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

23 October 2003 *

In Case T-255/01,

Changzhou Hailong Electronics & Light Fixtures Co. Ltd, established at Changzhou (China),

Zhejiang Yankon Group Co. Ltd, formerly Zheijang Sunlight Group Co. Ltd, established at Shangyu (China), represented by P. Bentley QC, and F. Ragolle, lawyer,

applicants,

v

Council of the European Union, represented by S. Marquardt, acting as Agent, and by G.M. Berrisch, lawyer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by V. Kreuschitz, T. Scharf and S. Meany, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China (OJ 2001 L 195, p. 8),

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

composed of: R. García-Valdecasas, President, P. Lindh, J.D. Cooke, J. Pirrung and H. Legal, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 27 March 2003,

gives the following

Judgment

Legal background

1 Article 1(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, 'the basic regulation') provides that an anti-dumping duty may be applied to any dumped product the release of which for free circulation in the Community causes injury. Pursuant to Article 1(2) of the basic regulation a product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

2 The primary basis for determining a product's normal value is set out in Article 2(1) of the basic regulation. In accordance with that provision, 'normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.

3 Where normal value cannot be determined on that primary basis, Article 2(3) provides for it to be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs ('SG & A costs') and a reasonable profit margin, or on the basis of the

export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

4 Article 2(7) of the basic regulation laid down a special rule for imports from non-market economy countries. As it stood before being amended as set out in paragraph 5 below, it provided:

'In the case of imports from non-market economy countries and, in particular, those to which Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries... (OJ 1994 L 67, p. 89) applies, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

...'

5 Article 2(7) of the basic regulation was amended by Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18), and subsequently by Council Regulation (EC) No 2238/2000 of 9 October 2000 (OJ 2000 L 257, p. 2). As amended, that provision reads as follows:

'(a) In the case of imports from non-market-economy countries... normal value shall be determined on the basis of the price or constructed value in a market-economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market-economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market-economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from the Russian Federation, the People's Republic of China, the Ukraine, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO (World Trade Organisation) at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and

procedures set out in subparagraph (c) that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market-economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.'

Background to the dispute

6 The applicants are undertakings established in the People's Republic of China ('the PRC') which produce integrated electronic compact fluorescent lamps ('CFL-i products') and export them to the Community.

7 Following a complaint received from the European Lighting Companies Federation ('the complainant') on 4 April 2000, the Commission initiated an anti-dumping proceeding under Article 5 of the basic regulation concerning imports of CFL-i products from the PRC. The notice of initiation of that proceeding was published in the *Official Journal of the European Communities* of 17 May 2000 (OJ 2000 C 138, p. 8). That notice indicated *inter alia* that the Commission envisaged choosing Mexico as 'an appropriate market-economy country for the purpose of establishing normal value in respect of the [PRC]'.

8 Following the publication of that notice the applicants made their point of view known to the Commission, cooperated during the investigation, submitted information and were inspected by Commission officials on site at their premises in the PRC.

9 On 7 February 2001 the Commission adopted Regulation (EC) No 255/2001 imposing a provisional anti-dumping duty on imports of integrated electronic compact fluorescent lamps originating in the [PRC] (OJ 2001 L 38, p. 8, 'the provisional regulation'). That regulation imposed a provisional anti-dumping duty of 59.6% on the first applicant's products and of 35.4% on the second applicant's products.

10 It is apparent from recitals 26 to 32 in the preamble to the provisional regulation that, in determining normal value for the exporting producers of the PRC, the Commission confirmed the choice of Mexico as the appropriate market-economy non-member country. In that way it rejected the objections to that choice raised by some of those exporting producers, including the applicants. Normal value was determined on the basis of the prices of the products made by Philips Mexicana SA and sold on the Mexican market.

11 During the procedure before the Commission 10 exporting producers, including the applicants, claimed market-economy treatment in accordance with Article 2(7)(b) of the basic regulation. The applicants were refused that treatment on the grounds that they did not satisfy the conditions laid down in Article 2(7)(c) of the basic regulation.

