JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
17 July 1998 *

In Case T-118/96,

Thai Bicycle Industry Co. Ltd, a company incorporated under the law of Thailand, established in Samutprakarn (Thailand), represented by Jean-François Bellis and Richard Luff, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

applicant,

v

Council of the European Union, represented by Antonio Tanca, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, and of the Brussels Bar, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of Council Regulation (EC) No 648/96 of 28 March 1996 imposing a definitive anti-dumping duty on imports of bicycles originating in Indonesia, Malaysia and Thailand and collecting definitively the provisional duties imposed (OJ 1996 L 91, p. 1),

* Language of the case: English.

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

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

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 January 1998,

gives the following

Judgment

Facts of the case

1 This application seeks the annulment of Council Regulation (EC) No 648/96 of 28 March 1996 imposing a definitive anti-dumping duty on imports of bicycles originating in Indonesia, Malaysia and Thailand and collecting definitively the provisional duties imposed (OJ 1996 L 91, p. 1, hereinafter 'the contested regulation'). That regulation follows Commission Regulation (EC) No 2414/95 of 13 October 1995 imposing a provisional anti-dumping duty on imports of bicycles originating in Indonesia, Malaysia and Thailand (OJ 1995 L 248, p. 2, hereinafter 'the provisional regulation').

2 The applicant, Thai Bicycle Industry Co. Ltd, is a company incorporated under the law of Thailand which produces bicycles and exports them to the Community. It also manufactures bicycle and motor-cycle parts.

3 Following a complaint lodged by the European Bicycle Manufacturers' Association, the Commission on 3 February 1994 published a notice of initiation of an anti-dumping proceeding concerning imports of bicycles originating in Indonesia, Malaysia and Thailand (OJ 1994 C 35, p. 3), pursuant to 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').

4 The Commission sent the applicant a questionnaire, to which the applicant replied by letters of 21 and 23 March 1994. Three other Thai bicycle manufacturers cooperated in the investigation, namely Bangkok Cycle Industrial Co. Ltd, Siam Cycle MGF Co. Ltd (hereinafter 'Siam') and Victory Cycle Co. Ltd (hereinafter 'Victory').

5 On 26 and 27 September 1994 the Commission visited the applicant's premises in order to verify the replies to the questionnaire and any other relevant information (hereinafter 'the on-the-spot verification').

6 On 13 October 1995 it adopted the provisional regulation, which imposed a provisional anti-dumping duty of 13.2% on imports of the applicant's bicycles.

7 By letter of 16 October 1995 it informed the applicant of the principal facts and considerations on the basis of which it had imposed the provisional anti-dumping

duty (hereinafter 'the provisional disclosure'). The applicant commented on that disclosure by letter of 13 November 1995.

8 By letter of 1 February 1996 the Commission informed the applicant of the principal facts and considerations on the basis of which it intended to propose to the Council the imposition of a definitive anti-dumping duty (hereinafter 'the definitive disclosure'). The applicant commented on that disclosure by letter of 12 February 1996.

9 On 28 March 1996 the Council adopted the contested regulation, which imposed a definitive anti-dumping duty of 13% on imports of the applicant's bicycles.

The regulations at issue

10 The investigation into dumping covered the period from 1 January to 31 December 1993 (recital 9 of the provisional regulation).

11 In order to determine the dumping margin of the applicant's bicycles, the Commission and the Council (hereinafter 'the institutions') compared the normal value of those products with their export prices to the Community.

12 It was not possible to determine the normal value on the basis of the actual price charged on the Thai market. The models sold on that market were not comparable to those sold for export to the Community (recitals 37 and 38 of the provisional regulation). The normal value was therefore determined, in accordance with Article 2(3)(b)(ii) of the basic regulation, on the basis of a constructed value for the

products exported to the Community (recital 39 of the provisional regulation and recital 28 of the contested regulation).

13 The constructed value was calculated by adding to the production costs of the exported models a reasonable amount for selling, general and administrative expenses (hereinafter 'SG&Aexpenses') and a reasonable profit margin (recital 40 of the provisional regulation and recital 28 of the contested regulation).

14 As regards production costs, the applicant had stated in its reply to the questionnaire that the production costs connected with the manufacture of its bicycles amounted to THB 318 542 803. During the on-the-spot verification, the Commission found that the figure for production costs shown in the applicant's profit and loss account was THB 362 704 018. Because of that difference, it decided, in accordance with Article 2(11) of the basic regulation, to increase the figure for production costs as stated by the applicant by 2.4% of its turnover (recital 5.4 of the definitive disclosure).

15 As regardsSG&Aexpenses, the applicant's profit and loss account contained an item of THB 17 076 144 for 'export expenses'. The institutions considered that the applicant had failed to explain and prove satisfactorily the real nature of those expenses. They therefore decided, in accordance with Article 2(11) of the basic regulation, to allocate that amount to its domestic sales and its export sales to the Community in proportion to turnover (recital 30 of the contested regulation). Following that allocation, the applicant's export expenses amounted to THB 10 610 898.

16 As regards the profit margin, Article 2(3)(b)(ii) of the basic regulation provides:

'The ... profit shall be calculated by reference to ... the profit realised by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use [it] shall be calculated by reference to the ... profit realised by other producers or exporters in the country of origin or export on profitable sales of the like product.'

17 In the present case, the institutions considered that the profits of a producer or exporter could be 'reliable' within the meaning of that provision only if they were realised on a sufficiently large and representative number of its domestic sales. They subsequently established that a producer or exporter's actual profit margin could be used to calculate the constructed normal value only if the volume of its profitable domestic sales represented at least 10% of its total domestic sales volume of the like product (recital 22 of the provisional regulation and recital 31 of the contested regulation, hereinafter 'the 10% threshold').

18 The applicant did not comply with that threshold. Its profitable domestic sales represented only 9.26% of its total domestic sales. Consequently, the institutions declined to use its profit margin, which was 4.14%. Instead they used the weighted average profit margin — 13.7% — of Victory and Siam, for which it had been possible to establish a reliable profit (recital 31 of the contested regulation).

