JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
29 January 1998 *

In Case T-97/95,

Sinochem National Chemicals Import & Export Corporation, a company incorporated under Chinese law, established in Beijing, represented by Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Council of the European Union, represented initially by Yves Cretien, Legal Adviser, and Antonio Tanca, of its Legal Service, acting as Agents, then solely by Mr Tanca, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, and members 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,

* Language of the case: English.

supported by

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

and

Furfural Español SA, a company incorporated under Spanish law, established in Alcantarilla (Spain), represented by José Rivas de Andrés, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Rue Marie Adélaïde,

interveners,

APPLICATION for the annulment of Council Regulation (EC) No 95/95 of 16 January 1995 imposing a definitive anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China (OJ 1995 L 15, p. 11),

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

composed of: R. García-Valdecasas, President, V. Tiili, J. Azizi, R. M. Moura Ramos and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 18 September 1997,

gives the following

Judgment

Facts

1 The applicant, Sinochem National Chemicals Import & Export Corporation (hereinafter 'Sinochem'), is a State company in the People's Republic of China engaged in the importation into and the exportation from that country of chemical products. Until 1 January 1993 Sinochem was the sole exporter of furfuraldehyde from the People's Republic of China. After that date it has been possible to export furfuraldehyde freely as a result of the liberalisation of the Chinese trade regime. At the material time Sinochem exported the bulk of the furfuraldehyde originating in the People's Republic of China.

2 Furfuraldehyde, the product at issue in the present proceedings, is a liquid chemical obtained by the processing of agricultural waste. It has two quite distinct basic applications: first, it is used as a selective solvent in oil refining for the production of lubricating oils and, second, it is used as a raw material for the production of furfuryl alcohol.

3 In January 1993 Furfural Español SA (hereinafter 'Furfural Español') lodged a complaint with the Commission. The complaint alleged that furfuraldehyde originating in China was being dumped, giving rise to serious injury.

4 In the light of this, the Commission, 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'), published on 31 July 1993 a notice of initiation of an anti-dumping proceeding concerning imports of furfuraldehyde originating in the People's Republic of China (OJ 1993 C 208, p. 8) and opened an investigation.

5 The investigation lasted from 1 July 1992 to 30 June 1993. The Commission carried out verifications and investigations at the premises of the Community producer, Furfural Español, a number of importers in the Community, in particular Quaker Oats Chemicals Inc. (hereinafter 'QO Chemicals'), an American company based in Antwerp (Belgium) and a subsidiary of another American company, Great Lakes Chemicals Corporation. It also carried out investigations at the premises of two Argentinian producers of furfuraldehyde, since Argentina had been used as an analogue country for the purpose of calculating normal value.

6 Furfural Español is a company established in Alcantarilla (Spain). It was at the time of the investigation the sole Community producer of furfuraldehyde. It was therefore the 'Community industry' for the purposes of Article 4(5) of the basic regulation.

7 The main producer of furfuryl alcohol in the Community is QO Chemicals. The applicant and Furfural Español both supplied furfuraldehyde both for the cleaning of lubricating oil and for the production of furfuryl alcohol. Until 1992 there was another producer of furfuryl alcohol in the Community, namely the French company Agrifurane. In 1994 a new company producing that alcohol, Indofurane Europe, was set up in France. Furfural Español supplied furfuraldehyde to QO Chemicals in 1989. It also supplied it to Agrifurane until 1992 and, in 1995, to Indofurane Europe. The vast majority of those sales have always been for the production of lubricating oils.

8 QO Chemicals is the world's largest producer of furfuryl alcohol. It is therefore, *de facto*, the European Community's largest purchaser of furfuraldehyde. During the investigation period it was the only producer of furfuryl alcohol in the Community and so accounted for the entire Community furfuryl alcohol market.

9 The furfuraldehyde supplier from which QO Chemicals obtains over 80% of its requirements is established in the Dominican Republic. It is also the world's largest producer of furfuraldehyde. Since the 1960s a long-term supply agreement has existed between itself and QO Chemicals — through a related American company. The agreement provides for QO Chemicals to buy almost all the furfuraldehyde produced by the Dominican Republic producer and for the latter to sell almost all the furfuraldehyde which it produces to QO Chemicals.

10 By Commission Regulation (EC) No 1783/94 of 18 July 1994 imposing a provisional anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China (OJ 1994 L 186, p. 11, hereinafter 'the provisional regulation') a provisional anti-dumping duty of ECU 352 per tonne was imposed on imports of the product in issue falling within CN code 2932 12 00 of the Combined Nomenclature of the European Union.

11 It determined a dumping margin of 62.6% corresponding to the weighted average of the dumping margins of both cooperating and non-cooperating exporters (point 21 of the preamble to the provisional regulation). It found that this dumping margin exceeded the injury threshold, calculated on the basis of the difference between the weighted average c.i.f. import price and the cost of production of the Community producer, plus a profit margin of 5% (point 50 of the preamble to the provisional regulation).

12 On 28 July 1994 Sinochem proposed to the Commission an undertaking to limit the quantity of furfuraldehyde which it would export to the Community.

13 By Council Regulation (EC) No 95/95 of 16 January 1995 imposing a definitive anti-dumping duty on imports of furfuraldehyde originating in the People's Republic of China (OJ 1995 L 15, p. 11, hereinafter 'the definitive regulation'), the Council confirmed the anti-dumping duty of ECU 352 per tonne imposed by the provisional regulation. It rejected (point 29 of the preamble to the definitive regulation) the undertaking proposed by Sinochem, on the ground that that State-owned company did not meet the requirements specified for that purpose in the case of a country which does not have a non-market economy. It also referred to the numerous breaches of undertakings entered into by Chinese exporters and, in particular, by Sinochem itself.

