JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
18 September 1996 *

In Case T-155/94,

Climax Paper Converters Ltd, a company incorporated under the laws of Hong Kong, with its registered office in Hong Kong, represented by Izzet M. Sinan, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Council of the European Union, represented initially by Bjarne Hoff-Nielsen and Jorge Monteiro, subsequently by Mr Hoff-Nielsen and Yves Cretien, subsequently by Mr Hoff-Nielsen, Legal Advisers, acting as Agents, and Hans-Jürgen Rabe and Georg M. Berrisch, Rechtanwälte, Hamburg, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

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

intervener,

* Language of the case: English.

APPLICATION for the annulment of Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty (OJ 1993 L 333, p. 67),

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 8 May 1996,

gives the following

Judgment

Relevant provisions and facts

1 This is an application for the annulment of Council Regulation (EC) No 3664/93 of 22 December 1993 which imposed a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the

People's Republic of China and provided for definitive collection of the provisional anti-dumping duty (OJ 1993 L 333, p. 67, hereinafter 'the regulation at issue'). That regulation followed upon Commission Regulation (EEC) No 2477/93 of 6 September 1993 which had imposed a provisional anti-dumping duty on imports of certain photo albums originating in the People's Republic of China (OJ 1993 L 228, p. 16, hereinafter 'the provisional regulation').

2 The applicant, Climax Paper Converters Ltd (hereinafter 'Climax Paper Converters'), a company incorporated under Hong Kong law, exports to the Community photo albums in bookbound form manufactured in the district of Baoan, China, in production plants established in agreement with the Chinese authorities.

3 Following a complaint lodged by the Committee of European Photo Album Manufacturers (CEPAM), in May 1992 the Commission initiated an anti-dumping proceeding concerning imports into the Community of certain photo albums originating in China, pursuant to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic anti-dumping regulation'), notice of initiation of the proceeding being published in OJ 1992 C 120, p. 10.

4 On 13 May 1992 the Commission sent to the applicant a questionnaire, to which it replied on 6 July 1992. The applicant was the only exporter to respond to the questionnaire, which had been sent by the Commission to non-Community exporters and producers.

5 By letter of 17 July 1992 the applicant submitted additional observations to the Commission.

6 On 10 March 1993 the Commission wrote to the applicant requesting information concerning the applicant's independence from the Government of the People's Republic of China. In its reply to that request the applicant stated that it was free to determine the export prices for albums manufactured in China, to choose the currency used for exports, to determine the quantities it produced and exported and, finally, to run the operations of the factory situated in the district of Baoan without interference from the Chinese Government.

7 By letter of 5 May 1993 the applicant gave to the Commission, at the latter's request, further details regarding the agreements governing that factory and regarding the relationship between the applicant and its Chinese partners.

8 The Commission adopted the provisional regulation on 6 September 1993. That regulation imposed a provisional anti-dumping duty of 19.4% on imports of photo albums in bookbound form originating in the People's Republic of China.

9 By letter of 9 September 1993 the Commission informed the applicant of the principal facts and considerations which had led it to impose the provisional anti-dumping duty.

10 The applicant's representatives and the Commission's officials met on 20 September 1993 to discuss the provisional regulation.

11 On 8 October 1993 the applicant commented in writing on the provisional regulation.

12 On 3 November 1993 the applicant was given a hearing by the Commission.

13 By letter of 9 November 1993 the Commission again informed the applicant of the principal facts and considerations on the basis of which it intended to propose to the Council the imposition of a definitive anti-dumping duty.

14 On 22 December 1993 the Council adopted the regulation at issue which imposes a definitive anti-dumping duty of 18.6% on imports into the Community of photo albums in bookbound form originating in the People's Republic of China.

The regulations in question

15 In the course of the proceedings before the Commission, the applicant requested that a separate dumping margin should be applied in its case. The Commission concluded that in the particular case it was not at the time appropriate to grant individual treatment and refused that request, justifying its conclusion in points 13 to 18 of the provisional regulation.

16 The Commission observes, first, that the basic anti-dumping regulation does not require individual treatment to be given, since it provides that anti-dumping regulations need only specify the country and the product on which the duty is imposed (point 13 of the provisional regulation).

17 Secondly, it states that, since in the case of non-market economy countries the normal value must be determined on the basis of prices or costs in market economy countries, the only way in which individual treatment could be given to exporters

in non-market economy countries is by taking account of their individual export prices. However, that method would tend to give rise to distorted, and therefore inappropriate, individual results (point 14 of the provisional regulation).

18 Thirdly, the Commission refers to the extreme difficulty in the case of a country such as the People's Republic of China where the State still dominates all economic activity of establishing in practice whether a company is really independent of the State and, in particular, whether that independence is permanent (point 15 of the provisional regulation).

19 Fourthly, it states that it is not at present in a position to verify, on the spot, the declarations of Chinese exporters, owing mainly to the difficulty of carrying out inspections in countries with centrally planned economies. It refers in particular to the difficulties of verifying some arrangements which ostensibly guarantee independence from the State, especially where such arrangements have been made in the knowledge that anti-dumping measures may be adopted (point 16 of the provisional regulation).

20 It adds that individual treatment may offer a State the opportunity to circumvent anti-dumping measures by channelling exports through the exporter with the lowest duty or concentrating exports on it. The Commission concludes that, since it is not wholly satisfied that those difficulties will not arise, departures should not be made from the general rule whereby a single anti-dumping duty is established for State-trading countries (point 17 of the provisional regulation).

21 As regards the present case, point 18 of the provisional regulation states as follows:

' [...] the production arrangements in the People's Republic of China are governed by an agreement between the company in Hong Kong and the Chinese authorities. This agreement does not establish that the production operations in China are fully autonomous from State control. This production is carried out in China in premises where the Hong Kong company uses its own machinery and staff but which are owned by, and use managers and labour provided by, a Chinese public entity which has to report on its economic activities to Chinese State authorities and which signed the agreement with the Hong Kong company. The wording of certain provisions of this agreement, notably concerning the management of the production plant and the recruitment and payment conditions of the workforce, suggests that the administration of the production and trade business for the plant concerned is not actually independent of the influence of the Chinese authorities.

Moreover, in the documentation submitted, reference was made to another agreement with the indication that its terms have to be implemented by the parties to the first agreement mentioned above. This second agreement was not submitted to the Commission because, it was alleged, it was concluded between two Chinese parties and was not a public document. However, according to the information submitted, it stipulated the terms and conditions for inviting foreign investment in the Chinese region concerned, and those terms and conditions are relevant for the conduct of the business operations in the Chinese plant producing photo albums.'