19 The export price of the applicant's bicycles was established by reference to the price actually paid or payable for the bicycles sold for export to the Community, in accordance with Article 2(8)(a) of the basic regulation (recital 48 of the provisional regulation).

20 The normal value and the export price were compared at ex-factory level and on a transaction-by-transaction basis (recital 49 of the provisional regulation).

21 In its letter of 21 March 1994 the applicant had requested an adjustment on the ground that it sold most of its bicycles exported to the Community to 'original equipment manufacturers' (hereinafter 'OEMs'), that is, suppliers under their own brand of products manufactured by other undertakings.

22 Its request read as follows:

'... since export sales to the European Union were generally made on an OEM basis, we would ... like to request that an adjustment be made in order to reflect such differences in conditions and terms of sales where applicable'.

23 The Council rejected that request in the following terms (recital 50 of the contested regulation):

'In a covering letter which accompanied the questionnaire responses of [the applicant, it] requested in imprecise terms an OEM adjustment. Such claim was not explicitly made in the response to the questionnaire nor was it substantiated despite specific instructions in the questionnaire to claim and substantiate any request for deductions if applicable. Furthermore, the substantive requirements for such an adjustment are not met: the majority of the export sales of [the applicant] were not made at a level which would constitute an OEM sale, i. e. normally a level between manufacture and distribution. These sales were made to a level on the Community market the function of which is, in substance, only that of distri-

bution. ... [I]t appears that no clear and distinct pricing pattern existed between exporter to the manufacturer concerned as compared with sales to distributors in the Community. Thus, no appropriate (OEM) adjustment is required in this respect.

In examining the OEM claim, it was found that the substantive requirements for a level of trade adjustment were not met as sales appeared to be made to a similar mix of customers on both the export and the domestic market.'

24 With respect to the dumping margin, the Commission found that the comparison of the normal value with the export price had shown the existence of dumping in respect of the applicant (recital 66 of the provisional regulation). After revising the calculations, the Council fixed that margin at 13% (recitals 54 and 55 of the contested regulation).

Procedure and forms of order sought by the parties

25 By application lodged at the Registry of the Court of First Instance on 26 July 1996, the applicant brought the present action.

26 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by letter of 21 November 1997, it requested the parties to produce certain documents and answer certain questions. By letters lodged at the Registry on 19 December 1997, the applicant and the Council complied with that request within the period prescribed.

27 The parties presented oral argument and replied to the Court's questions at the hearing on 28 January 1998.

28 The applicant claims that the Court should:

— annul the contested regulation, in so far as it relates to the applicant;

— order the Council to pay the costs.

29 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

30 In support of its application, the applicant puts forward two pleas in law:

— infringement of the basic regulation, manifest error of assessment and breach of the principle of non-discrimination, in that the Council refused to use the applicant's actual profit margin in establishing the constructed normal value of its products exported to the Community;

— infringement of the basic regulation, in that the Council refused to make an adjustment in calculating the profit margin to be included in the constructed normal value of its products sold in the Community to OEM purchasers (hereinafter 'the OEM adjustment').

31 During the written procedure, the applicant also argued that the Commission had breached its right to a fair hearing. At the hearing, however, it stated that that argument was not a plea in law in support of annulment.

32 It should be observed, as a preliminary point, that when the institutions, acting under the basic regulations, adopt specific protective measures against dumping, they enjoy a wide discretion by reason of the complexity of the economic, political and legal situations they have to examine (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86, and Case C-26/96 *Rotexchemie* v *Hauptzollamt Hamburg-Waltershof* [1997] ECR I-2817, paragraph 10; Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131, Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 72, Case T-155/94 *Climax Paper Converters* v *Council* [1996] ECR II-873, paragraph 98, and Case T-170/94 *Shanghai Bicycle* v *Council* [1997] ECR II-1383, paragraph 63).

33 It follows that review of such assessments by the Community judicature must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power (Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 19, Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 21, Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63, and *Rotexchemie*, cited above, paragraph 11; *Climax Paper Converters*, paragraph 98, and *Shanghai Bicycle*, paragraph 64, both cited above).

1. *First plea in law: infringement of the basic regulation, manifest error of assessment and breach of the principle of non-discrimination, in that the Council refused to use the applicant's actual profit margin in establishing the constructed normal value of its products exported to the Community*

34 The applicant submits that, in order to establish the constructed normal value of its products, the Council should have used its actual profit margin rather than the weighted average profit margin of Siam and Victory.

35 This plea is divided into four limbs. In the first limb, the applicant submits that the reason put forward by the Council for refusing to use its profit margin is manifestly erroneous. In the second limb, it maintains that the adjustments of its bicycle production costs andSG&Aexpenses are unfounded. In the third and fourth limbs, it claims that the Council was not entitled to use the profit margins of Siam and Victory.

First limb: the applicant's profit margin

Arguments of the parties

36 The applicant acknowledges that where complex economic questions are concerned, the Council enjoys a wide discretion. However, by refusing to use the applicant's actual profit margin on the ground that the volume of its profitable domestic sales represented less than 10% of its total domestic sales volume, the Council exceeded its powers.

37 The applicant relies on six arguments in support of its submission.

38 First, the case-law of the Court of Justice requires the profit margin to be calculated primarily by reference to the profit realised by the producer in question on its profitable domestic sales of the like product (Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraphs 36 to 38).

39 Second, the 10% threshold is not in the basic regulation. The Council thus created a totally new requirement. Since 1985 its consistent practice was to use the profit margin of the producer concerned where its profitable domestic sales represented at least 5% of its export sales to the Community. The applicant satisfied that requirement, as its profitable domestic sales represented 5.35% of its export sales to the Community.