Procedure and forms of order sought by the parties

14 By application lodged at the Registry of the Court of First Instance on 6 April 1995 the applicant brought the present action, directed against the definitive regulation.

15 On 8 September 1995 the Commission applied for leave to intervene in support of the form of order sought by the defendant. That application was granted by order of the President of the Fifth Chamber (Extended Composition) of 2 October 1995.

16 On 3 October 1995 Furfural Español applied for leave to intervene in support of the form of order sought by the defendant. That application was granted by order of 18 December 1995 of the President of the Fifth Chamber (Extended Composition).

17 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided, first, to adopt measures of organisation of procedure under Article 64 of the Rules of Procedure consisting in written questions to the parties and, secondly, to open the oral procedure.

18 The parties replied to the written questions in August 1997. At the hearing on 18 September 1997 the parties presented oral argument and replied to the oral questions put to them by the Court.

19 The applicant claims that the Court should:

— annul the anti-dumping duty imposed by the definitive regulation;

— annul the Council's decision to reject the undertaking proposed by the applicant;

— order the Council to pay the costs.

20 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

21 Furfural Español, the intervener, claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those of the intervener.

22 In its reply the applicant requests that Furfural Español, the intervener, should in any event be ordered to bear its own costs.

Substance

23 The applicant puts forward five pleas in law in support of its application for annulment of the anti-dumping duty imposed by the definitive regulation. The first plea alleges infringement of Articles 5(2) and 7(1) of the basic regulation. The second plea alleges infringement of Article 2(1) of the basic regulation and of the principle of proportionality. The third plea alleges infringement of Article 4(1) of the basic regulation and a manifest error of assessment. The fourth and fifth pleas allege infringement of Article 190 of the EC Treaty and a manifest error of assessment with regard to the rejection, in the definitive regulation, of the undertaking proposed by the applicant.

24 In view of the connection between the first and the second pleas in law, it is appropriate to deal with them together.

The first and second pleas in law alleging, first, infringement of Articles 5(2) and 7(1) of the basic regulation and, secondly, infringement of Article 2(1) of the same regulation and of the principle of proportionality

Arguments of the parties

— The first plea in law

25 The applicant submits that the definitive regulation infringes Articles 5(2) and 7(1) of the basic regulation inasmuch as the proceeding concerns all imports of furfuraldehyde originating in China, irrespective of whether it is used in the cleaning of lubricating oils or in the production of furfuryl alcohol, whereas the evidence of

injury presented in the complaint and the notice of initiation of the proceeding concerns solely furfuraldehyde for use in the cleaning of lubricating oils.

26 It points out that Article 5(2) of the basic regulation provides that: '[t]he complaint shall contain sufficient evidence of the existence of dumping or subsidisation and the injury resulting therefrom'. Thus, before initiating a proceeding, the Commission is required to examine whether the evidence in the complaint, particularly regarding the alleged injury, is sufficient. That obligation constitutes an essential procedural requirement, breach of which renders the proceeding unlawful (judgment of the Court of Justice in Case C-216/91 *Rima Eletrometalurgia* v *Council* [1993] ECR I-6303).

27 According to the applicant, the Commission also infringed Article 7(1) of the basic regulation, which provides that it may initiate a proceeding and commence an investigation only if it is apparent that there is sufficient evidence to justify initiating a proceeding. The evidence to which Article 7(1) refers is the same as that described in Article 5(2) and (6), namely evidence as to the existence of dumping and the injury resulting therefrom.

28 In this case, the Commission accepted a complaint relating to all imports of furfuraldehyde from the People's Republic of China, although that complaint contained evidence of injury linked to only one of the two applications of furfuraldehyde, namely its use in the cleaning of lubricating oils. However, that evidence is manifestly inadequate inasmuch as the furfuraldehyde used for that application, as the complainant itself recognised in its complaint, accounts for only one-third of total furfuraldehyde consumption in the Community. The Commission ought therefore to have requested the complainant to supply further evidence or ought to have restricted the scope of the proceeding to imports of furfuraldehyde for use in the cleaning of lubricating oils.

29 The two applications of furfuraldehyde correspond in actual fact to two totally different markets, a situation which is confirmed moreover by the fact that the customers for these two applications are also totally different.

30 The definition of the product in the notice of initiation refers to the two applications of furfuraldehyde, while the figures concerning market shares in the section of the same notice entitled 'Allegation of Injury' refer only to furfuraldehyde used for the cleaning of lubricating oils.

31 The Commission thus initiated a proceeding which did not comply with Articles 5 and 7 of the basic regulation. Anti-dumping measures adopted at the end of a proceeding the initiation of which was unlawful are themselves unlawful and must accordingly be annulled.

32 The Council contests the existence of two separate markets. The product intended for the two different applications is one and the same product and there are no objective criteria for determining the intended or eventual use of that product when it is imported into or sold within the Community.

33 The complaint examined all the factors which, under Article 4(2) of the basic regulation, must be taken into account in the examination of the injury and provided all the evidence establishing such injury.

34 The Council concludes that the Commission was correct in finding that the complaint contained sufficient prima facie evidence with regard to the existence of injury and that an anti-dumping proceeding ought to be opened.