12 On 16 July 2001 the Council adopted Regulation (EC) No 1470/2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the [PRC] (OJ 2001 L 195, p. 8, 'the contested regulation'). That

regulation imposed a definitive anti-dumping duty of 59.5% on the first applicant's products and of 35.3% on the second applicant's products.

Procedure and forms of order sought

13 By application lodged at the Registry of the Court of First Instance on 11 October 2001 the applicants brought the present proceedings.

14 By application lodged at the Registry of the Court of First Instance on 14 February 2002 the Commission sought leave to intervene in support of the forms of order sought by the Council.

15 By order of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance of 16 May 2002 the Commission was granted leave to intervene. The Commission waived its right to lodge a statement in intervention.

16 The parties presented oral argument and replied to the Court's questions at the hearing of 27 May 2003.

17 The applicants claim that the Court should:

— annul the contested regulation in so far as it applies to them;

— order the Council to pay the costs.

18 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

19 The applicants put forward two pleas in law in support of their action. The principal plea alleges infringement of Article 2(7)(b) of the basic regulation and of the principle of equal treatment. The subsidiary plea alleges infringement of Article 2(7)(a) of the basic regulation and of the principle of equal treatment.

First plea in law: infringement of Article 2(7)(b) of the basic regulation and of the principle of equal treatment

The applicants' arguments

20 The applicants maintain that, by determining the normal value of their products in accordance with Article 2(7)(a) of the basic regulation and not with Article 2(1)

to (6) thereof, the Council has infringed Article 2(7)(b) of that regulation and the principle of equal treatment.

21 They claim that in an anti-dumping investigation involving imports from the PRC the general rule is that normal value should be determined on the basis of normal value in an appropriate market-economy third country. It is the established policy of the Commission to set the same value for all the exporting producers in the PRC.

22 In their submission, Article 2(7)(b) of the basic regulation, as amended, provides for an exception to that general method of determining normal value in the case of non-market-economy third countries, an exception applicable in anti-dumping investigations concerning imports from, *inter alia*, the PRC or any non-market-economy country which is a member of the WTO (World Trade Organisation) at the date of the initiation of the investigation. In such a case, normal value is to be determined 'in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned and if this is not the case, the rules set out under subparagraph (a) shall apply'.

23 According to the applicants, the Community legislature recognises in this manner that the exporting producers in the PRC do sometimes operate in market-economy conditions and that, in consequence, the ordinary and fairer method under Article 2(1) to (6) of the basic regulation can be applied in order to establish whether or not those exporting producers are dumping.

24 They state that the Commission and Council's refusal to use a Chinese producer recognised to operate in market-economy conditions as the closest basis for comparison because the reference in Article 2(7)(a) of the basic regulation to 'a market-economy third country' necessarily excludes the PRC arises from a highly simplistic reading of the regulation and runs counter to the obvious purpose of the legislation, which is to find a reasonable normal value in order to establish whether or not dumping is taking place. In the circumstances of the case Philips Mexicana's situation is plainly further removed from the applicants' circumstances than the situation of another Chinese company unconnected to the complainants.

25 They observe that in this instance two Chinese exporting producers, namely, Lisheng Electronic & Lighting (Xiamen) Co. Ltd ('Lisheng') and Philips and Yaming Lighting Co. Ltd ('Philips-Yaming') were granted market-economy treatment, that is to say, the Commission accepted that they satisfied the criteria set out in Article 2(7)(c). As a result, the Commission considered that market-economy conditions obtained as regards one producer or more in the PRC. The applicants conclude that Article 2(7)(b) applied and that a normal value ought therefore to have been determined for all Chinese exporting producers on the basis of Article 2(1) to (6). According to the applicants, it is only '[w]hen this is not the case', in other words, where no producer carries on activity in market-economy conditions, that the general method under Article 2(7)(a) is to apply and that a normal value has to be determined for all exporting producers on the basis of normal value in an appropriate analogue country.