40 Third, the 10% threshold is arbitrary. Producers could evade its application by concealing information. Thus, if the applicant had decided not to supply the production costs of certain bicycle models sold at a loss on the domestic market, the institutions would have found that the volume of its profitable domestic sales represented more than 10% of the total volume of its domestic sales.

41 Fourth, in absolute terms the applicant's profitable domestic sales were much greater than the profitable sales of Siam and Victory taken together. They accounted for over 60% of the profitable sales achieved on the domestic market. The Council therefore could not logically have found that the profitable domestic sales of Siam and Victory were more 'reliable' than those of the applicant.

42 Fifth, in terms of value the applicant's profitable domestic sales satisfied the 10% threshold. They accounted for 10.6% of the total value of its domestic sales. Applying the 10% threshold to the volume rather than the value of domestic sales leads to absurd consequences. The volume of a producer's profitable domestic sales might very well represent over 10% of its total domestic sales volume but, because of the reduced price of the products sold with a profit margin, constitute only a very small proportion (for example, 1%) of its turnover on domestic sales. In that event it would be illogical to conclude that its profitable domestic sales constituted 'reliable' data for determining the constructed normal value.

43 Sixth, having regard to the fact that it was entirely new, the 10% threshold was applied too rigidly. The applicant's profitable domestic sales were only 0.74% short of that threshold. Moreover, in the case of some bicycle models, over 50%, and in other cases over 80%, of its domestic sales were profitable.

44 The Council contests those arguments.

Findings of the Court

45 Article 2(3) of the basic regulation provides:

'... the normal value shall be ... 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 [hereinafter "the actual price"] ... or ... the constructed value ...'.

46 According to the wording and scheme of Article 2(3)(a) of that regulation, in order to establish the normal value regard must be had primarily to the actual price (Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 11, and *Goldstar*, paragraph 12). It is apparent from Article 2(3)(b) of that regulation that that principle may 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.

47 The ordinary course of trade is a concept which relates to the nature of sales themselves. It is meant to exclude, for the purpose of determining the normal value, situations in which sales on the domestic market are not made under ordinary trade conditions, in particular where a product is sold at a price below production costs (*Goldstar*, paragraph 13).

48 The institutions consider that where the volume of a producer's profitable domestic sales is less than 10% of its total volume of domestic sales of the like product, the actual price does not constitute an appropriate basis for the purpose of establishing the normal value (see recitals 21 and 22 of the provisional regulation, recital 19 of the definitive regulation and recital 18 of Commission Regulation (EC) No 2140/97 of 30 October 1997 imposing a provisional anti-dumping duty on imports of personal fax machines originating in the People's Republic of China, Japan, Republic of Korea, Malaysia, Singapore, Taiwan and Thailand (OJ 1997 L 297, p. 61)).

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

50 According to the case-law, that requirement is satisfied where sales by the producer concerned on the domestic market exceed 5% of export sales to the Community (*Goldstar*, paragraphs 16 and 17).

51 In the present case, the institutions were unable to establish the normal value of the applicant's bicycles on the basis of the actual price because the models it had sold on the Thailand market were not comparable with those it had sold for export to the Community. They therefore established the normal value on the basis of a constructed value for the products exported to the Community.

52 Under Article 2(3)(b)(ii) of the basic regulation:

'the constructed value [shall be] determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for [SG&A] expenses. The amount for [SG&A] expenses and profit shall be calculated by reference to the expenses incurred and the profit realised by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realised by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realised shall be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.'

53 Article 2(3)(b)(ii) thus lays down three methods of calculating the constructed value. Having regard to the wording of that provision, those three methods must be considered in the order in which they are set out (*Nakajima*, paragraph 61, and *Goldstar*, paragraph 35).

54 The profit margin must therefore be calculated primarily by reference to the profit realised by the producer concerned on profitable domestic sales of the like product. Only if those data are unavailable or unreliable or not suitable for use is the profit margin to be calculated by reference to the profits realised by other producers on their domestic sales of the like product (*Goldstar*, paragraph 36).

55 In the present case, the institutions considered that where a producer realises profits on a domestic sales volume which is less than 10% of the total volume of its domestic sales of the like product, those profits are not 'reliable' and are consequently 'not suitable for use' in calculating the profit margin to be included in the constructed normal value.

56 It is therefore necessary to ascertain whether, by using such a threshold, the institutions infringed the basic regulation or committed a manifest error of assessment.

— Adoption of the 10% threshold

57 The complaints to be examined are that (a) the institutions introduced a new requirement, (b) the 10% threshold is arbitrary, and (c) that threshold is contrary to the institutions' previous practice.

(a) Introduction of a new requirement

58 The applicant submits that by adopting the 10% threshold the institutions introduced a new requirement which does not appear in the basic regulation.

59 It follows from the wording of Article 2(3)(b)(ii) of that regulation that each of the methods of calculating the profit margin must be applied in such a way as to keep the calculation reasonable (see *Nakajima*, paragraphs 35 and 36).

60 Where a producer sells an excessive number of products on the domestic market at a price below the production cost, its sales cannot be regarded as taking place under ordinary trade conditions (see paragraphs 47 and 48 above). Consequently, the institutions may not take into consideration the profits realised on those sales in calculating the profit margin to be included in the constructed normal value. If they were taken into consideration, the effect would be to render the first method of calculating the profit margin unreasonable.

61 The 10% threshold is intended to ensure that the producer's profits are realised on a sufficiently large number of domestic sales of the like product.

62 Consequently, by adopting such a threshold, the institutions correctly interpreted Article 2(3)(b)(ii) of the basic regulation.

(b)Arbitrary nature of the 10% threshold

63 The applicant submits that the 10% threshold is arbitrary.

64 As regards the concept of the ordinary course of trade, the institutions consider that where the volume of a producer's profitable domestic sales is less than 10% of

its total volume of domestic sales of the like product, the actual price does not constitute an appropriate basis for establishing the normal value (see paragraphs 47 and 48 above).

65 It is therefore logical that when the institutions determine the constructed normal value, they do not consider the profits realised by that producer on such sales to constitute an appropriate basis for calculating the profit margin either.