22 The Council confirmed the Commission's conclusion that individual treatment of the applicant should be refused. While acknowledging that 'the exclusion of individual treatment and consequently the establishment of a single dumping margin has an impact on the cooperating exporter', the Council finds that 'no other

solution is practicable since the overriding consideration must remain that all exports from countries referred to in Article 2(5) of the Basic Regulation must be subject to a single country-wide duty for the reasons set out in recitals 13 to 17 of the provisional Regulation and since, in the present case, it is not established that Climax is free to act independently from the State in the conduct of its business affairs' (point 9 of the regulation at issue).

23 The normal value was determined on the basis of the constructed value of the like product in a market economy country, South Korea, in accordance with Article 2(5)(b) and Article 2(3)(b) of the basic anti-dumping regulation (points 19 to 22 of the provisional regulation and points 10 to 12 of the regulation at issue).

24 As regards the determination of the export price, the Commission used two methods. In respect of exports for which it had information supplied by the applicant, the export price was constructed on the basis of the price at which the product concerned was resold by the applicant to independent Community customers, as provided for by Article 2(8)(b) of the basic anti-dumping regulation. As to the other exports, for which no information was available, the prices were determined on the basis of the facts available, in accordance with Article 7(7)(b) of the basic anti-dumping regulation. For that purpose, the applicant's lowest prices were used so as to avoid rewarding non-cooperation by the other exporters concerned (point 23 of the provisional regulation and point 15 of the regulation at issue).

25 The Council confirmed the Commission's approach. In point 17 and points 19 to 21 of the regulation at issue the Council set out the method used by the Commission in order to determine the export prices for which no information was

available. It emerges from that account that, in estimating the volume of those exports, the Commission had available statistics from Eurostat on the total volume of imports from the People's Republic of China into the Community of photo albums of all types and knew the precise volume of albums exported by the applicant. It was estimated that 50% of the balance was made up of bookbound photo albums. That estimate was based on statements, confirmed by an importer, that three manufacturers of bookbound photo albums had relocated their production to the People's Republic of China and on the fact that the applicant was apparently the main exporter of the product concerned to the Community (point 17 of the regulation at issue).

26 Next, in establishing the export prices the Commission divided the albums exported by the applicant into sub-categories, taking as a basis the size of the inner sheet and the outer cover and the number of sheets contained in the albums. After reexamining the representativeness of the sub-categories included in the exercise, in the course of the procedure preceding the adoption of the regulation at issue, all the sub-categories in which sales exceeded 5% of total sales were included in the sample (points 19 to 21 of the regulation at issue).

27 As regards the comparison, the normal value and the export prices were compared on a transaction-by-transaction basis (point 24 of the provisional regulation). A single dumping margin was established for the People's Republic of China on the basis of a weighted average of a dumping margin of 11.5%, applicable to exports for which information was available, and a dumping margin of 32.3%, calculated on the basis of the facts available in accordance with Article 7(7)(b) of the basic anti-dumping regulation, for the other exports. That latter dumping margin was slightly amended during the procedure prior to the adoption of the regulation at issue. Following that amendment, the single dumping margin was established on a weighted average basis at 18.6% (point 25 of the provisional regulation and point 23 of the regulation at issue).

Procedure

28 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 15 April 1994, the applicant brought an action for annulment of the regulation at issue.

29 By order of 7 November 1994 the President of the Fourth Chamber, Extended Composition, of the Court of First Instance granted the Commission leave to intervene in support of the form of order sought by the Council. By letter of 20 December 1994 the Commission stated that it did not wish to submit a written statement in intervention.

30 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry.

31 At the hearing on 8 May 1996 the parties presented oral argument and replied to questions put by the Court.

Forms of order sought

32 Climax Paper Converters, the applicant, claims that the Court should:

— declare the application admissible;

— annul Regulation No 3664/93;

— order the Council to pay the costs.

33 The Council, the defendant, contends that the Court should:

— declare the application inadmissible;

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

34 Without formally raising a plea of inadmissibility under Article 114 of the Rules of Procedure, the Council contends, first, that the applicant is not directly and individually concerned by the regulation at issue. It points out that in Case 113/77 *NTN Toyo Bearing Company and Others* v *Council* [1979] ECR 1185, paragraph 11, the Court of Justice held that anti-dumping regulations directly and individually concern only the producers named in them.

35 In that regard the Council observes that in the present case the country concerned is a State-trading country and for that reason the regulation at issue imposes a single duty for the country as a whole in respect of all imports from that country. It contends that since the regulation at issue was therefore addressed to the People's Republic of China as a State, the only entity directly and individually concerned is the State itself or, possibly, a State organization or company responsible for all, or at least a large majority of, exports in the sector in question. In the past,

only such organizations have brought actions against anti-dumping regulations concerning State-trading countries. The Council observes that the applicant is not such an organization.

36 According to the Council, the applicant cannot rely on the judgment of the Court of Justice in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraphs 11 and 12, because the rule, laid down by the Court of Justice in that judgment, that anti-dumping regulations are of such a nature as to be of individual concern to those producers and exporters who are able to prove that they were identified in the measures of the Commission or of the Council or that they were concerned by the preliminary investigations, applies only to producers and exporters charged with dumping. In the present case, the charge of dumping is not made against the applicant or other producers and exporters, but against the People's Republic of China as a State.

37 The Council then observes that according to the order of the Court of Justice in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, which concerned an importer, the mere participation in an investigation, or the fact that an applicant is named in the preamble to a regulation, does not render an action admissible.

38 As to the judgment of the Court of Justice in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, the Council observes that Extramet was an independent importer established in the Community and not a producer or exporter in a State-trading country.

39 The applicant claims that it is directly and individually concerned both by the provisional regulation and by the regulation at issue. In that regard, it points out, first, that it was the only exporter to participate in all phases of the proceedings; secondly, that the information supplied by it constitutes the sole basis for the findings in the regulation at issue; thirdly, that it is expressly named both in the provisional

regulation and in the regulation at issue; and, finally, that the duties imposed by the regulations apply to its products.

40 It challenges the Council's argument that, in order to be directly and individually concerned by an anti-dumping regulation, it is necessary to be specified by name in that regulation. It observes that in *Allied Corporation and Others* v *Commission*, cited above, the Court of Justice laid down two alternative tests, namely, identification in the measures adopted by the Commission or Council, or the fact that the parties were concerned by the preliminary investigations. It considers that it is in any event named in the regulation at issue, since, in view of the fact that it is the only cooperating party, the findings in the regulation are based solely on the information it provided.