35 The intervener, Furfural Español, contends that the applicant is attempting to create the wrong impression that the only evidence of injury contained in the complaint was the figure showing consumption and that this figure related only to sales of furfuraldehyde for the cleaning of lubricating oils. The complaint devotes 25 pages to analysing the problem of injury and deals with all the factors listed in Article 4(2) of the basic regulation. It accordingly adduces, in relation to each of those factors, evidence to show injury. Furfural Español states that, in general, all data and evidence submitted in the complaint cover 1987 to 1992 (first quarter), the period during which Agrifurane, the only other Community producer of furfuryl alcohol, was operational. Thus it is undeniable that information concerning furfuraldehyde for the production of furfuryl alcohol was included in the complaint. Furthermore, the figures for the volume and price of imports of furfuraldehyde from China and other non-member countries were submitted in the complaint irrespective of whether the product was used for the cleaning of lubricating oils or for the production of furfuryl alcohol.

36 As regards the information on Community consumption, Furfural Español accepts that this is more precise with respect to the sales of furfuraldehyde for use in the cleaning of lubricating oils. However, it submits that, since all the data concerning imports of furfuraldehyde into Belgium were accorded confidential treatment and the main Community producer of furfuryl alcohol was based in Belgium, it would have been unfair to require the complainant to provide more detailed information concerning the furfuryl alcohol segment of the market. This would have been tantamount to depriving the complainant of its right to the legitimate protection granted to the Community industry by the basic regulation.

37 As regards the arguments of the Council and the intervener concerning the evidence adduced in the complaint other than the figures relating to market share, the applicant submits that, to the extent that Furfural Español supplied furfuraldehyde only for the cleaning of lubricating oils, all the economic factors relating to the impact of the imports on the complainant can, by definition, refer only to that market. Therefore, the factors which the complainant has invoked to establish the existence of injury relate only to furfuraldehyde used for the cleaning of lubricating oils.

38 Finally, the applicant states in its reply that it is surprising that the Commission did not see fit to consult its own file relating to a proceeding initiated in 1981 which concerned the same product, the same exporting countries and the same importer, QO Chemicals. In that proceeding, in which Furfural Español had also been accused of dumping furfuraldehyde in the Community, the Commission concluded, in factual circumstances very similar to those in the present case, that the undumped imports from the Dominican Republic had been the principal cause of the injury suffered by the Community industry and that, as regards imports from China (and also Spain), the interests of the Community did not call for protective measures.

39 The Council submits in its rejoinder that the 1981 proceeding cannot be compared to the present case, given that the situation on the furfuraldehyde market in the Community has since changed extensively. First, all the Community producers existing in 1981 have ceased to operate. Second, Furfural Español, which is now the sole Community producer since the accession of the Kingdom of Spain to the Community in 1986, was an exporter in 1981. Third, of the two major importers of furfuraldehyde in 1981 (QO Chemicals and Rhône-Poulenc), only QO Chemicals is still operating. Fourth, the applicant was in 1981 the sole exporter from China, whereas in the present case a great many independent exporters in China have manifestly been selling the product at very low prices. Finally, in the 1981 proceeding, unlike the situation in the present case, the complaint was directed, in particular, at the Dominican Republic, so that the exports from that country had to be looked at in a completely different context.

— Second plea in law

40 The applicant submits that the anti-dumping duty was imposed in breach of Article 2(1) of the basic regulation and the principle of proportionality. It covers all imports of furfuraldehyde, whereas the injury determination is based on the finding according to which injury was caused only as regards furfuraldehyde for use in the cleaning of lubricating oils. However, the product put to such use

accounts for a small proportion of total Community consumption of furfuraldehyde.

41 The applicant points out that, under Article 2(1), an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury. This means, in its view, that the anti-dumping duty can be justified only in so far as it is necessary to remove the injury caused by dumping.

42 The anti-dumping measure imposed by the institutions clearly goes beyond what is necessary to remove the injury since it applies to all imports of furfuraldehyde, and not only furfuraldehyde used for the cleaning of lubricating oils, which is the product covered by the complaint. Accordingly, the anti-dumping measure infringed the principle of proportionality.

43 Moreover, the institutions confirmed in the provisional regulation (point 24 of the preamble) that there was no competition between the sales made on each of the two markets for furfuraldehyde.

44 In its reply the applicant admits that the product intended for the two different applications is one and the same product. None the less, on the basis of a number of examples, it submits that Community customs legislation contains provisions making it possible, for the purpose of customs duties, to accord different treatment to physically identical products, depending on their intended end-use. In the applicant's view, the Council could thus have limited the imposition of the anti-dumping duty to furfuraldehyde for the lubricating-oils use, that being the only application for which the complaint claimed injury.

45 At the hearing the applicant submitted that, given Furfural Español's reduced production capacity, imports of Chinese furfuraldehyde intended for QO Chemicals were not likely to cause injury to the Community industry. For that reason, the anti-dumping duty should have been imposed solely on furfuraldehyde intended for the cleaning of lubricating oils and the imposition of anti-dumping duties on furfuraldehyde intended for customers other than QO Chemicals would have been adequate to remove the injury. The applicant adds that, even after the introduction of the anti-dumping duties, Furfural Español did not provide furfuraldehyde to QO Chemicals.

46 The Council contends that all imports of furfuraldehyde from China, irrespective of their actual or intended use, caused injury to the Community industry. Furthermore, the investigation of the Community institutions with respect to injury related to all imports and not only to such furfuraldehyde as was used for the cleaning of lubricating oils.

47 The Council considers that the applicant's reference to point 24 of the preamble to the provisional regulation is wholly misleading. Under that point the institutions did not confirm that no competition could exist between sales on the market in furfuraldehyde for the production of furfuryl alcohol and those on the market in furfuraldehyde for the cleaning of lubricating oils. On the contrary, point 24 draws a distinction between a 'captive market' and a 'free market'. Moreover, the definitive regulation indicates the Commission's change of approach on the investigation of injury *vis-à-vis* the provisional regulation in regard to the existence of a 'captive market'.