66 Consequently, far from being arbitrary, the 10% threshold reflects the consistent approach of the institutions in the context of establishing the normal value. It is clear that the applicant cannot seriously maintain that the possibility that a producer might conceal certain information is capable of rendering the 10% threshold arbitrary.

(c) Existence of a previous practice

67 The applicant claims that, in the context of establishing the constructed normal value, the practice of the institutions is to calculate the profit margin on the basis of the profits realised by the producer concerned on its profitable domestic sales where those sales represent over 5% of its export sales to the Community.

68 It should be recalled that when they exercise the discretion conferred on them by the basic regulation, the institutions are not obliged to explain in detail and in advance the criteria which they intend to apply in every situation, even where they create new policy options (see, to that effect, Case 250/85 *Brother* v *Council* [1988] ECR 5683, paragraphs 28 and 29, and *Nakajima*, paragraph 118).

69 In any event, therefore, without there being any need to rule on the practice alleged by the applicant, the existence of such a practice did not in itself deprive the institutions of the possibility of adopting the threshold at issue.

70 It follows that, by adopting the 10% threshold, the institutions did not infringe the basic regulation or commit a manifest error of assessment.

71 On this point, the Court observes that, in the absence of a specific legal provision, that threshold gives the economic operators concerned a measure of legal certainty with respect to the assessment by the institutions as to whether the profits realised by a producer on its profitable domestic sales of the like product are representative. In the light of that guarantee, the 10% threshold should be upheld *and* may be derogated from only in exceptional cases (see, by analogy, *Goldstar*, paragraph 17).

— Application of the 10% threshold to the applicant

72 The complaints to be considered concern (a) the applicant's profitable domestic sales in absolute terms, (b) its profitable domestic sales in terms of value and (c) the rigid application of the 10% threshold.

(a) The applicant's sales in absolute terms

73 The applicant states that, in absolute terms, its profitable domestic sales were much greater than the aggregated profitable sales of Siam and Victory, and

accounted for over 60% of the profitable sales realised on the domestic market.

74 The 10% threshold is intended to guarantee that the profits realised by a particular producer on its domestic sales of the like product constitute a reasonable basis for calculating the profit margin to be included in the constructed normal value. The essential element of the rule is thus the ratio of that producer's profitable domestic sales to its total domestic sales.

75 Consequently, the overall volume of the profitable domestic sales realised by the applicant on the domestic market is not material. It does not in any way affect the finding that its profitable domestic sales represented less than 10% of its total domestic sales. Similarly, the comparison between its profitable domestic sales and those of Siam and Victory is irrelevant as long as those producers on their own scale realise their profits on a sufficiently representative number of domestic sales.

(b)The applicant's domestic sales in terms of value

76 The decision to apply a figure of 10% to the volume rather than the value of domestic sales falls within the broad discretion enjoyed by the institutions.

77 According to the applicant, that decision might have absurd consequences. It cites the example of a producer whose volume of profitable domestic sales represents over 10% of its total domestic sales volume but, because of the low price of

the products sold with a profit margin, constitutes only a very small proportion (for example, 1%) of the turnover realised on its domestic sales.

78 That example, which is in any case hypothetical, is not such as to call into question the appropriateness of the above decision. It is for the institutions to examine, in each particular situation, whether specific circumstances require or justify making an exception to the 10% threshold.

79 Moreover, the institutions' decision does not exceed the limits of their discretion. It should be observed that the criteria they use in connection with the concept of the ordinary course of trade (see paragraphs 47 and 48 above) and in assessing whether sales on the domestic market are representative (see paragraphs 49 and 50 above) apply also to the volume of sales of the like product.

(c) Rigid application of the 10% threshold

80 The applicant considers that the 10% threshold was applied to it too rigidly.

81 It is common ground here that the volume of its profitable domestic sales represented 9.26% of the total volume of its domestic sales of the like product.

82 That is not affected by the fact that for several bicycle models the majority of its domestic sales were profitable. In addition, neither the novelty of the 10% threshold nor the fact that the applicant's profitable domestic sales fell only 0.74% short

of satisfying that threshold constituted exceptional circumstances which would permit making an exception thereto.

83 It follows that, by applying the 10% threshold to the applicant, the institutions did not infringe the basic regulation or commit a manifest error of assessment.

84 The first limb of this plea is therefore not well founded.

Second limb: adjustments of production costs and SG&A expenses

85 Without the adjustment of the applicant's production costs or SG&A expenses, the volume of its profitable domestic sales would have been equal to or greater than 10% of the total volume of its domestic sales of the like product.

86 It is necessary therefore to consider whether those adjustments were justified.

87 Under Article 7(7)(b) of the basic regulation, where an interested party refuses access to necessary information or does not provide it within a reasonable period, preliminary or final findings may be made by the Commission on the basis of the facts available. Article 2(11) of that regulation provides that 'all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover'.

Adjustment of the applicant's production costs

— Arguments of the parties

88 The applicant submits that the adjustment of its bicycle production costs is unjustified. During the on-the-spot verification it explained clearly that the difference between the figure for production costs stated in its reply to the questionnaire and that shown in its profit and loss account corresponded to the costs of manufacturing bicycle and motor-cycle parts.

89 It further submits that the adjustment was discriminatory. The Council should also have adjusted Victory's production costs.

90 In its case, it submits, the Commission found that the production costs of bicycles represented 87.8% of its total production costs, whereas the turnover achieved on the sale of those bicycles represented 90.2% of its total turnover. The adjustment at issue consisted in increasing its production costs by the amount of the difference found, namely 2.4% of its turnover. In the case of Victory, the applicant calculated that the percentage of production costs of bicycles was, as in its own case, lower than the percentage of turnover achieved on the sale of those bicycles. Yet despite that difference, the Council made no adjustment.