41 The applicant also challenges the argument put forward by the Council to the effect that only the People's Republic of China or a State organization or company responsible for all, or a large majority of, exports is directly and individually concerned. The fact that the regulation at issue concerns imports from a State-trading country is irrelevant to the question of *locus standi*. That is clear from the judgments in *Allied Corporation* and in *Extramet*, cited above, in which the Court of Justice held that 'although regulations imposing anti-dumping duties are ... of a legislative character inasmuch as they apply to all the traders concerned, taken as a whole, their provisions may none the less be of individual concern to certain traders'.

42 Secondly, the Council contends that the action must be declared inadmissible since the applicant is seeking the annulment of the regulation at issue in its entirety, and not just to the extent that the applicant was not exempted from the application of the anti-dumping duty. It observes that, according to settled case-law, and in particular to the judgment of the Court of Justice in Case 174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 7, a regulation imposing different anti-dumping duties on a series of producers is of direct concern to any one of them only in respect of those provisions which impose on it a specific anti-dumping duty and

determine the amount thereof. According to the Council, the regulation at issue does not impose a specific anti-dumping duty on the applicant or fix the amount, but, on the contrary, imposes an applicable anti-dumping duty generally on all imports of photo albums in bookbound form originating in the People's Republic of China.

43 The applicant also contests that ground of inadmissibility. It observes, first of all, that the situation in the present case is different from that in the *Ricoh* judgment, cited above, because the regulation at issue imposes an anti-dumping duty of general application, whereas in the *Ricoh* judgment different duties had been imposed on different undertakings.

44 It goes on to maintain that it is not necessary to submit an alternative plea for the partial annulment of the regulation at issue since Article 174 of the EC Treaty confers on the Court of Justice a discretion to state which of the effects of a regulation which it has declared void are to be considered as definitive. According to the applicant, that discretion does not depend upon the wording of the form of order sought by an applicant.

Findings of the Court

45 First, as to the Council's submission that the regulation at issue is not of direct and individual concern to the applicant, the Court observes that it is settled case-law that although regulations imposing anti-dumping duties are, by their nature and scope, of a legislative character, they may be of direct and individual concern to those producers and exporters who are alleged to engage in dumping (see the judgment in *Allied Corporation and Others* v *Commission*, cited above, paragraph 11).

46 It also follows from the case-law that, in general, measures imposing anti-dumping duties are of such a nature as to be of individual concern to those producers and exporters who are able to prove that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary measures (see the judgments in *Allied Corporation and Others* v *Commission*, cited above, paragraph 12, and in Case 53/83 *Allied Corporation and Others* v *Council* [1985] ECR 1621, paragraph 4, and *Extramet Industrie* v *Council*, cited above, paragraph 15).

47 In the first place, the Court notes that the provisional regulation and the regulation at issue show that the major part of the dumping practices are alleged to have been carried out by the applicant.

48 In that regard the Court observes that the Commission knew the precise volume of albums exported by the applicant and that it used that figure as its basis for determining the volume to be attributed to the other Chinese exporters (see point 17 of the regulation at issue). The single dumping margin of 18.6% was established on the basis of a weighted average of the dumping margin determined for the exports for which the applicant provided information, namely 11.5%, and the dumping margin determined on the basis of the facts available, in accordance with Article 7(7)(b) of the basic anti-dumping regulation (see point 25 of the provisional regulation and point 23 of the regulation at issue). The latter dumping margin was determined at 32.3% in the provisional regulation and then slightly amended during the procedure preceding the adoption of the regulation at issue. It is also apparent from the file that that dumping margin was applied to 38% of exports, whereas the margin of 11.5% was applied to 62% of the exports attributed to the applicant.

49 In the second place, the Court considers that the applicant was concerned by the preparatory measures. Its products were amongst those affected by the anti-dumping duty imposed by the regulation at issue and it is apparent from that regulation, and from the provisional regulation, that it was the subject-matter of the investigation. The institutions based themselves solely on the information supplied by the applicant in determining all the export prices used in order to calculate the

different dumping margins and, consequently, in determining the single dumping margin (see points 23 to 25 of the provisional regulation and points 13 to 23 of the regulation at issue).

50 Furthermore, the Court points out that the applicant received an anti-dumping questionnaire (see point 3 of the provisional regulation); that it was the only exporter to reply to that questionnaire (see point 11 of the provisional regulation); that it is referred to as an 'exporter of bookbound photo albums originating in the People's Republic of China' both in the provisional regulation (see point 4 thereof) and in the regulation at issue (see point 2 thereof) and that it is the only exporter to have cooperated in the investigation (see point 19 of the provisional regulation).

51 Moreover, the Court observes that the provisional regulation and the regulation at issue refer on several occasions to the applicant; consequently, it was identified in the measures adopted by the Commission and the Council.

52 In those circumstances the Court finds that the regulation at issue is of individual concern to the applicant.

53 As to the question whether the applicant is directly concerned, the Court observes that the regulation at issue, which applies to all imports into the Community of photo albums in bookbound form originating in the People's Republic of China, imposes an anti-dumping duty fixed at 18.6%. The regulation does not envisage any discretion on the part of the national authorities. On the contrary, implementation by the national authorities is purely automatic. It occurs not in pursuance of intermediate national rules but of Community rules only (see the judgment of the Court of Justice in Case 118/77 *Iso* v *Council* [1979] ECR 1277, paragraph 26). It must therefore be held that the regulation at issue is of direct concern to the applicant.

54 Secondly, as to the scope of this action, it is sufficient to note that, as the applicant observed at the hearing, the object of the action is defined on the first page of the application as being for 'a declaration that Council Regulation (EEC) No 3664/93 of 22 December 1993 is void in so far as it affects the applicant'.

55 The Court observes that it is also apparent from the file that the applicant is seeking the annulment of the regulation at issue either on the ground that it was not exempted from the anti-dumping duty or because the regulation imposes on it a duty in excess of 11.5%.

56 It follows that the object of the action must be seen as being confined to the annulment of the regulation to the extent that it affects the applicant.