26 The applicants argue that it was therefore quite possible in the circumstances of this case to apply Article 2(1) to (6) of the basic regulation and that the Commission did indeed do so in part, as is clear from the 25th recital in the preamble to the provisional regulation. That recital states that, for one of the exporting producers granted market-economy treatment, SG & A costs and the profit margin were calculated on the basis of the figures for the other exporting producer granted that treatment because the first exporting producer had not made any representative domestic sales of the product concerned.

27 The applicants acknowledge that the main method of determining normal value set out in Article 2(1) of the basic regulation did not apply to them, since the Commission had found that they did not operate in market-economy conditions. It is, none the less, their view that the Commission could have applied the method contained in Article 2(3). 'Constructed normal value' is made up of two elements, namely, the cost of production in the country of origin and a reasonable margin for SG & A costs and for profits. The applicants state that the Commission could have established the first of those components, either by taking the applicants' actual production costs or, if it regarded those figures as unreliable, by seeking an objective measure of production costs in the country of origin by, for example, taking as a point of reference the production costs of other producers for which the figures were reliable (for example, the production costs of one of the two exporting producers which had been granted market-economy treatment). With regard to the second component, namely, SG & A costs and profit margin, the applicants submit that the Commission could, in accordance with Article 2(6), use the weighted average of the actual amounts determined for the exporting producers granted market-economy treatment. They maintain, as a result, that Article 2(7)(b) required the Commission to determine the normal value of their products on the basis of Article 2(1) to (6), and that it was quite feasible to do so.

28 Furthermore, that refusal to determine normal value on the basis of Article 2(1) to (6) for exporting producers which obtain individual treatment leads to disproportionately unequal treatment of those producers as compared with the treatment of producers accorded the status of a market-economy company.

29 The applicants argue that, contrary to what the Commission maintains, Article 2(7)(b) does not establish any link between producers operating in market conditions and producers in respect of which the method under Article 2(1) to (6) may be used. Article 2(7)(b) merely lays down a condition which, if satisfied, permits the application of Article 2(1) to (6) generally and to

the exclusion of Article 2(7)(a). In addition, even though the conditions laid down in Article 2(7)(a) have to be assessed by reference to individual producers, nothing in the text makes it possible to assert that application of paragraphs 1 to 6 must be limited to those individual producers.

30 The applicants accept that the Commission might decide that their domestic prices had not been set 'in the ordinary course of trade' and that the figures given for their costs were not reliable since they did not operate in market-economy conditions. That does not, however, prevent normal value from being determined on the basis of Article 2(1) to (6), because there exist other producers in the country which do operate in market-economy conditions. Once such exporting producers are found to exist, normal value both may and must be determined for all exporting producers pursuant to Article 2(1) to (6) of the basic regulation.

31 The Council first of all draws attention to the purpose and legislative history of Article 2(7) of the basic regulation. In particular, it claims that, as it stood before Regulation No 905/98, Article 2(7) of the basic regulation defined non-market-economy countries as those to which Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83 (OJ 1994 L 67, p. 89) applied, including, in particular, the PRC and Russia. It notes that, under the old version of Article 2(7), normal value was to be determined by reference to what is known as the 'analogue country' method, which means that for all producers in non-market-economy countries normal value was determined on the basis of sale price or of the normal constructed value in a market-economy third country. According to the Council, the producer's individual situation was not therefore taken into account.

32 It states that, as a result of changing economic conditions in the PRC and Russia, the Community institutions judged that it could no longer be supposed that all producers' prices and costs did not *ipso facto* reflect market-economy conditions.

Amendments were therefore made to Article 2(7)(b), introducing a specific individualised assessment applicable to exporting producers in the PRC and Russia. For those producers, normal value can in that way be calculated according to the method contained in Article 2(1) to (6) of the basic regulation, that is to say, according to the same method as that applicable to imports from market-economy countries, but on condition that one or more producers should submit a properly substantiated claim showing, in accordance with the criteria and procedures laid down in Article 2(7)(c), that 'market-economy conditions prevail for this producer or [these] producers'.