48 Finally, as regards the argument, based on the customs legislation, to the effect that it is possible to treat products differently depending on their intended end-use, the Council contends that there is no purpose in the present case in inquiring whether that would have been theoretically possible, since it did not base the contested regulation on the fact that it was technically impossible to limit the imposition of an anti-dumping duty in the manner proposed by the applicant.

49 With regard to the applicant's reference to point 24 of the preamble to the provisional regulation, Furfural Español adds that the Chinese producers and itself were also competing to obtain orders from Agrifurane for furfural for the production of furfuryl alcohol, until that company ceased its activities. It claims that they are at present competitors with regard to orders from Indofurane Europe for the production of furfuryl alcohol.

50 At the hearing it admitted that it had sold furfuraldehyde to QO Chemicals only after the imposition of anti-dumping duties. None the less, it relied on its legitimate right not to be excluded as a potential supplier to any customer on the market which met conditions of fair competition, in particular with respect to prices.

Findings of the Court

— The existence of one or two markets for furfuraldehyde

51 The first question is whether the institutions were right in concluding that there did not exist two separate markets for furfuraldehyde linked respectively to each of the two applications of that product, bearing in mind that, in the field of measures to protect trade, the institutions enjoy a wide discretion and that judicial review must be restricted to verifying whether or not they have committed manifest errors of assessment or misused their powers (Case 188/85 *Fediol* v *Commission* [1988] ECR 4193, paragraph 6).

52 It should first be observed that, whether it is used for the cleaning of lubricating oils or for the production of furfuryl alcohol, furfuraldehyde is a single product, as the applicant itself admits. It can therefore be directed to either of the two applications at any stage. The Commission stated at the inquiry, without being contra-

dicted by the applicant either during the administrative procedure or in the present contentious proceedings, that the furfuraldehyde produced by the Community producer and that produced in China had the same specifications and were found to be interchangeable as far as their application is concerned (point 11 of the preamble to the provisional regulation, confirmed by point 4 of the preamble to the definitive regulation).

53 Secondly, it should be noted that none of the provisions of the basic regulation requires the institutions to treat the same product differently according to its various applications. As the Council rightly points out, there is no objective test for determining the intended or eventual use of that product when it is imported into or sold within the Community.

54 Thirdly, it should be made clear that any company supplying furfuraldehyde to customers who use it for the cleaning of lubricating oils is also a potential supplier to buyers using the same product for the production of furfuryl alcohol, as is shown by the sales by Furfural Español to Agrifurane, Indofurane and QO Chemicals and by the resale by the latter company to other dealers for the cleaning of lubricating oils.

55 In those circumstances, the institutions did not exceed their wide discretion in considering that there did not exist two separate markets, with no links between them, and in deciding as a result not to treat furfuraldehyde differently according to its two applications.

— Whether there is evidence in the complaint sufficient to justify the opening of an investigation with respect to all imports of furfuraldehyde from China

56 The applicant's argument alleging infringement of Articles 5(2) and 7(1) of the basic regulation, an argument designed to provide support for its submission that the investigation could only relate to imports of furfuraldehyde intended for the cleaning of lubricating oils, is founded on the premiss that there were two separate markets for furfuraldehyde.

57 Since the Court has held that there was only one market, that argument is unfounded.

58 It is therefore only for the sake of completeness that the main elements of that argument will nevertheless be examined.

59 The applicant cannot base its argument on the contents of the notice of initiation of the proceeding. Even if the figures relating to the market shares appearing in the section entitled 'Allegation of Injury' do in fact refer to furfuraldehyde used for the cleaning of lubricating oils, the definition of the product as well as the figures relating to other data, in particular the volume of imports, contained in the same notice, mention both applications of furfuraldehyde. Accordingly, the applicant cannot claim that the mere fact that one of the elements of the notice of initiation relates to one of the two applications of furfuraldehyde obliged the Commission to restrict the scope of the proceeding exclusively to that particular application of the product.

60 In any event, as Furfural Español, the intervener, rightly contends, to make the validity of a complaint depend on the supply of information regarding the imports

of furfuraldehyde into Belgium — information to which the complainant cannot gain access on account of the confidential treatment accorded to it — even though the complaint contains sufficient other evidence as regards the injury suffered, and the product which is manufactured by the complainant and the one which is being dumped are entirely interchangeable, would have the effect of depriving the complainant of its right to the legitimate protection which the basic regulation confers on the Community industry.

61 The applicant is wrong in maintaining that, since Furfural Español has supplied furfuraldehyde only for the cleaning of lubricating oils, all the economic factors submitted in the complaint relating to the impact of the imports on the complainant can, by definition, refer only to the market for furfuraldehyde for the cleaning of lubricating oils. In fact, Furfural Español has also supplied furfuraldehyde to producers of furfuryl alcohol.

62 Neither may the applicant rely on the judgment in *Rima Eletrometalurgia* v *Council*, cited above at paragraph 26. In that case the Court of Justice annulled the anti-dumping regulation for infringement of Article 7(1) of the basic regulation on the ground that, in connection with a review of anti-dumping measures, the institutions had initiated a new investigation into Rima Eletrometalurgia, although its products had, following the initial investigation, been excluded from application of the anti-dumping duty and the institutions had no evidence as to the existence of dumping by that undertaking. It was in that context that the Court of Justice held, at paragraph 16 of the judgment, that 'the existence of sufficient evidence of dumping and the injury resulting therefrom is always a prerequisite for the opening of an investigation, whether at the initiation of an anti-dumping proceeding or in the course of a review of a regulation imposing anti-dumping duties'. Contrary to what the applicant claims, it cannot therefore be inferred from that statement that evidence of injury relating to a single application of a particular product must, in any event, be considered to be insufficient. Given that the complaint contained evidence of the injury suffered by the Community producer, the Commission was justified in regarding it as sufficient, even though it related only to one of the two applications, since the product was the same.