57 It follows from all the foregoing that the action is admissible.

Substance

58 The applicant relies on three pleas in law in support of the form of order which it seeks. The first plea alleges infringement of the basic anti-dumping regulation, of the rights of the defence, and of the principles of non-discrimination and legal certainty, as well as an abuse of power by the Community institutions. In its second plea the applicant claims that, by failing to grant it individual treatment, the Commission and the Council infringed the principle of the protection of legitimate expectation, committed a manifest error of appraisal of the facts and denied it the right to be heard. The third plea alleges infringement of Article 13(3) of the basic anti-dumping regulation on the ground that an excessive anti-dumping duty was applied.

59 The Court finds that the first and second pleas challenge the Community institutions' refusal to grant individual treatment to the applicant. Those two pleas should therefore be considered together.

The first and second pleas, taken together: infringement of the basic anti-dumping regulation, manifest error of appraisal, infringement of the principle of the protection of legitimate expectations, of the rights of the defence and of the principles of non-discrimination and legal certainty, and abuse of power by the Community institutions

Arguments of the parties

60 By way of a preliminary point, the applicant observes that, as regards the imposition of anti-dumping duties, the Community institutions have for some years applied a policy of refusing individual treatment to undertakings from non-market economy countries. Accordingly, a single anti-dumping duty is imposed for an entire country and applied to all products exported to the European Community, irrespective of the dumping margins assessed for each producer or exporter concerned. According to the applicant, the Commission and the Council take the view that the imposition of separate anti-dumping duties on different undertakings in a planned economy would prompt the State to intervene and channel all exports through the company to which the lowest duty has been applied.

61 The applicant claims, first, that the application of such a policy is contrary to the letter and to the spirit of the basic anti-dumping regulation, which requires the Community institutions to grant individual treatment, irrespective of the origin of the products, wherever that is possible and particularly where the undertaking has fully cooperated during the anti-dumping procedure.

62 In that regard, it observes that Article 2(13) expressly provides that export prices are to be compared with the normal value on a transaction-by-transaction basis, which necessarily means application on an individual basis. It then notes that Article 2(14)(a) defines the dumping margin as the amount by which the normal value exceeds the export price. The individual nature of that comparison is, the applicant claims, highlighted by Article 2(9), which provides that, for the purposes of ensuring a fair comparison, due allowance in the form of adjustments is to be made in each case, on its merits, for the differences affecting price comparability.

63 It adds that Article 13(2) of the basic anti-dumping regulation lends further strength to its argument, since the purpose of the obligation to name the supplier, where it is practicable to do so, is to exclude solely non-cooperating parties.

64 The applicant considers that the anti-dumping procedure makes sense only in the context of the individual application of the rules. It observes that China as such does not sell anything. It is individual Chinese companies which produce and sell their products to customers in the Community.

65 It concludes that the whole system established by the basic anti-dumping regulation provides for individual treatment. In interpreting the regulation differently, the Commission and the Council have committed a manifest error. By adopting such an approach, they have deprived the applicant of its right to a fair hearing.

66 Secondly, the applicant claims that even in the context of the disputed policy the Commission and the Council ought to have granted it individual treatment.

67 In that regard it observes that in previous cases concerning products originating in the People's Republic of China the contested policy was applied more fairly. By way of example, it refers to Council Regulation (EEC) No 2093/91 of 15 July 1991 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China and collecting definitively the provisional anti-dumping duty (OJ 1991 L 195, p. 1), in which individual treatment was withheld from Chinese exporters because they were members of the China Commercial Chamber of Audio and Video Products Exporters which strictly controlled all exports and of which all exporters had to be members, except for joint ventures, which were free to export and import products independently, and because during the proceedings they were all represented by the Commercial Chamber, without any positions being individualized. It also cites Council Regulation (EEC) No 3836/91 of 19 December 1991 imposing a definitive anti-dumping duty on imports of dihydrostreptomycine originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty (OJ 1991 L 362, p. 1), in which individual treatment was refused because all the exporters were represented by a single Chamber of Commerce, they had been unable to show that they were not State-controlled, and they were unable to transfer any part of their profits outside China.

68 It then refers to two other cases in which individual treatment was granted. The first concerned Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the anti-dumping proceeding in respect of imports of those yarns originating in the Republic of Korea (OJ 1991 L 276, p. 7). According to the applicant, individual treatment was granted to one of the exporters because the company was 'free to establish its export prices and [could] transfer profits obtained to its foreign shareholders subject to certain administrative requirements'. It observes that the exporter in question was a joint venture formed by Chinese and Hong Kong partners and that the Hong Kong partner was related to a Community group. In the second case, the applicant refers to Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty

(OJ 1991 L 293, p. 2), in which individual treatment was granted to cooperating Chinese exporters. In that case, the exporters were, according to the applicant, joint-venture companies with foreign investment and were able to establish their export prices freely and, subject to certain administrative requirements, to transfer profits from China to their foreign shareholders.

69 As to its independence, the applicant considers that it fulfils the criteria laid down by the Community institutions in the previous regulations and also described in a memorandum of the Commission of 1 December 1992. It claims that in the present case it was the only exporter to cooperate, a fact which individualizes it in relation to all the other exporters; that it was represented by its own counsel during the entire proceedings and that it acts wholly independently of the Chinese State. It is, in particular, entirely free to export goods, to establish its export prices and to transfer its profits to its shareholders.

70 It states that it is a publicly-quoted company on the Hong Kong stock exchange, that none of its shareholders has any connection with the Chinese State and that the Chinese authorities have no *de facto* influence on the operations of the applicant's factory in China, even though it was established in agreement with the Chinese authorities. It adds that it owns the machinery, provides the raw materials and manages the factory.

71 It considers that the agreements concluded between it and the Chinese authorities, in the name of Baoan County Xinan Town Tiegang Economic Development Company (hereinafter 'Baoan Company'), confirm its independence. The agreements provide specifically that the applicant is to appoint 'the factory manager, financial accountants, administrative and warehouse personnel who are responsible for the management and financial control of the factory'. Furthermore, although the

agreements provide that the Baoan Company may appoint personnel to co-manage the plant, the applicant claims that it in fact has complete control over whom it wishes or no longer wishes to employ. The Chinese authorities have a purely residual, theoretical influence on employment, in that, after checking that the level of salaries exceeds the minimum wage level, they approve the employment contracts used by the applicant, which, according to the applicant, does not differ essentially from the influence exercised by State authorities in the majority of European countries.

72 It claims that the Chinese authorities cannot, in order to evade the anti-dumping measures, compel it to export products manufactured elsewhere in China or require it to increase its production. Its profits are generated in Hong Kong and it is free to relocate its manufacturing activities outside China. According to the applicant, foreign trade is not controlled by the Chinese State. Chinese undertakings act on the market in exactly the same way as Community undertakings.