33 The Council submits that the overall structure of the new Article 2(7) leaves no doubt that the PRC and China are not yet to be considered to be market-economy countries. That is borne out by the preamble to Regulation No 905/98, which refers to 'the emergence of firms for which market-economy conditions prevail'.

34 The Council emphasises that the applicants' request for market-economy treatment was considered by the Commission, which concluded that they did not meet the requirements of Article 2(7)(c). It observes that the applicants do not allege that the Commission made any error in that regard. The applicants' claims are based entirely on the proposition that, because two particular exporting producers from the PRC were found to fulfil the criteria laid down in Article 2(7)(c), all exporting producers throughout the PRC must be granted market-economy treatment, irrespective of whether or not they themselves satisfy those conditions.

35 The Council submits that the applicants' interpretation is incorrect and inconsistent with the wording of Article 2(7)(b). Market-economy treatment may be granted to one or more producers only if it is shown that 'market-economy conditions prevail for this producer or [these] producers'. The interpretation suggested by the applicants contradicts that text in that it requires market-

economy treatment to be granted whenever such conditions prevail for at least one other producer. In addition, it is inconsistent with the wording of Article 2(7)(b) which requires the demonstration that market-economy conditions prevail to be made 'in accordance with the criteria and procedures set out in subparagraph (c)' of that article. In the Council's submission, all those criteria must be applied to each undertaking individually. It does not make sense to argue, as the applicants do, that the basic regulation requires detailed assessment of those individual criteria in respect of one producer but then blindly applies the result of that assessment to all producers, including those who meet none of those conditions.

36 The Council submits that Article 2(7)(b) calls for an individualised assessment of each producer's claim for market-economy treatment. It maintains that where it is not established that market-economy conditions prevail for the producer or producers making the claim, the last sentence of Article 2(7)(b) compels the Community institutions to apply the rules set out in Article 2(7)(a). Since it is common ground that the applicants did not satisfy the conditions set out in Article 2(7)(c), the Council did not infringe Article 2(7)(b) by refusing market-economy treatment to the applicants.

Findings of the Court

37 In their first plea, the applicants claim that it would have been in keeping with Article 2(7)(b) of the basic regulation, and permissible under Article 2 thereof, for the normal value of their products to have been determined according to the rules applicable to market-economy countries provided for in Article 2(1) to (6) rather than according to the provisions of Article 2(7)(a).

38 That argument cannot be accepted.

39 By way of preliminary remark, it is to be noted that the method of determining normal value set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down in Article 2(7)(a) applicable to imports from non-market-economy countries. It is settled case-law that any derogation from or exception to a general rule must be interpreted strictly (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 23; Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19, and C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 56).

40 In the first place, the Court considers that it follows from the wording and structure of Article 2(7) of the basic regulation, in particular when read in the light of the recitals in the preamble to Regulation No 905/98, that determination of the normal value of products originating in the PRC by reference to the rules laid down in Article 2(1) to (6) is confined to specific individual cases in which the producers concerned have each of them made a properly substantiated claim in accordance with the criteria and procedures laid down in Article 2(7)(c). That follows from the reference in Article 2(7)(b) to the obligation to show that market-economy conditions prevail 'for this producer or [these] producers'. That interpretation is confirmed by the sixth recital in the preamble to Regulation No 905/98, which refers to claims made by producers that 'wish to avail themselves of the possibility to have normal value determined on the basis of rules applicable to market-economy countries', namely, the rules under Article 2(1) to (6). Moreover, the fourth recital in the preamble to Regulation No 905/98, while recognising that reforms in the PRC have fundamentally altered that country's economy, makes it clear that while that has led to the appearance of some market conditions, that is in respect of certain firms only and not of the country as a whole. The Community legislature therefore clearly intended the application of the rules relating to market-economy countries to products from the PRC to be dependent on the presentation by each undertaking individually concerned of a properly substantiated claim in accordance with the criteria and procedures set out in Article 2(7)(c) of the basic regulation.

