified and because it was made too late in the procedure; the Court of First Instance could have held simply that sufficient reasons had been stated on the first aspect. Even if its actual finding were held to be an error in law, the appeal should still be dismissed on the ground of lateness of the application. In its rejoinder, the Council argues that the plea

38 — Case 203/85 *Nicolet* [1986] ECR 2049, paragraph 10 of the judgment; Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 118 of the judgment, cited by the Court of First Instance in paragraph 114 of the judgment under appeal.

39 — See paragraphs 38 to 40.

is unfounded because Republica did not discharge its burden of proof during the administrative procedure.

98. The main issue between the parties is what they have described as the burden of proof, although the obligation to state reasons operates at a different level from proof, which is a matter of substantive assessment. However, the question to be answered is whether the Council was obliged to state its reasons for finding that the disputed sales were made in the ordinary course of trade if Republica had not substantiated its claim that they were not.

99. I take the view, in line with my reasoning with regard to Petrotub, that there was such an obligation. The first subparagraph of Article 2(1) lays down the basic rule for determining normal value (on the basis of 'prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'). Under the third subparagraph, prices of the kind in issue 'may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship'. It is thus an exceptional departure from the normal procedure and requires an explanation going beyond a mere statement that the sales in question 'were indeed made in the ordinary course of trade' — which provides no information from which to determine whether there may have been a manifest error of assessment — yet there was no such explanation in the contested regulation.

100. It is admittedly to be expected that exporters' interests will be the opposite of Republica's in the present case. They will usually wish to have transactions with associated parties or compensatory transactions — which are likely to be at lower prices than other transactions — included in the calculation of normal value which in turn will be lowered, thus reducing the extent of any dumping margin calculated on that basis. The onus of establishing that there are grounds for departing from the standard procedure will thus fall on the exporter and not on the Community institution in those circumstances. Here, however, for whatever reason, the position is reversed and that is accepted by the Council.

101. It is thus the Community institution which is seeking to depart from the standard method of calculation and its reasons for doing so must be stated in a manner sufficient to enable the Court to exercise its power of review and interested parties to ascertain the circumstances in which the Community anti-dumping rules were applied. If the Council had alleged and

established bad faith on Republica's part, the situation would have been different, but it has not sought to do so and it must be assumed that there is no bad faith.

102. In this instance, moreover, there seems to be no evidence or allegation that any explanation was given to Republica at any stage. Both at first instance and on appeal, the Council has argued simply that Republica's request for the transactions to be excluded was presented too late and was not properly substantiated. However, assuming that Republica had a justifiable interest in the exclusion of the disputed transactions, it was for the Council to provide reasons for the exceptional course it took and not for the exporter to demonstrate, at any stage, why the normal course should be followed.

103. Consequently, the question whether Republica's request was submitted at too late a stage in the preliminary procedure is of no relevance.

104. I am therefore of the opinion that the contested regulation did not contain an adequate statement, such as to enable the Court to exercise its power of review and interested parties to ascertain the circumstances in which the Community anti-dumping rules were applied, of the reasons for departing from the normal basis of determining normal value to be used in accordance with Article 2(1) of the basic regulation.

Consequences of possible success in one appeal and failure in the other

105. Both appellants argue that since (despite their objections) a single dumping margin and a single rate of duty were specified, any invalidity of one dumping margin renders the other invalid.

106. Since I have reached the view that the appeal should succeed independently in respect of both appellants, there is no need to consider this argument. However, if the Court were to uphold the appeal as regards one appellant and dismiss it as regards the other, that argument must fail in accordance with the Court's consistent case-law, most recently reaffirmed in *Nachi Europe*.[40]

40 — Judgment in Case C-239/99 *Nachi Europe* [2001] ECR I-1197, in particular at paragraphs 22 to 27; see also my Opinion in the same case, especially at paragraphs 36 to 53.

Conclusion

107. Since the contested regulation contains inadequate reasoning with regard to both appellants, which the Court of First Instance wrongly accepted as adequate, it is necessary to set aside the judgment under appeal. The state of the proceedings is such that the Court may itself give final judgment and annul the contested regulation with regard to Petrotub and Republica. Both the appellants have asked for costs at first instance and on appeal.

108. I am therefore of the opinion that the Court should:

— set aside the judgment of the Court of First Instance in Joined Cases T-33/98 and T-34/98;

— annul Council Regulation (EC) No 2320/97 in so far as it concerns the appellants;

— order the Council to pay the costs at first instance and on appeal, except those of the Commission, which must bear its own costs.