73 The applicant claims that the Council's contention that it is necessary to take into account the State's power to intervene in foreign trade does not take account of the sovereignty of the State, which is in fact a superior authority, acting out of political considerations and which has a right to intervene in commercial matters.

74 In any event, it considers that if it is necessary to establish State control, it is something which the Community institutions must prove and not merely assume.

75 It concludes that, by adopting the regulation at issue on the basis of erroneous considerations and without taking into account the essential information provided by the applicant, the Council committed a manifest error in its appraisal of the facts. That error constitutes an abuse of power and deprives the applicant of its

right to be heard. It claims that the Council's confirmation, in the regulation at issue, of the Commission's reasoning shows that the applicant's arguments concerning the question of individual treatment were not taken into account.

76 Thirdly, it claims that, since the treatment given to it in the present case does not correspond to the Community's previous practice, the regulation at issue infringes the principle of the protection of legitimate expectations.

77 Fourthly, the applicant claims that the justification for refusing to grant individual treatment, namely a possible circumvention of anti-dumping measures, infringes general principles of Community law, in particular the principles of equal treatment and of legal certainty, and constitutes an abuse of power by the Community institutions. According to the applicant, the correct way of dealing with circumvention is either to apply existing anti-circumvention provisions or to enact specific provisions for that purpose. The applicant maintains, moreover, that those grounds are not valid, since the capitalist economic system operates in the same way. It is logical for most exports to be carried out by the party to whom the lowest duty is applied.

78 The Council contends that the basic anti-dumping regulation does not require the Community institutions to treat exporters individually. In that regard, it maintains that it is evident from Article 7(1)(a) of the basic anti-dumping regulation that an anti-dumping proceeding concerns exports from one or more countries and not exports from one or more companies taken individually.

79 It also maintains that there is no provision in the basic anti-dumping regulation which requires that individual dumping margins be calculated for each exporter. On the contrary, it considers that it follows from the regulation, and *inter alia* from Article 16(1) thereof, that the imposition of duties solely at the level of a

country is the general rule and that, consequently, the application of individual treatment must be based on good reasons. The fact that the applicant is a Hong Kong based company does not amount to such a reason, since the regulation at issue is not aimed at the applicant; it is aimed at all exports of the product concerned from the People's Republic of China.

80 The Council accepts that the method of imposing individual duties often offers the most effective and proportionate protection against harmful dumping and that, where the dumping margins and the injury margins vary according to the source, the imposition of a single duty for the whole country would lead to the imposition of a duty which both provided too much protection against those exporters whose margins were low and too little protection against those whose margins were higher. However, with regard to exports from non-market economy countries, the Council considers that the imposition of a single duty for the whole of the country is the most appropriate measure. In that regard it refers to the reasons contained in points 11 to 18 of the provisional regulation, from which it is clear that the independence of the exporter is neither the only, nor the most important, consideration.

81 It states that Article 13(2) of the basic anti-dumping regulation merely provides that anti-dumping regulations must in any event indicate the country of origin or of export and, if practicable, the names of the suppliers. As to Article 2(9) and (13) of the regulation, it contends that their terms do not compel the Community institutions to impose individual anti-dumping duties.

82 The Council maintains that in the present case the applicant could not be treated individually. It submits that it has not been shown that the applicant is free to act independently of the Chinese State (see point 18 of the provisional regulation). Furthermore, according to the Council, the question of an exporter's independence is no longer the only, nor the most important, factor to be taken into account in

determining whether an exporter must be given individual treatment. An even more important question is the power of the State to regulate foreign trade and to amend the applicable rules. According to the Council, the Chinese State can at any moment exercise its control over all economic operators in the People's Republic of China by changing its export policy and can direct imports through certain companies.

83 Although State control in the People's Republic of China has lessened somewhat and Chinese exporting companies currently enjoy a degree of independence, the situation of the People's Republic of China cannot be compared to that of a market economy country, in which totally independent companies exist.

84 In that regard the Council maintains that the organization of the foreign trade of the People's Republic of China differs in many respects from that of the Community. First of all, the prices of products manufactured in the People's Republic of China are generally not determined by market forces. There are 'imperative' plans for certain very important products, containing mandatory rules, and 'indicative' plans for less important products, containing guidelines for the production and distribution of the product in question. Those plans stipulate *inter alia* how many products are allocated to those undertakings and may be exported by them. The Council then states that an export licence is required in order to export products. That licence is issued by the State, which may withdraw it at any time. Finally, it states that the legal framework applicable to commercial transactions in the People's Republic of China cannot be compared with the systems in force in the Community. The fundamental difference results from the existence in the People's Republic of China of secret laws which are not published, to which foreigners have no access, and which deal in particular with foreign economic relations and foreign trade. The Council adds that the control of the People's Republic of China's foreign trade is largely exercised through personal links. One practice is to promote officials of the Ministry of Foreign Trade and Economic Cooperation to high positions in the various companies who, if they are to retain their posts, are required to follow the Ministry's instructions.

85 In the present case, the Council observes that it is difficult to assess the correctness of the applicant's assertions that there is no *de facto* influence and that it has never experienced any State interference. In any event it is the State's power to act which is important.

86 It adds that the agreement concluded on 28 January 1988 between the applicant and Shenzhen Baoan Foreign Company provides that Shenzhen will make available the factory and the production workers and will manufacture the products for, and deliver them to, the applicant. Next, according to the Council, the agreement concluded on 20 January 1988 between the Baoan Company and the applicant gives the Baoan Company the right to appoint the plant manager. Furthermore, in a letter to the Commission dated 5 May 1993 the applicant accepted that the Baoan Company is 'required to be licensed by the Baoan County Industrial and Commerce Executive Management Council, a government entity'. That letter also states that the agreements between the applicant and the Baoan Company are governed by the 'Regulations of the General Administration of Customs of the PRC on the Control of Processing and Assembly Undertaking for Foreign Parties' of 10 September 1987, which, according to the Council, provide for continuous State control of plants such as the applicant's.

87 The Council states that the fact that the applicant is based in Hong Kong does not mean that it escapes the control of the People's Republic of China or that it should be evaluated differently. Even if the applicant were to be considered to be independent of direct State control, the products concerned are manufactured in the People's Republic of China, which still exercises a significant control over companies such as Shenzhen Baoan Foreign Company and the Baoan Company.