63 Finally, it is of no avail to the applicant to refer to the anti-dumping proceeding initiated in 1981, since the new investigation which gave rise to the proceeding now in point was opened on the basis of sufficient evidence. In any event, as the Council rightly observes (see paragraph 39 above), the applicant's argument has been rendered irrelevant in view of the substantial and obvious changes which have meantime taken place.

64 It follows from all the foregoing that the Commission was justified in not restricting the scope of the proceeding solely to imports of furfuraldehyde used in the cleaning of lubricating oils and that, in deciding to initiate the proceeding with regard to furfuraldehyde imports as a whole, it did not infringe either Article 5(2) or Article 7(1) of the basic regulation.

— Injury

65 At this stage of the Court's reasoning, it is appropriate to analyse the arguments which, under its second plea in law, the applicant puts forward in relation to the injury suffered by the Community industry. According to those arguments, the anti-dumping measure imposed by the institutions goes far beyond what was necessary in order to remove the injury since it applies to all imports of furfuraldehyde and not only to furfuraldehyde used for the cleaning of lubricating oils, whereas a measure limited to imports of furfuraldehyde intended for that application would have been adequate to remove the injury.

66 That argument cannot be accepted, inasmuch as it has been held (see paragraph 55 above) that the two different applications of furfuraldehyde did not correspond to two separate markets and that the product was the same.

67 Moreover, it should be borne in mind that Article 2(1) of the basic regulation provides: 'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury'. That provision in no way requires the institutions to impose anti-dumping duties solely on one of the applications of a given product. The only condition it lays down for the imposition of duties is that the product should have caused injury, which is not disputed in the present case.

68 In the absence of any obstacles to the use of furfuraldehyde indifferently for one or other of its two applications and given the existence of actual or potential competition from the point of view of both demand and supply, the imposition of anti-dumping duties solely on furfuraldehyde intended for the cleaning of lubricating oils would not have been such as to ensure the removal of the injury.

69 Furfuraldehyde purchased for use in one of the two applications could be diverted without the slightest difficulty for use in the other application, as is shown by the fact, acknowledged by the parties, that QO Chemicals, the main producer of furfuryl alcohol in the Community, resells the surplus of the furfuraldehyde purchased by it for its own production to undertakings engaged in the cleaning of lubricating oils.

70 Accordingly, the purpose of imposing anti-dumping duties would not be observed in the present case if duties were imposed only on imports of furfuraldehyde intended for the cleaning of lubricating oils.

71 In those circumstances, by imposing anti-dumping duties on the whole of the imports of furfuraldehyde from China, the institutions did not go beyond what was necessary in order to remove the injury.

72 The applicant's argument based on the possibility of treating a product differently, for the purposes of customs duties, according to its intended end-use cannot be accepted. Having regard to what has been stated above, the fact that that possibility might exist under the customs legislation did not mean that the Council was obliged to pursue it. In any event, the Community institutions acted in conformity with the provisions of the basic regulation without, as held above, exceeding their wide discretion.

73 Moreover, Furfural Español, the intervener, has correctly pointed to the Community industry's right not to be actually or potentially excluded from a certain market by dumping practices.

74 It must therefore be concluded that the institutions did not infringe Article 2(1) of the basic regulation or the principle of proportionality by imposing anti-dumping duties on all imports of furfuraldehyde, irrespective of the end-use of that product.

75 In view of all the foregoing considerations, the first and second pleas in law must be rejected.

The third plea in law, alleging infringement of Article 4(1) of the basic regulation and manifest error of assessment

Arguments of the parties

76 According to the applicant, the institutions' finding that the injury was caused by imports of furfuraldehyde originating in China in the market for furfuraldehyde

used for the cleaning of lubricating oils is vitiated by an erroneous assessment of the facts and by fundamental contradictions.

77 The Community institutions took no account, in their injury analysis, of the imports of furfuraldehyde originating in the Dominican Republic on the ground that they benefited only one single Community importer, QO Chemicals, and that the latter did virtually no business with the Community producer.

78 The applicant considers nevertheless that, in so far as 84% of imports from China were intended for QO Chemicals, the same reasoning should be applied to that firm and that, therefore, those imports were likely to cause injury to the Community producer only to the extent of the remaining 16%.

79 Nor did the Community institutions take into account the furfuraldehyde resold by QO Chemicals to undertakings engaged in the cleaning of lubricating oils, on the ground that those sales did not cause injury to the Community furfuraldehyde producer, since the resale price was in fact higher than those of the Chinese exporters and not less than those of the Community producer.

80 The institutions were wrong in taking the view that imports from other countries could not have been the cause of injury on the ground that their market share was insignificant in comparison with imports from China. The applicant maintains that if 84% intended for QO Chemicals is subtracted from the total imports from China, the volume of the imports from China is not much greater than that of the imports from other exporter countries. It claims that sales of furfuraldehyde originating in China to Community customers other than QO Chemicals amounted to 1 050 tonnes. It states that the Council makes the unsubstantiated claim that these sales amounted to almost 2 500 tonnes during the investigation period and adds

that, even if this were true, this volume would not be significantly higher than that of the other exporting countries which supplied furfuraldehyde to the Community during the investigation period. Thus, the total volume of imports from Argentina, South Africa, Indonesia and Slovenia during that period was 2 116 tonnes.