91 Moreover, in justifying the fact that no adjustment was made, the institutions put forward contradictory reasons. In its definitive disclosure, the Commission stated that the percentage of Victory's production costs of bicycles was in fact greater than the percentage of its turnover. In the present proceedings, however, the Council submits that Victory gave an adequate explanation of why the figure for production costs stated in its reply to the questionnaire was different from that which appeared in its profit and loss account.

92 The Council contests those arguments.

— Findings of the Court

93 It is common ground that the figure for production costs of bicycles stated by the applicant in its reply to the questionnaire was lower than the figure given in its profit and loss account. During the on-the-spot verification it did indeed explain that the difference corresponded to the production costs of bicycle and motorcycle parts.

94 However, the documents in the case show that it did not produce any evidence enabling the institutions to verify that its explanation was correct.

95 Consequently, the institutions were entitled to make an adjustment of its production costs by making an allocation, in accordance with Article 2(11) of the basic regulation, in proportion to the turnover on the basis of the available accounting data.

96 The principle of non-discrimination, on which the applicant also relies, requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified (Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* v *Fattoria Autonoma Tabacchi and Donatab* [1994] ECR I-4863, paragraph 51, Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 113, and *NMB France*, paragraph 116).

97 In the present case, the Council explained that, as in the case of the applicant, the amount of production costs stated by Victory in its reply to the questionnaire

was different from that which appeared in its profit and loss account. Unlike the applicant, however, Victory had explained that difference by producing satisfactory evidence.

98 The applicant has not produced any evidence to cast doubt on that explanation.

99 As matters stand, consequently, it must be accepted that Victory's situation was not comparable to the applicant's. Hence the latter cannot criticise the institutions for failing also to allocate Victory's production costs for bicycles in proportion to its turnover.

100 Therefore, by making an adjustment of the applicant's production costs for bicycles, the institutions did not commit a manifest error of discretion or breach the principle of non-discrimination.

Adjustment of the applicant's SG&A expenses

— Arguments of the parties

101 The applicant submits that the adjustment of itsSG&Aexpenses is unwarranted. It demonstrated that its export expenses were genuine by submitting a list of all its export sales containing, for each transaction, the precise amount of export expenses actually incurred. Those expenses, when added together, corresponded to the figure of THB 17 076 144 shown under the item 'export expenses' in its profit and loss account.

102 In its view, the adjustment was arbitrary as well. When establishing the export price of its bicycles to the Community, the institutions verified that its export expenses were genuine. They found that these amounted to THB 12 540 882. It was thus illogical to fix the amount of those expenses at THB 10 610 898 in the calculation of the applicant'sSG&Aexpenses for inclusion in the constructed normal value of its products.

103 The Council contests those arguments.

— Findings of the Court

104 In order to assess whether the applicant's arguments were well founded, the Court requested the parties to produce certain documents and to reply to a number of written and oral questions. It appears from the information received that the material facts are as follows.

105 In the context of establishing the normal value, the applicant had informed the Commission before the on-the-spot verification that itsSG&Aexpenses amounted to a total of THB 49 215 903. Of these expenses, it had allocated THB 17 076 144 to the single item 'export expenses'.

106 Despite the size of that item, it did not at any stage of the administrative procedure furnish a breakdown of the costs in question. Similarly, it did not produce or even prepare any evidence enabling the institutions effectively to verify that those expenses were genuine.

107 In the context of establishing the export price, the applicant had transmitted to the Commission, a few days before the on-the-spot verification, a list of its export

sales to the Community, indicating for each transaction the expenses allegedly incurred. These amounted to THB 7 743 186. However, that list contained numerous errors, so that it could not as such serve as a basis for determinating the export price of the applicant's bicycles to the Community. The Commission therefore had to establish that price on the basis of the available accounting data, in accordance with Article 7(7)(b) of the basic regulation.

108 To that end, during the on-the-spot verification, it examined, in respect of some ten export sales, all the invoices evidencing export expenses actually incurred by the applicant. On the basis of that sample, it drew up a new list of the applicant's export sales to the Community. That list showed that the insurance and transport costs of the applicant's products amounted to THB 12 540 882.

109 Contrary to the applicant's submission, that amount did not necessarily have to be used as the basis for calculating its export expenses, to be deducted from its SG&A expenses when determining the constructed normal value of its products.

110 First, that amount constituted only an extrapolation of its export expenses, on the basis of the available accounting data. It therefore did not in any way prove that the export expenses actually incurred by the applicant were correct.

111 Second, it is settled case-law that determination of the normal value and determination of the export price are governed by separate rules which are independent of each other (see, *inter alia*, Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraphs 14 and 15, Case 260/84 *Minebea* v *Council* [1987] ECR 1975, paragraphs 8 and 9, Joined Cases 260/85 and 106/86 *TEC and Others* v *Council* [1988] ECR 5855, paragraph 31, Case C-171/87 *Canon* v *Council* [1992] ECR I-1237, paragraph 15, and Case C-178/87 *Minolta Camera* v *Council* [1992]

ECR I-1577, paragraph 12). The amount of THB 12 540 882 was calculated precisely in order to determine the net export price to the Community of the applicant's bicycles at the ex-factory level. Consequently, the institutions were not obliged to take that amount into consideration when determining the constructed normal value of its products.

112 The institutions were accordingly entitled to make an adjustment of the export expenses allegedly incurred by the applicant, allocating them in proportion to turnover on the basis of the available accounting data, in accordance with Article 2(11) of the basic regulation.

113 The second limb of the plea is therefore unfounded.

Third limb: Siam's profit margin

Arguments of the parties

114 The applicant submits that the Council was not entitled, in order to calculate the profit margin to be included in the constructed normal value of its products, to use the profits realised by Siam on its profitable domestic sales of the like product. The institutions applied the 10% threshold only to the domestic sales for which that producer had communicated information on its costs of bicycle production. If they had taken all Siam's domestic sales into account, they would have found that its profitable sales represented only 9.45% of its total domestic sales.