88 The Council also contends that in the present case it would have been relatively easy for the State to make use of the possibility of circumventing the anti-dumping measures (see point 17 of the provisional regulation). It would have been sufficient to have had the applicant invoice photo albums exported to the Community, irrespective of where they were produced.

89 The Council then states that the Community institutions' approach to individual treatment has changed in the case of imports from non-market economy countries. Consequently, the applicant's arguments concerning the institutions' previous practice and the Commission's internal memorandum of 1 December 1992 are irrelevant.

90 Finally, it claims that it took into account all the arguments submitted by the applicant regarding the issue of individual treatment and all other relevant points.

91 At the hearing the Commission explained, in reply to a question put by the Court, that the reason for which the Community institutions changed their approach in regard to the individual treatment of exporters from the People's Republic of China is that originally they had probably been rather naive as to the nature of the situation in that country and that it was only recently that a large number of anti-dumping proceedings had been initiated in regard to Chinese products. According to the Commission, the original policy did not take account of the high degree of control which existed and still exists, even though that control is less than it previously was.

Findings of the Court

— The imposition of a single anti-dumping duty

92 The Court observes that there is no provision in the basic anti-dumping regulation which prohibits the imposition of a single anti-dumping duty for State-trading countries. Article 2(5) merely indicates the criteria on the basis of which the normal value must be determined in the case of imports from non-market economy

countries. Article 2(9), concerning the comparison of the normal value with the export price, concerns only the comparability of prices and the adjustments that are intended to take account of the differences affecting that comparability. It follows from Article 2(13) that, where prices vary, the export prices must normally be compared with the normal value on a transaction-by-transaction basis, which does not mean, contrary to the applicant's claim, that a single anti-dumping duty cannot be fixed. Furthermore, in the present case, the normal value and the export prices were compared on a transaction-by-transaction basis (see point 24 of the provisional regulation). As to Article 2(14), although it is true that it defines the dumping margin as the amount by which the normal value exceeds the export price (subparagraph (a)), it nevertheless provides that 'where dumping margins vary, weighted averages may be established' (subparagraph (b)).

93 Finally, Article 13(2) provides that anti-dumping regulations 'shall indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the reasons on which the regulation is based'. In that regard, the Court considers that, although it does indeed follow both from the scheme and the purpose of that provision that the obligation to indicate the name of the supplier in anti-dumping regulations in principle implies an obligation to fix a specific anti-dumping duty for each supplier, the wording of that provision nevertheless specifies that the name is to be indicated only 'if practicable'. The legislature therefore expressly limited the obligation to indicate the name of the supplier and, thereby, the obligation to fix a specific anti-dumping duty for each supplier, strictly to those cases where such specific particulars are practicable.

94 The Court considers that, in pursuing the disputed policy, the institutions did not wrongly interpret the term 'if practicable'. The fact is that it is not practicable to indicate the name of each supplier if, in order to avoid the risk of circumventing anti-dumping duties, it is necessary to impose a single duty for an entire

country. That is particularly so where, in the case of a State-trading country, the Community institutions have examined the situation of the exporters concerned and are not convinced that those exporters are acting independently of the State.

95 Nor does the Court consider that the disputed policy is contrary to the purpose and spirit of the basic anti-dumping regulation. The purpose of the basic anti-dumping regulation is *inter alia* to protect the Community against dumped imports. As to its spirit, it follows from its various provisions that the normal value and the export prices must normally be established individually for each exporter. However, that does not mean that the Community institutions are obliged to do so in each case, or that they are obliged to impose an individual anti-dumping duty for each exporter. The spirit of the regulation leave to the Community institutions with a wide discretion in deciding when the most appropriate solution is to grant individual treatment to the exporters concerned. That follows *inter alia* from Article 2(14)(b) and Article 13(2), which leave to the Community institutions the possibility of establishing a weighted average of the dumping margins, and thus a single dumping margin, for an entire country and of imposing a single anti-dumping duty for that country.

96 If follows from the foregoing that a policy which results in the imposition of a single anti-dumping duty in respect of an entire country is not contrary to the letter or purpose, nor to the spirit of the basic anti-dumping regulation, if that policy is necessary in order for the Community to protect itself against dumping and against the risk of protective measures being circumvented.

97 It is necessary to examine next whether in the present case the Community institutions should have granted individual treatment to the applicant.

98 As a preliminary point, the Court observes that the question as to whether an exporter in a State-trading country is acting with sufficient independence of the State for individual treatment to be granted to him involves an assessment of complex factual situations which are, at one and the same time, of an economic,

political and legal nature. In that regard, it is established in case-law that the institutions enjoy a wide discretion in regard to the assessment of complex economic matters (see the judgment in Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131) and that judicial review of such an assessment must be limited to verifying whether the procedural rules have been complied with; whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (see the judgments of the Court of Justice in Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 21, and C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63). This Court considers that the position is the same in regard to factual situations of a legal and political nature in the country concerned which the Community institutions must assess in order to determine whether an exporter is acting with a sufficient degree of independence from the authorities of a State-trading country in order to receive individual treatment.

99 As may be seen from the letter of 5 May 1993, the Baoan Company is a cooperative undertaking, with its own legal personality, composed of members of the Tiegang Villagers' Committee, a consortium of landowners from Tiegang Village. The aim of that committee is to promote the development of the village through foreign investment. The Baoan Company received from the Baoan County Industrial and Commerce Executive Management Council, a Government body, a licence entitling it to pursue economic activities.

100 According to the same letter, the function of the Boaon County Foreign Trade Company, which has its own legal personality, is *inter alia* to supervise imports by foreign investors of raw materials and the subsequent export of finished products incorporating those raw materials. The Baoan County Foreign Trade Company supervises the carrying out of the import arrangements, comparable to the Community's inward processing arrangements, which benefit the factory in which the applicant's production takes place. Those arrangements are approved in advance by the Baoan County Foreign Economic Committee, a Government agency responsible for approving foreign investment in the Baoan district and to which the Baoan County Foreign Trade Company belongs.

101 Next, according to the documents before the Court, the applicant's production in China in the factory of the Five Brothers Stationery Manufacturer is governed by the agreement of 20 January 1988 and by the two supplementary agreements of 2 January 1991 and 18 January 1992 concluded between the applicant and the Baoan Company. Those three agreements were annexed to the application, as was a fourth agreement dated 28 January 1988, which, according to its title, was concluded between the applicant and the Shenzhen Baoan Foreign Company associated with Baoan County Xinan Town Tiegang Village Five Brothers Stationery Manufacturer.