41 In the second place, the argument put forward by the applicants is incompatible with application of the rules laid down in Article 2(1) to (6) of the basic regulation, which presupposes that certain data, such as the prices paid or payable, the cost of production and sales in the ordinary course of trade in a market economy and relating primarily to the product under investigation, are available. The criteria under Article 2(7)(c) of the basic regulation which must be met if market-economy treatment is to be allowed, namely, the provisions of Article 2(1) to (6), require the undertakings wishing to claim that treatment to operate in market-economy conditions and prices, costs and the set of basic books of account to be reliable. In the present case the claims made by the applicants under Article 2(7)(b) were rejected.

42 In the third place, given that the Community institutions competent in the anti-dumping sphere are in each case obliged to determine a product's normal value on the basis of the rules applicable, the applicants' suggested interpretation of Article 2(7)(b) would produce a result incompatible with the purpose of the rules, namely, that once a producer of such a product in the PRC had presented a properly substantiated claim pursuant to that provision, those institutions would be bound to apply the provisions of Article 2(1) to (6) to all the other producers in that country that were subject to the investigation, including those that deliberately refrained from submitting claims on the ground that use of the analogue country and producer chosen in determining normal value would be more favourable to them.

43 The complaint alleging breach of the principle of equal treatment (see paragraph 28 above) must be rejected as unfounded for the reasons set out in paragraph 60 et seq. below.

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

Second plea in law: infringement of Article 2(7)(a) of the basic regulation and breach of the principle of equal treatment

Arguments of the parties

45 By their secondary plea the applicants maintain that, even if in the circumstances of this case recourse to Article 2(7)(a) is not contrary to Article 2(7)(b), the Council has still infringed Article 2(7)(a) and the principle of equal treatment by choosing Philips Mexicana SA as the analogue market-economy producer.

46 They submit that the criterion of an analogue country is used in order to find an objective measure of normal value in undistorted open-market conditions. In accordance with the Commission's practice and settled case-law, two criteria must be more particularly taken into account in this context, namely, the comparability of the products concerned, on the one hand, and on the other, the comparability of the production process or of the structure of production costs. Furthermore, the use of the words 'or where those are not possible, on any other reasonable basis' in Article 2(7)(a) shows that the objective of all the methods provided for by that provision is to obtain a 'reasonable' measure of normal value in the country of export. When the analogue country is selected, the object must be to come as close as possible to the situation that would exist in the country of export if it were a market-economy country (Opinion of Advocate General Van Gerven in Case C-16/90 *Nölle* [1991] ECR I-5163, I-5172, paragraph 15).

47 The applicants allege that, when it determined normal value on the basis of an undertaking established in Mexico and recognised that adjustments were needed to take account of differences in the lamps' operating voltage, the level of trade and product types, the Commission ought to have seen that the adjusted normal value was still far higher than that of at least one of the exporters that qualified for market-economy treatment. That ought to have prompted the Commission to conclude that analogue normal value determined in Mexico, even when adjusted, was plainly inappropriate and unreasonable. It ought therefore to have employed an alternative reasonable method in calculating the appropriate normal value, either by making further adjustments or by using a different analogue country or any other reasonable basis 'as similar as possible' to the normal value in market-economy conditions in the PRC.

48 The applicants claim that the fact that the result of concurrent use of both subparagraphs (a) and (b) of Article 2(7) in anti-dumping cases is unequal treatment, unless adequate adjustment is made to normal value determined in the analogue country, is clearly illustrated by the ferro-molybdenum case which gave rise to Commission Regulation (EC) No 1612/2001 of 3 August 2001 imposing a provisional anti-dumping duty on imports of ferro-molybdenum originating in the People's Republic of China (OJ 2001 L 214, p. 3, point 52). They argue that that regulation demonstrates the consistent disadvantage suffered by those undertakings which receive individual treatment, because normal value in the analogue country is not adequately adjusted so as to be 'as similar as possible' to normal value in market-economy operating conditions in the PRC. In addition, that disadvantage amounts to unequal treatment in that the companies receiving individual treatment and those granted market-economy status compete against each other in the market for other exports to the Community.