115 The Council submits that the applicant's argument is of no relevance. Even on the assumption that the profits realised by Siam were 'not suitable for use' in calculating the profit margin, it would not in any case have used the profits realised by the applicant on its own domestic sales. It would simply have had recourse to one of the other calculation methods provided for by Article 2(3)(b)(ii) of the basic regulation.

Findings of the Court

116 The Council's argument must be rejected. Judicial review is directed towards the accuracy of the facts used by the institutions and whether there has been a manifest error in the assessment of those facts. If the calculation of the profit margin used to determine the constructed normal value of the applicant's bicycles were shown to have been based on incorrect facts or to be the result of a manifest error of assessment, such a calculation would affect the validity of the calculation of the dumping margin, and would consequently entail the annulment of the contested regulation.

117 During the investigation period, Siam sold ... [1] units on the Thailand market. It provided the Commission with information relating to its production costs for ... units only. On the basis of that information, the institutions found that ... units had been sold with a profit margin.

118 By submitting that the application of the 10% threshold to Siam's total domestic sales (... units) would have meant that its profitable domestic sales (... units) represented 9.45% of the total, the applicant necessarily assumes that the domestic sales in respect of which Siam gave no information to the Commission (... units) were all made at a loss.

1 — Some figures have been omitted in order to protect confidential information concerning Siam and Victory.

119 In the present case, the institutions did not commit a manifest error of assessment by applying the 10% threshold only to sales of the units for which Siam had furnished information on its production costs (... units).

120 In the first place, ... units represented a substantial volume, namely 46.1%, of sales of the like product realised by Siam on the domestic market (... units). Second, according to the information available, the volume of Siam's profitable domestic sales (... units) represented over 20% of the total volume of its domestic sales of the like product (... units). Third, the institutions had no reason to doubt the reliability of the data supplied by Siam. The Council explained, without being contradicted by the applicant, that the reason why Siam had not communicated information concerning its production costs for the ... units at issue was not that those units had been sold at a loss — as the applicant supposes — but that they had been manufactured during a financial year before the investigation period.

121 It follows that the institutions did not commit a manifest error by using the profits realised by Siam on its profitable domestic sales of the like product for the purposes of calculating the profit margin to be included in the constructed normal value of the applicant's products.

122 Consequently, the third limb of the plea is unfounded.

Fourth limb: Victory's profit margin

Arguments of the parties

123 The applicant submits that, in order to calculate the profit margin to be included in the constructed value of its products, the Council was not entitled to use the

profits realised by Victory on its profitable domestic sales of the like product, the information relating to that producer not being suitable for use.

124 To begin with, in its reply to the questionnaire, Victory provided no information enabling the Commission to calculate its profit margin. Even during the on-the-spot verification, it provided information relating to its production costs only for a very limited number of its domestic sales.

125 Second, the average sales price of Victory's bicycles on the domestic market was calculated on the basis of a mere sample of 110 invoices. That sample represented only 15% of Victory's total domestic sales.

126 Third, Victory realised its domestic sales at a different level of trade from that of the applicant. It sold its products in small quantities to small retailers, whereas the applicant sold its products in large quantities to major distributors.

127 Fourth, Victory's bicycle production costs were manifestly not suitable for use.

128 On this point, the applicant submits that the production costs supplied by Victory to the Commission were incorrect. As evidence, the applicant produces a table comparing, for certain bicycle models, its average sales prices and average production costs with those of Victory (Annex 6 to the reply). From that comparison two things emerge. On the one hand, the average sales price of Victory's bicycles on the domestic market is said to be 25% to 45% above the average production costs

of those bicycles. Yet for identical models sold at similar prices, the applicant's profit margin is generally negative. Victory's profit margin is therefore not realistic. On the other hand, for identical bicycle models sold at similar prices, Victory's production costs are considerably lower than those of the applicant. Yet the overall operating profit realised by the two producers is equivalent. The production costs supplied by Victory are thus incorrect.

129 The Commission also committed a manifest error in calculating Victory's bicycle production costs. It omitted to take into account an amount of THB ... relating to the purchase of bicycle parts. That omission had the effect of increasing Victory's profit margin, and hence the constructed normal value of the applicant's products.

130 The Council submits that the applicant's arguments are of no relevance. Even on the assumption that the profits realised by Victory were 'not suitable for use' in calculating the profit margin, it would not in any case have used the profits realised by the applicant on its own domestic sales. It would simply have had recourse to one of the other calculation methods provided for by Article 2(3)(b)(ii) of the basic regulation.

131 As to the applicant's fourth argument, it constitutes a new plea in law, and is inadmissible under Article 48(2) of the Rules of Procedure. The question whether Victory's production costs and their calculation were correct was raised by the applicant for the first time in the reply.

Findings of the Court

132 For the reasons set out in paragraph 116 above, the Council's first argument must be rejected.

133 In order to assess whether the fourth limb of the plea is well founded, the Court requested the Council to reply to certain questions and to produce *inter alia* the provisional and definitive disclosures relating to Victory. The applicant for its part produced, in Annex 1 to the reply, Victory's reply to the questionnaire.

134 The applicant's arguments will be considered in the order in which they were put forward.

— Information supplied by Victory

135 Contrary to the applicant's assertion, Victory, in its reply to the questionnaire, submitted precise information on the quantities and value of the products it had sold on the domestic market during the investigation period. It follows from the provisional and definitive disclosure documents concerning Victory that that information was supplemented during the on-the-spot verification. The Commission was therefore entitled to consider that the information obtained from Victory was sufficient to determine the normal value of its products.

136 Consequently, the applicant's first argument must be rejected.

— Average sales price of Victory's bicycles

137 In order to determine the average sales price of Victory's bicycles on the domestic market, the Commission took a sample of 110 invoices issued by that producer during the investigation period. On that basis it calculated an average net invoice price for each bicycle model. It multiplied that price by the quantity of the model actually sold and thus obtained a total net invoice value for each model. Next, it added the total net values for each model and arrived at an estimate of the total

turnover on domestic bicycle sales. It then compared that estimate with the total turnover on domestic bicycle sales stated in Victory's profit and loss account. That comparison showed that there was a negligible difference, 0.54%, between the two figures.