102 In the agreement of 20 January 1988 the Baoan Company undertook to build a factory in conformity with the plans provided by the applicant, which was then to be leased to the applicant. The applicant undertook to supply the equipment and raw materials and the additional materials necessary for production and to pay the rent, wages, water and electricity charges and taxes. Article 1 of Section VII of that agreement provides that the Baoan Company is to appoint a plant manager and necessary accounting and management personnel to manage the plant jointly with staff appointed by the applicant. The Baoan Company undertakes to assist the applicant in regard to import and export procedures. The management and administrative personnel, the 'management personnel', appointed by the Baoan Company must, before being engaged, pass the applicant's recruitment test. According to Article 4 of Section VIII, workers required by the applicant must pass the recruitment test conducted by both parties.

103 The two supplementary agreements essentially concern the financing of the construction work, the rent and the construction of the factory itself.

104 As to the agreement dated 28 January 1988, the Court finds that it appears to be concluded with an undertaking other than the Baoan Company and that its terms are different from those of the agreement of 20 January 1988. In that regard, the Court observes that the applicant's claim that it appoints 'the factory manager,

financial accountants, administrative and warehouse personnel who are responsible for the management and financial control of the factory' is based on Section I of the agreement of 28 January 1988. As may be seen from paragraph 102 of this judgment, that claim contradicts Article 1 of Section VII of the agreement of 20 January 1988. In addition, the Court observes that at the hearing the applicant was unable to reply to the Court's question concerning the significance of the agreement of 28 January 1988 in relation to that of 20 January 1988. It should, moreover, be noted that according to the replies given by the Community institutions to a question put by the Court, which have not been challenged by the applicant, the Commission does not appear to have received a copy of the agreement of 28 January 1988 during the administrative procedure.

105 The Court also observes that, as the Commission pointed out in the provisional regulation, the letter of 5 May 1993 also refers to an agreement concluded between the Baoan County Foreign Economic Committee and the Tiegang Villagers' Committee, which is said to define the terms and conditions under which foreign investment may be attracted to the region. According to the applicant, that agreement is not a public document and, accordingly, was not submitted to the Commission.

106 It follows from the above examination that the relationship between the applicant and the Chinese State must be characterized as rather vague and confused, even without taking into account the obfuscation brought about by the agreement of 28 January 1988. As the Commission found in the provisional regulation (see point 18 thereof), the examination does not show that the applicant is actually independent of the influence of the Chinese authorities. In that regard, the Court observes that neither the agreements between the applicant and the Baoan Company, nor the description in the letter of 5 May 1993, enable any conclusion to be drawn concerning the actual control exercised over the Baoan Company by the Baoan County Industrial and Commerce Executive Management Council, and that exercised by the Baoan County Foreign Economic Committee, through the Baoan County Foreign Trade Company, over the Five Brothers Stationery Manufacturer. The role played by the Tiegang Villagers' Committee also remains unclear.

Furthermore, the agreement of 20 January 1988 leaves the Baoan Company with a not inconsiderable possibility of influencing production by the Five Brothers Stationery Manufacturer.

107 That conclusion is confirmed by two pieces of information contained in the letter of 5 May 1993. First, according to that letter, in view of the fact that the agreements between the applicant and the Baoan Company do not contain an arbitration clause, if no subsequent arbitration agreement were concluded, the parties would, in case of a dispute, have to bring the dispute before a 'people's court' in China. Secondly, in the letter the applicant's representative states that the Commission must 'bear in mind that the environment in which the arrangements for Climax's production in China have been set up is rather different from those generally prevailing in western countries, and it may not always be possible to provide answers with the degree of legal precision to which you may be accustomed'.

108 For the rest, the Court observes that, for the reasons set out by the Commission in points 15 and 16 of the provisional regulation (see paragraphs 18 and 19 above), the current situation in China makes it even more difficult, if not impossible, to establish whether a Chinese undertaking or a foreign undertaking manufacturing products in China is actually independent of the State. As the Council states (see paragraphs 83 and 84 above), the situation in the People's Republic of China cannot be compared with that in market economy countries, at least as regards the organization of foreign trade.

109 It follows from the foregoing that the applicant has not shown that it was actually independent of the influence of the Chinese authorities. It follows that the Community institutions have not committed a manifest error of appraisal of the facts.

— The other arguments relied on by the applicant

110 First, as to the alleged breach of the principle of the protection of legitimate expectations, the Court observes that, according to the case-law, any economic operator for whom an institution has created justified hopes may rely on that principle. However, economic operators do not have a legitimate expectation that an existing situation which may be modified at the discretion of the Community institutions will be maintained (see *inter alia* the judgment in Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 48). That is so, in particular in an area such as protection against dumped imports, where the institutions have to assess, amongst other things, complex economic situations and where they must necessarily adapt their policy to situations existing on different markets as they gain experience.

111 As pointed out in paragraph 98 of this judgment, the institutions enjoy, as regards State-trading countries, a wide discretion with respect to the factual situations of an economic, legal and political nature in the country concerned which have to be evaluated in determining whether an exporter is acting with a sufficient degree of independence from the State in order to be granted individual treatment.

112 It follows that the applicant could not have a legitimate expectation that the Community institutions would not change their policy regarding individual treatment if experience showed that such a change was necessary in order to reach a satisfactory solution to the problems caused by dumping practices alleged against exporters from State-trading countries.

113 In that regard, the Court finds that it is clear from the provisional regulation that during the course of the procedure the Commission came to the conclusion that the utmost prudence was required in this matter and that, since it was not

completely satisfied that the difficulties concerning the imposition of inappropriate levels of duty and the circumvention of anti-dumping measures would not arise, there should be no departure from the general rule that a single anti-dumping duty is established for State-trading countries (see points 12 and 17 of the provisional regulation).

114 The Court considers, moreover, that the alteration of the policy is all the less open to criticism in that the Commission carefully set out the reasons which led it to modify its policy (see points 13 to 17 of the provisional regulation, confirmed by the Council at point 9 of the regulation at issue).

115 As to the Commission's memorandum of 1 December 1992, it is sufficient to note that it is clear from the documents before the Court that that document is an internal memorandum, and thus the Commission's own working document, and as such cannot give rise to justified hopes on the part of the applicant.

116 Secondly, as to the alleged breach of the rights of the defence, the Court observes that it is settled case-law that those rights are observed if the undertaking concerned was afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged (see the judgment of the Court of Justice in Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 108).