49 The applicants maintain that the words 'where those are not possible', used in the first sentence of Article 2(7)(a), do not refer to an arithmetical impossibility but to the question whether the methods come 'as close as possible' to the situation that

would exist if the country of export were a market-economy country. Thus recourse to normal value in a market-economy third country is always subject to the overriding requirement that the result should be reasonable. In their submission, 'the fact that normal value has actually been determined for some exporters from the PRC provides a more reasonable basis of determination than a Mexican company related to a complainant'. They claim that the Council's submission that they have confused dumping margins with normal value is without foundation.

50 In the applicants' view, the Council's argument that, even had the Community institutions erred in calculating normal value, the dumping determination would not have been vitiated must be rejected as inadmissible and invalid, being based on an assessment made by the Community institutions after the contested regulation was adopted and never subjected to scrutiny during the investigation procedure. In particular, that assessment was not submitted to the Advisory Committee for consultations with the representatives of the Member States, nor was it disclosed to the applicants pursuant to Article 20 of the basic regulation.

51 The Council contends that the interpretation of Article 2(7)(a) of the basic regulation is relatively straightforward. The primary method of determining normal value in the case of imports from non-market-economy countries is that of 'the price or constructed value in a market-economy third country or the price from such a third country to other countries, including the Community'. A secondary method of determining normal value is then defined, but the provision in question limits the circumstances in which the institutions may resort to that secondary method. In other words, where it is not possible to employ the primary method, it is permissible to have recourse to 'any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin'. It

follows, according to the Council, that the expression 'where [that is] not possible' means that the method using 'any other reasonable basis' is valid only as a method of last resort.

52 The Council submits that in the circumstances it correctly applied the provisions of Article 2(7)(a). It observes that the PRC is neither a 'market-economy country' nor a 'third country' within the meaning of Article 2(7)(a) and that the applicants acknowledge that, since they argue that the prices charged by a Chinese producer granted market-economy treatment would constitute 'any other reasonable basis' for the purposes of that provision. The Community institutions would, however, have been entitled to resort to that subsidiary method only if it had not been possible to refer to prices charged in a market-economy third country, namely, Mexico, in order to calculate normal value. The fact that adjustments had to be made does not mean that it was not possible to use Mexican prices. The Council notes that the applicants do not claim that it failed to make the appropriate adjustments and that they do not identify any issue on which adjustments were wrongly made or omitted.

53 In the Council's view, the applicants' allegation that it was unreasonable and inappropriate to determine normal value by taking Mexico as the reference country because normal value, after adjustment, was still much higher than that of one of the Chinese exporters that qualified for market economy treatment makes no sense. It alleges that the applicants have confused dumping margins with the concept of normal value. Furthermore, it remarks that the differences in dumping margins between those exporters which received market economy treatment and those which did not are no indication whatsoever that the choice of the analogue country was unreasonable, let alone impossible. The Council observes that one of the producers which received market economy treatment had the highest of all the dumping margins found and that there was a considerable difference between the dumping margins of those producers which did not receive

market economy treatment ranging from 8.4% to 59.5%. Even if the list of relevant criteria for the choice of the reference country, as given by the Court of Justice in *Nölle*, is not exhaustive, it is unquestionable, according to the Council, that the amount of the dumping duty finally imposed could never be a relevant criterion.

54 The Council submits that the discretion enjoyed by the Community institutions in the choice of an analogue country does not authorise them to ignore the requirement to choose a market-economy third country wherever possible. It notes that the Commission and the applicants were equally unable to find another analogue country more suitable than Mexico which satisfied that requirement.