81 The applicant submits that the Council has itself acknowledged that the product originating in the Dominican Republic was sold at export prices much lower than those of any other exporting country and that the volume of those exports to the European Union was four times greater than the volume exported by China.

82 Finally, the applicant denies the Council's assertion that imports from China increased during the investigation period. It maintains that, on the contrary, they decreased significantly between 1990 and 1992.

83 The Council contends that the crucial question is whether it correctly found that imports from China caused injury to the Community producer whereas imports of furfuraldehyde from the Dominican Republic did not.

84 It maintains that imports from China are in a situation entirely different from that of imports from the Dominican Republic in view of the fact that there has never existed any special relationship between the applicant and QO Chemicals, that QO Chemicals is not dependent on the applicant whereas it is on the Dominican producer and that therefore, with respect to that proportion of QO Chemicals' demand that is not met by the Dominican producer, the applicant and other Chinese exporters compete with the Community producer and exporters from other non-member countries. The Council further points out that the proceeding did not concern imports of furfuraldehyde sold by the applicant, but imports of furfuraldehyde originating in China.

85 As regards the alleged decrease in imports from China during the investigation period, the Council points out that the applicant relies on a table entitled 'Imports of furfuraldehyde by EU importers other than QO Chemicals (Market for lubricating oils)(Tonnes)' which contains only the figures for imports of furfuraldehyde into Member States other than Belgium.

86 The Council concludes by claiming that the applicant wholly fails to explain how, despite the imports from the Dominican Republic, the Community producer was in the past able to maintain its market share and prices and operate on a largely profitable basis, a finding which in the Council's view confirms that the imports from the Dominican Republic had not caused injury to the Community producer.

87 In its statement in intervention Furfural Español points out that the definitive regulation (point 17 of the preamble) took into account the imports from the Dominican Republic when analysing the injury and that, although the figures relating to consumption, market share, sales and other matters had changed, the trends indicated by those figures remained the same, a finding which confirms that the imports from the Dominican Republic were not the cause of the injury suffered by the Community producer.

88 The intervener accepts that it is true to say that the Commission acted as if 100% of the Chinese imports were sold on the market in competition with Furfural Español, since those imports were in actual competition with Furfural Español. It maintains that the only sales which were not in competition with Furfural Español were those made to QO Chemicals by its supplier in the Dominican Republic under their special arrangement.

Findings of the Court

89 Article 4(1) of the basic regulation provides:

'A determination of injury shall be made only if the dumped or subsidised imports are, through the effects of dumping or subsidisation, causing injury i. e., causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry. Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidised, or contraction in demand, which, individually or in combination, also adversely affect the Community industry must not be attributed to the dumped or subsidised imports.'

90 The Court must verify whether the conditions laid down in that provision have been fulfilled in the present case.

91 First, the applicant does not deny that its imports were carried out at dumping prices or that the dumping margin was set at 62.6% of the weighted average of the dumping margins obtained for all the Chinese exporters.

92 Second, it does not deny either that its imports caused injury to the Community producer. It maintains nevertheless that only 16% of the imports from China were likely to cause such injury, given that the remaining 84% were intended for the production of furfuryl alcohol, an application to which the Community producer did not contribute. That 16% therefore constituted, according to the applicant, the same volume as imports originating in non-member countries other than the Dominican Republic.

93 In this respect it should be observed that the furfuraldehyde used in both applications is a single product capable of being used in either of those applications at any time (see paragraph 52 above). Accordingly, 100% of the imports from China are likely to cause injury to the Community producer.

94 Third, the definitive regulation points out (point 25 of the preamble):

'As regards the imports from the [Dominican Republic], they have, over the last 30 years provided the major proportion of the furfuraldehyde consumed in the Community ... Despite that situation the Community producer was able to maintain its prices, its market share and remained largely profitable until 1991. It was only starting from 1992 when the price for furfuraldehyde imported from China dropped abruptly, that the Community producer was compelled to cut its domestic sales prices and follow this downward trend in order to preserve its market share ...'.

95 In this respect, it is apparent from the provisional and definitive regulations that, first, although the Community producer's prices increased by 23.7% between 1988 and 1991, they decreased by 36.4% between 1991 and the investigation period and that, second, its financial results, which were still positive in 1991, became increasingly negative over subsequent years, with losses beginning to appear in 1992 and becoming significant during the investigation period (between 10% and 20% of turnover).

96 Accordingly, the deterioration in the Community producer's economic situation in 1992 must be attributed not to a situation which remained stable for more than 30 years, but to the change which took place in the market in 1992, namely a sudden fall in the price of imports from China. Moreover, it is not disputed that the imports of furfuraldehyde from the Dominican Republic did not prevent the Community producer from being largely profitable until the price of furfuraldehyde from China fell suddenly.

97 Finally, the definitive regulation emphasises at point 18 of its preamble that, although the market share of imports from the Dominican Republic increased between 1989 and 1992, that trend was reversed between 1992 and the end of the investigation period and the market share of imports from China increased from 13.7% to 15.2%.

98 In those circumstances, the institutions did not commit a manifest error of assessment in considering that the imports of furfuraldehyde from the Dominican Republic, to which no dumping was attributed, were not such as to break the causal link between the dumping practised in the imports of furfuraldehyde from China and the injury suffered by the Community industry.

99 In any event, it is settled case-law that the imposition of anti-dumping duties cannot be contested on the ground that they leave intact the problems which competition from products imported from non-member countries but not dumped pose for the Community industry.