138 Consequently, in determining the average sales price of Victory's bicycles on the basis of the 110 invoices in question, the institutions obtained a reliable result. The applicant's second argument must therefore be rejected.

— Different levels of trade

139 The applicant asserts that Victory's domestic sales took place at a different level of trade from its own. However, it has not shown how that circumstance, if it were established, could preclude the institutions from using the profits realised by that producer on its profitable domestic sales in the calculation of the profit margin to be included in the constructed normal value of the applicant's products. It follows that its third argument is unfounded.

— Victory's production costs

140 The applicant submits that the production costs supplied by Victory to the Commission are incorrect and that the institutions committed a manifest error in calculating those costs.

141 The Council contends that those arguments are inadmissible because they were not relied on in the application.

142 It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission which may be regarded as amplifying a submission made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25, Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9, and Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38).

143 In the introductory part of its application (p. 3), the applicant observed that 'the information ... concerning Victory played a fundamental role in the determination of the dumping margin of the applicant'. In connection with its first ground of annulment (pp. 10 to 12 of the application), it stated that that information was incomplete, so that it could not serve as a basis for determining the constructed normal value of its products. On this point, it stressed (p. 10) the highly suspect nature of the information concerning Victory's profits on its profitable domestic sales of the like product.

144 The applicant's arguments concerning the correctness of the production costs communicated by Victory and their calculation therefore amplify a submission previously made in the application and are closely connected therewith.

145 Since those arguments are admissible, the Court must examine whether they are well founded.

146 The applicant considers that the comparative table produced in Annex 6 to the reply shows that the production costs furnished to the Commission by Victory were manifestly incorrect.

147 However, in that table the applicant merely entered the technical references of certain bicycle models without even indicating how its own models could have been validly or usefully compared with those of Victory. Moreover, it gave no explanation as to the way in which it had calculated the average production costs and average sales prices of Victory's bicycles.

148 In those circumstances, the table in question has no probative force.

149 The applicant further considers that the institutions, by finding that the bicycle production costs incurred by Victory during the investigation period amounted to THB ..., failed to take into account an amount of THB ... corresponding to the purchase of bicycle parts.

150 That argument must be rejected. It appears from the Council's replies to the Court's questions that Victory did not use those parts in the manufacture of its bicycles, but sold them as parts on the domestic market. Accordingly, the amount of THB ... should not be included in Victory's bicycle production costs.

151 It follows from all the foregoing that the fourth limb of the plea is unfounded.

152 The first plea in law must therefore be rejected.

2. *Second plea in law: infringement of the basic regulation, in that the Council refused to make an adjustment in calculating the profit margin to be included in the constructed normal value of the applicant's products sold in the Community to OEM purchasers*

Arguments of the parties

153 The applicant observes that the Council refused on two grounds to make an adjustment in calculating the profit margin to be included in the constructed normal value of its products sold in the Community to OEM purchasers. First, its request for an adjustment was not supported by evidence. Second, its sales did not satisfy the conditions for granting an OEM adjustment. Those grounds are contrary to Article 2(3) of the basic regulation.

Requirement that a request must be supported by evidence

154 The applicant submits that the institutions are obliged to make an OEM adjustment on their own initiative, even in the absence of a substantiated request.

155 The OEM adjustment is made in the context of Article 2(3)(a) of the basic regulation. That provision states that the normal value of a product is the 'comparable' price paid or payable for that product in the exporting country or country of origin. However, where a producer sells its products both for export to OEMs in the Community and, under its own brand, to ordinary distributors on the domestic market, its domestic sales cease to be 'comparable' to its export sales. OEM sales are generally made at lower prices and profit margins than domestic sales of

own-brand products. In that case, the normal value of the products exported to the Community is determined on the basis of a constructed value. In determining that value, the OEM adjustment enables account to be taken of the differences in price and profit. It consists of using a flat-rate profit margin lower than the profit margin actually realised by the producer on its domestic own-brand sales.

156 In so far as the OEM adjustment aims to establish a constructed normal value comparable to the export price, the institutions are obliged under Article 2(3)(a) of the basic regulation to make the adjustment on their own initiative. The requirement of a substantiated request in fact concerns only the adjustments provided for by Article 2(10) of that regulation. The OEM adjustment is not referred to in that provision.

157 In addition, the OEM adjustment does not constitute a level-of-trade adjustment. In that respect, the applicant refers to recitals 11 and 24 of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12).

158 In any event, level-of-trade adjustments were abolished by the basic regulation. Article 2(9) of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1) required the export price and the normal value to be compared at the same level of trade. Similarly, under Article 2(10)(c) of that regulation, producers or exporters were able to obtain a level-of-trade adjustment, provided they had made a substantiated request to that effect. Article 2(9) and (10) of the basic regulation purely and simply abolished those references to level of trade.

159 The Council observes that the OEM adjustment constitutes a level-of-trade adjustment. OEMs sell products manufactured by other producers under their own brand. However, they make use of identical distribution networks to those of genuine producers. They carry out specific functions and thus represent an additional stage between manufacture and distribution of the products. In support of its point of view, the Council relies *inter alia* on recital 29 of Commission Regulation (EEC) No 4062/88 of 23 December 1988 imposing a provisional anti-dumping duty on imports of video cassettes and video tape reels originating in the Republic of Korea and Hong Kong (OJ 1988 L 356, p. 47).

160 The requirement of a substantiated request is not confined to the adjustments referred to in Article 2(10) of the basic regulation, but applies to all adjustments relating to the level of trade (*Minebea*, paragraph 43, and *Canon*, paragraph 32). Such a request is all the more justified in the case of an OEM adjustment. That adjustment consists in taking account of the differences in price and profit between export sales to OEMs in the Community and domestic own-brand sales. Consequently, it is for the producer concerned to establish whether and to what extent the OEM adjustment is justified. Moreover, in the context of Article 2(3) of the basic regulation, the institutions require detailed and substantiated information for all aspects relating to the determination of the normal value.