55 The Council denies that it breached the principle of equal treatment. Recital No 20 in the preamble to the contested regulation itself contradicts the applicants' allegation that the ferro-molybdenum case demonstrates a consistent disadvantage for undertakings receiving individual treatment. That recital shows that the dumping margins for undertakings granted market-economy treatment ranged from 61.8% (Philips & Yaming) to *de minimis* (Lisheng), whereas the margins for undertakings receiving individual treatment ranged from 59.5% (Hailong) to 8.4% (Zuoming). There is, therefore, no consistent disadvantage for undertakings receiving individual treatment and no unequal treatment of them.

56 The Council argues that, even if the Community institutions erred in calculating normal value, such an error had no material effect on the actual finding that dumping was taking place. As a hypothesis, it argues that the Commission calculated the dumping margins that would have been determined if normal value had been established on the basis of sales made by the Chinese exporters granted market-economy treatment, as the applicants suggest; for the purposes of that

calculation, it was assumed that the applicants were allowed a generous adjustment reaching 21.5% of normal value. That calculation resulted in a dumping margin of 64.9% for the first applicant and of 45.3% for the second, margins which are actually higher than those established in the contested regulation.

Findings of the Court

57 In their second plea the applicants make the secondary claim that the competent institutions, having determined the normal value of the products in question on the basis of the rules applicable in market-economy conditions to two Chinese producers, that is to say, the rules set out in Article 2(1) to (6) of the basic regulation, ought to have realised that the use of Philips Mexicana was clearly inappropriate and unreasonable, since it led to the fixing of normal values which, even when adjusted, were still much higher than the value set for at least one of the two Chinese producers granted market-economy treatment. The competent institutions ought therefore to have had recourse to some 'other reasonable basis' as provided for by Article 2(7)(a).

58 That argument must be rejected.

59 The competent institutions may choose not to apply the general rule set out in Article 2(7)(a) of the basic regulation for the determination of the normal value of products originating in non-market economy countries, using a different reasonable basis, only where it is impossible to apply that general rule. The Court of First Instance considers that such impossibility arises only where the data required in order to determine normal value are not available or are not reliable. That it happens to be necessary to adjust those data in order to adapt them as

closely as possible to the conditions which would obtain for Chinese producers if the PRC were a market-economy country does not demonstrate that it was either impossible or even inappropriate to use the data concerning Philips Mexicana.

60 The applicants' argument that the approach adopted by the competent institutions leads to unequal treatment, in that it consistently disadvantages those producers which receive individual treatment as compared with those accorded 'market-economy treatment' pursuant to Article 2(7)(b), cannot be accepted. It is settled case-law that for the Community institutions to be accused of discrimination, they must be shown to have treated like cases differently, thereby placing some traders at a disadvantage by comparison with others, without such differentiation's being justified by the existence of substantial objective differences (Joined Cases T-164/96, T-165/96, T-166/96, T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 188, and the decisions referred to therein).

61 In the circumstances of this case the applicants, which do not operate in market-economy conditions, were not in the same situation as the two Chinese producers which did operate in those conditions and which had submitted properly substantiated claims in that connection. In addition, as the competent institutions have noted, the very great divergence between the dumping margins imposed by the contested regulation in respect of the two undertakings accorded market-economy treatment is proof that the producers for which normal value was determined pursuant to the rule laid down in Article 2(7)(a) did not necessarily suffer any disadvantage in comparison with those for which normal value was determined pursuant to the rule laid down in Article 2(7)(b).

62 It follows that the second plea is unfounded and that the action must therefore be dismissed in its entirety.

Costs

63 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Council has applied for an order for costs, the applicants must be ordered to pay the costs incurred by the Council.

64 In accordance with the first paragraph of Article 87(4) of the Rules of Procedure, institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders the applicants to bear their own costs and to pay the costs incurred by the Council;**

3. **Orders the Commission to bear its own costs.**

García-Valdecasas Lindh Cooke

Pirrung Legal

Delivered in open court in Luxembourg on 23 October 2003.

H. Jung P. Lindh

Registrar President