100 The fact that a Community producer is experiencing difficulties attributable in part to causes other than dumping is not a reason for depriving that producer of all protection against the injury caused by dumping, as the Court of Justice held in its judgment in Case 250/85 *Brother Industries* v *Council* [1988] ECR 5683, paragraph 42.

101 In the case which gave rise to that judgment the applicant, Brother Industries, had claimed (paragraph 40 of the judgment) that the imposition on it of a definitive anti-dumping duty did not serve the interests of the Community in any way, when other undertakings from outside the Community continued to sell their products on the Community market at prices that were equal to, or lower than, those of the applicant.

102 The Court of Justice noted (paragraph 41) that Brother Industries was not asserting that the abovementioned undertakings sold their products on the Community market at dumping prices and that, in those circumstances, the interests of the Community were effectively guaranteed by protective measures against dumped imports, even though an anti-dumping duty did not have the effect of shielding Community manufacturers against competition from products which originated in other non-member countries but were not being dumped.

103 Similarly, in its judgment in Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 63, the Court of Justice, in response to the applicant's argument that part of the losses suffered by the Community producer had been caused by its inefficiency, held that the fact that a Community producer is facing difficulties attributable in part to causes other than the dumping is not a reason for depriving that producer of all protection against the injury caused by the dumping.

104 In the light of the foregoing considerations, since, first, it has been found that there was dumping of imports from China as well as injury caused by those imports and that, second, the applicant has not shown that the injury suffered by the Community industry as found in the provisional and definitive regulations was to be attributed to other factors, in particular to imports from the Dominican Republic, it must be concluded that the conditions laid down by Article 4(1) of the basic regulation have been fulfilled in the present case.

105 The applicant's argument relating to the effect on the injury of imports originating in non-member countries other than the Dominican Republic (see paragraph 80 above) is based on the principle that a distinction can be drawn between a market for furfuraldehyde intended for the cleaning of lubricating oils and a market for furfuraldehyde intended for the manufacture of furfuryl alcohol. The applicant subtracts 84% of the imports directed at QO Chemicals from all the imports from China and compares the surplus of those imports with those from non-member countries other than the Dominican Republic.

106 It has, however, been held (see paragraph 93 above) that 100% of the imports from China are likely to cause injury to the Community industry. Accordingly, in order to appreciate the relative significance of the imports from China by comparison with those from non-member countries other than the Dominican Republic, the comparison should be drawn between 100% of the imports from China and the imports from each of the other non-member countries and not between 16% of the imports from China and the total volume of imports from all the other non-member countries. In those circumstances, the applicant's argument to the effect that the imports from China were of the same significance as those from non-member countries other than the Dominican Republic cannot be accepted.

107 The applicant's assertion, challenged by the Council, that the volume of imports from China decreased during the investigation period is based on the figures provided by the table entitled 'Imports of furfuraldehyde by EU importers other than QO Chemicals (Market for lubricating oils)(Tonnes)' which include only imports directed to countries other than Belgium. However, 84% of the imports from China were intended for QO Chemicals, a company established in Belgium. Moreover, the applicant stated at the hearing that it had traditionally supplied approximately 10 000 tonnes of furfuraldehyde per annum to QO Chemicals, a figure which proves to be substantially higher than those which appear in another table relied upon in the application and entitled 'EU imports of furfuraldehyde from China'. Accordingly, the figures provided by the applicant are not sufficient to substantiate its claim.

108 In any event, it is settled case-law that, according to Article 4(2) of the basic regulation, examination of the injury suffered by the Community must encompass a series of factors no one of which can in itself constitute a decisive ground for a determination. That is why a reduction in the market share of the dumped imports does not preclude the finding that significant injury had been caused by them, provided that that finding is based on various factors which the abovementioned provision requires to be taken into consideration (Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraphs 50 to 52, Joined Cases C-320/86 and C-188/87 *Stanko France* v *Commission and Council* [1990] ECR I-3013 (summary publication), paragraphs 60 and 61, and Case C-157/87 *Electroimpex and Others* v *Council* [1990] ECR I-3021 (summary publication), paragraphs 41 and 42).

109 In the present case the definitive regulation (points 19 and 21 of the preamble) made the following findings relating to the injury suffered by the Community industry:

— import prices of furfuraldehyde originating in China undercut the prices of the Community producer by 24.4% and had fallen by more than 30% during the investigation period;

— the production of furfuraldehyde by Furfural Español had fallen by 17.7% between 1989 and the investigation period;

— the sales of that company on the Community market had fallen by 28.5% between 1989 and the investigation period;

— the rate of utilisation of its capacity had fallen from 85% to 70%;

— its prices had decreased by 36.4% between 1991 and the investigation period, the decrease being 22.4% between 1992 and that same period;

— its stocks had increased by more than 31.6% during the period under consideration.

110 In view of those factors, the Community institutions, notwithstanding any reduction in the imports from China, were entitled to conclude, without committing a manifest error of assessment, that imports from China at dumping prices had caused injury to the Community industry.

111 The third plea in law must therefore be rejected.

The fourth and fifth pleas in law, alleging infringement of Article 190 of the Treaty and manifest error of assessment with regard to the Council's refusal to accept the undertaking proposed by the applicant

Arguments of the parties

112 The applicant admits that the institutions have a wide discretion in deciding whether undertakings should be accepted or not. However, that discretion is, it points out, subject to the obligation to state reasons as laid down in Article 190 of the Treaty. According to the applicant, the statement of the reasons for the decision to reject the undertaking proposed by it is inadequate and that decision is therefore not valid.