161 Contrary to the applicant's submission, the basic regulation did not abolish level-of-trade adjustments. Article 2(9) provides that, in order to make a valid comparison between export sales and domestic sales, the institutions must take account, in the form of adjustments, of the different levels of trade.

Conditions for granting the OEM adjustment

162 The applicant states that the conditions for granting the OEM adjustment were defined by the Council in recital 8 of Regulation No 535/87. In the present case, it satisfies those conditions.

163 On the one hand, all its export sales to the Community are to importers who resell its products under their own brand name — apart from two particular models ('Pheasant' and 'Flamingo') which it sells under its own brand in the Community to ordinary distributors.

164 On the other hand, the models exported to the Community are manufactured exclusively to the order of Community OEMs, in accordance with their specific detailed instructions. The design and technical specifications of those models are thus different from those of the models sold by the applicant under its own brand on the domestic market.

165 The applicant has demonstrated that those facts were genuine in its reply to the questionnaire and during the on-the-spot verification.

166 Consequently, the institutions were obliged to make an OEM adjustment when determining the constructed normal value of its products.

167 The applicant submits that it did not have to satisfy the two additional conditions which it considers were required by the Council, namely:

— to show that its export sales to OEMs in the Community were made at a price and profit margin lower than those of its domestic own-brand sales;

— to show that there was a difference in pricing between its export sales to Community OEMs and its export sales to Community distributors.

168 Those conditions are new. They do not appear in Regulation No 535/87 or in the *Goldstar* judgment.

169 The first condition is impossible to satisfy. The Commission calculated the applicant's profit margin on the basis of the profits realised by Siam and Victory on their domestic sales of the like product. The applicant was not aware of that margin until publication of the provisional regulation. It was therefore unable to show materially in its reply to the questionnaire that the profits realised on its export sales to OEMs were lower than its profit margin, as calculated by the Commission.

170 The second condition is manifestly erroneous. The OEM adjustment does not involve a comparison between export sales to Community OEMs and those to Community distributors. It consists in a comparison between export sales to Community OEMs and domestic own-brand sales.

171 The Council submits that, in order to benefit from an OEM adjustment, the producer concerned must satisfy two conditions, namely:

— show that its export sales to the Community are made to OEMs;

— show that its export sales to OEMs in the Community are made at a price and profit margin lower than those of its domestic own-brand sales.

172 Those conditions are not new. Since Regulation No 535/87 they have formed part of a constant practice of the institutions (see, for example, recital 20 of Commission Regulation (EC) No 2426/95 of 16 October 1995 imposing a provisional anti-dumping duty on imports of certain magnetic disks (3.5″ microdisks) originating in the United States, Mexico and Malaysia (OJ 1995 L 249, p. 3)).

173 In the present case, the applicant did not satisfy any of those conditions.

Findings of the Court

174 It appears from the contested regulation (recital 50) that the Council refused on two grounds to make an adjustment in calculating the profit margin to be included in the constructed normal value of the products sold by the applicant in the Community to OEM purchasers. The first ground was the absence of a substantiated request for an adjustment. The second was that the conditions for granting an OEM adjustment were not satisfied.

175 It is first necessary to examine whether by adopting the second ground the Council infringed Article 2(3) of the basic regulation.

176 In that respect the applicant submits that it did not have to show that there was a price difference between its sales to OEMs and its own-brand sales.

177 It should be noted that the essential difference between OEM sales and own-brand sales is at the marketing stage. Those two types of sale are aimed at different customers, who generally operate at different marketing stages (*Goldstar*, paragraph 45). An OEM functions in a different way from ordinary retailers. It buys products from a manufacturer and then sells them under its own brand, while assuming the manufacturer's liability and bearing the costs inherent in marketing the products. The special nature of those functions is reflected in particular in the structure of the prices charged by the manufacturer to OEM purchasers, in that those prices are generally lower than those charged to ordinary distributors.

178 Consequently, by requiring the applicant to show that its export sales to OEM purchasers in the Community were made at a price and profit margin lower than those of its domestic own-brand sales, the Council did not infringe Article 2(3) of the basic regulation.

179 In the present case, the applicant has produced no evidence from which it might be concluded that it satisfied that requirement. Yet such proof, contrary to its assertion, was not impossible to provide. It would have been enough for it to show that there was a distinct and consistent pricing pattern for its export sales to OEMs in the Community and for its domestic own-brand sales.

180 As regards the difference in pricing between the applicant's sales to Community OEMs and its own-brand sales to Community distributors, the Council stated that that did not constitute a condition for granting the OEM adjustment but a means of verifying whether the OEMs actually performed specific functions compared to ordinary distributors. The documents in the case show that the applicant sold certain bicycle models to Community OEMs at a higher price than that of the models

it sold to Community distributors under its own brand ('Pheasant' and 'Flamingo'). That finding bears out the Council's conclusion that 'the majority of the export sales [of the applicant to the Community] were not made at a level which would constitute an OEM sale' (recital 50 of the contested regulation).

181 Consequently, by refusing to make an OEM adjustment on the ground that the applicant's sales did not satisfy the conditions for an adjustment, the Council did not infringe Article 2(3) of the basic regulation.

182 In those circumstances, any defects there may be in the first ground for refusing to grant the adjustment, namely the absence of a substantiated request, do not in any event have any effect on the assessment of the second plea in law.

183 It follows from all the above considerations that the second plea is unfounded.

184 The application must therefore be dismissed.

Costs

185 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Council.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lindh García-Valdecasas Lenaerts

Cooke Jaeger

Delivered in open court in Luxembourg on 17 July 1998.

H. Jung P. Lindh

Registrar President

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