113 According to the applicant, the undertaking which it proposed would have made it possible to limit the measures to what was strictly necessary in order to remove the injury alleged by the complainant. The two grounds for rejecting the undertaking which were put forward by the institutions are invalid. The decision refusing the undertaking must therefore be annulled.

114 The first ground for rejection (point 29 of the preamble to the definitive regulation) was that it was not possible to grant individual treatment to the applicant because, according to the institutions, it did not meet the requirements laid down in that regard for a country with a non-market economy. That ground for rejection derives from a previous Commission policy of 'individual treatment', which has since been drastically reconsidered. The applicant refers in this respect to previous cases.

115 The second ground for rejection (point 29 of the preamble to the definitive regulation) is based on the existence of breaches of undertakings made by Chinese exporters in recent years, including a breach by the applicant itself. The applicant submits that a breach of an earlier undertaking in the *potassium permanganate* case (Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's

Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports (OJ 1988 L 138, p. 1)), with which it is charged by the Council, was not committed by the applicant itself but rather by certain of its branches. That breach cannot, therefore, constitute a valid reason for rejecting its proposed undertaking. The applicant adds that it is not uncommon in the institutions' administrative practice for them to accept undertakings even though they have been offered by parties which had breached previous undertakings. The rejection of the undertaking which the applicant offered is therefore arbitrary.

116 The Council observes that the institutions are not required to accept undertakings. In any event, the circumstances of the present case would have prevented the Community institutions from accepting the undertaking proposed by the applicant which, since it related to quantity and not prices, would have conferred on the applicant a *de facto* monopoly with respect to exports of furfuraldehyde from China.

117 The Council maintains moreover that the applicant breached a previous undertaking. It points out that in the *potassium permanganate* case Sinochem had offered an undertaking covering all its exports, including those of its subsidiaries, so that it was responsible for their activities.

118 In its statement in intervention Furfural Español adds that the applicant failed to give any positive reason in support of its contention that the undertaking offered would have been sufficient to remove the injury being suffered by the EU industry and should therefore have been accepted.

Findings of the Court

119 No provision of the basic regulation requires the institutions to accept undertakings which are offered by economic operators who are the subject of an investigation prior to the imposition of anti-dumping duties. On the contrary, it is clear from Article 10 of that regulation that it is for the institutions, in the exercise of their discretion, to decide whether such undertakings are acceptable. It is not open to the Court to find fault with a rejection of offers of undertakings, which was issued after individual examination and was accompanied by a statement of reasons which satisfies the requirements of Article 190 of the Treaty, where the grounds on which that rejection is based do not exceed the margin of discretion conferred on the institutions (Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraphs 30 to 34).

120 The applicant claims that the obligation to state reasons has not been fulfilled. However, the reasons for which the Council rejected the undertaking offered by the applicant are set out at point 29 of the preamble to the definitive regulation. That statement of reasons enabled the applicant to know why its proposed undertaking had been rejected and the Court to exercise its power of review.

121 Thus, as the Council rightly maintains, the applicant did not propose to undertake to export at a certain minimum price but rather to limit on a yearly basis the volume of furfuraldehyde which it exports to the Community. The consequence of accepting the proposed undertaking would have been that a high anti-dumping duty would have been applied to all other imports from China and the applicant would have regained the monopoly in Chinese exports of furfuraldehyde to the Community. Such acceptance would thus have meant granting the applicant individual treatment without removing the injury.

122 The previous cases referred to by the applicant, in which the Community institutions accepted the undertaking proposed, are not comparable to the present case,

since only one single State-owned producer existed in the exporting country. The undertaking was therefore, in effect, proposed by the State itself rather than by an individual exporter and comprised all exports from the country. The effect of the acceptance was not, therefore, the granting of individual treatment to one specific exporter.

123 Finally, as regards the rejection of the undertaking on the ground that the applicant had breached previous undertakings, the applicant cannot avail itself of the fact that the breach of the undertaking given in the *potassium permanganate* case was attributable solely to its subsidiaries. In that case, its undertaking covered all its exports, including those of its subsidiaries, as the Council has contended without being contradicted on that point. In those circumstances, the applicant was responsible also for the activities of its subsidiaries.

124 Breach of a previous undertaking constitutes a factor which the Community institutions may validly take into consideration in conjunction with the facts of the case under consideration when deciding whether to accept or reject a proposed undertaking. The fact that, in previous cases, they have sometimes accepted undertakings given by exporters which had previously breached their undertakings is not such as to restrict the wide discretion which they enjoy in this matter.

125 In the present case the Council did not, therefore, exceed the bounds of its wide discretion by basing its rejection of the proposed undertaking on the fact that a previous undertaking had not been complied with.

126 In view of all the foregoing considerations, it must be concluded that the statement of the reasons for the measure satisfies the requirements of Article 190 of the

Treaty in so far as the contested rejection is concerned and that it is not open to criticism since the factors on which that rejection was based did not fall outside the bounds of the discretion which was vested in the Council.

127 Accordingly, the fourth and fifth pleas in law are unfounded.

128 The application must therefore be dismissed in its entirety.

Costs

129 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 and the Council has applied for costs, the applicant must be ordered to pay the costs incurred by the Council. Since the intervener, Furfural Español, has applied for costs, the applicant must, in the circumstances of the present case, also be ordered to pay the costs incurred by Furfural Español.

130 Under the first subparagraph of Article 87(4) of the Rules of Procedure, institutions which intervene in the proceedings are to bear their own costs. Accordingly, the Commission must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and to pay the costs of the Council and of the intervener Furfural Español;

3. Orders the Commission to bear its own costs.

García-Valdecasas Tiili Azizi

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 29 January 1998.

H. Jung R. García-Valdecasas

Registrar President