117 It is clear from the documents before the Court that the applicant submitted observations during the administrative procedure, that its representatives met the Commission's officials in order to discuss the case and that it was heard by the Commission. Furthermore, it is clear from the provisional regulation and the

regulation at issue that both the Commission and the Council examined the various arguments submitted by the applicant and replied to them and, in so far as possible, even took account of them.

118 In that context, it must be pointed out that the protection of the rights of the defence does not imply that the Community institutions must automatically adopt all the arguments submitted by the applicant.

119 Thirdly and finally, the Court finds that the applicant has in no way explained how the policy in question infringes the principles of equal treatment and legal certainty. Consequently, there is no need to rule on the merits of that aspect of the applicant's pleas. As to the alleged misuse of powers, the Court observes that since the policy pursued by the Community institutions is not contrary to the basic anti-dumping regulation, there is no misuse of powers.

120 It follows from the foregoing that the first and second pleas must be rejected as unfounded.

Infringement of Article 13(3) of the basic anti-dumping regulation

Arguments of the parties

121 The applicant claims, first, that by imposing on its products an anti-dumping duty higher than the dumping margin established, the Council penalized a party which had cooperated in the proceeding when other parties had not, and thereby infringed Article 13(3) of the basic anti-dumping regulation, which provides that duties are not to be imposed in excess of the dumping margin established.

122 Secondly, it maintains that the calculation method used by the Commission in order to establish the export price, described in point 23 of the provisional regulation and confirmed by the Council in points 15 to 21 of the regulation at issue, led to a result which is abusive, unfair and far removed from reality. In that regard, it claims, first of all, that by attributing to the applicant 62% of exports to the Community and 38% to other exporters the Community institutions based themselves on a mere estimate. In reality, its share of exports was well above 62%, a percentage which is in itself already sufficient, in the applicant's view, for its activities to be considered to be representative. Next, it maintains that by applying the highest anti-dumping margin found for the applicant to the remaining 38% the Commission severely and unlawfully penalized it for its cooperation, the dumping margin having increased from the applicant's actual margin of 11.5% to a rate of 18.6%. The applicant concludes that the Community institutions fabricated dumping margin calculations for transactions which may not exist and that they inflated the dumping margins of non-cooperating parties.

123 The Council contends that use was rightly made of the principle of 'best information available' contained in Article 7(7)(b) of the basic anti-dumping regulation in calculating the dumping margin in regard to non-cooperating parties.

124 It maintains that since the applicant started exporting from the People's Republic of China only towards the end of 1990, after other producers had also relocated their production plants to the People's Republic of China, the applicant's exports could not be considered to be representative of the whole of Chinese exports and that, moreover, if the institutions had considered them to be so, that would have rewarded the limited cooperation shown by Chinese producers. In those circumstances, the Community institutions took the view that instead of basing themselves exclusively on information submitted by the applicant, it was more reasonable to determine, on the basis of Article 7(7)(b) of the basic anti-dumping regulation, the export price of producers who had not cooperated in the investigation by identifying the lowest prices at which the applicant sold photo albums of the sub-categories concerned. It explains that, in accordance with a current practice in anti-dumping proceedings, which has never been held to be unlawful by the

Court of Justice, it is assumed that non-cooperating exporters sell at prices which are lower than or equal to the lowest prices of cooperating exporters. That approach aims to encourage exporters to participate for their own benefit in the anti-dumping proceedings. The dumping margin so established was, according to the Council, applied to 38% of exports, for which no information was available.

125 The Council states that the Community institutions based themselves to the largest extent possible on precise figures and used estimates only where they had no such figures owing to the lack of cooperation, with one exception, on the part of the exporters concerned. It contends that the applicant was not penalized for participating in the investigation. If the applicant had not participated in the proceeding, the dumping margin would have been established in respect of all imports on the basis of the best facts available, and so probably on the basis of the information contained in the complaint. According to the Council, that would certainly have led to the imposition of a higher anti-dumping duty.

Findings of the Court

126 The Court observes, first, that Article 13(3) of the basic anti-dumping regulation provides that the amount of anti-dumping duties may not exceed the dumping margin provisionally estimated or finally established and that it should be less if such lesser duty would be adequate to remove the prejudicial effect.

127 Moreover, according to the provisional regulation (see point 25) and the regulation at issue (see point 23), a dumping margin of 11.5% was calculated for the applicant's exports. Thereafter a definitive anti-dumping duty of 18.6% was imposed on all Chinese exports on the basis of a weighted average of the dumping margin calculated for the applicant's exports and of the dumping margin calculated for the other exports (see paragraph 48 above).

128 In that regard, the Court finds, prima facie, that, since the applicant was the sole exporter to have cooperated in the investigation, it may seem unfair to impose on it an anti-dumping duty higher than the margin established for its own exports. However, it follows from the Court's conclusions concerning the first two pleas, first, that the contested policy of the Community institutions is not contrary to the letter, purpose or spirit of the basic anti-dumping regulation and, secondly, that the applicant does not satisfy the necessary conditions for the grant of individual treatment and that the institutions did not therefore commit a manifest error in appraising the facts. Consequently, the institutions were correct in not imposing an anti-dumping duty of 11.5% in the case of the applicant and a higher duty in that of non-cooperating exporters. Such an approach would have meant that individual treatment would have been granted to the applicant.

129 Moreover, to impose an anti-dumping duty of 11.5% in regard to all exporters would encourage non-cooperation by exporters who know that their export prices are very low and that, consequently, the Community institutions may establish a very high dumping margin. Those exporters would therefore have every interest in not cooperating.

130 Furthermore, the contested policy is based on the assumption that as a rule exporters in State-trading countries are not independent of State influence and one of the aims of that policy is to avoid circumvention of anti-dumping duties. It follows that, for that reason too, the institutions could not have imposed an anti-dumping duty of 11.5% for all exporters. Such an approach might offer the authorities in a State-trading country the possibility, in the event of the initiation of an anti-dumping investigation, of ordering the exporter with the highest export prices to cooperate with the Community institutions and to prohibit other exporters from doing so. They could thus ensure that an anti-dumping duty equal to the dumping margin established for the exporter with the lowest margin would be applicable to all exporters involved in the dumping.

131 In addition, the Court finds that, as the Council has correctly stated, although the anti-dumping duty imposed is higher than the dumping margin established for the applicant, the applicant is not penalized for its participation in the investigation. If

it had not cooperated, there would have been a risk of an even higher duty being applied to it, since the institutions would have been compelled to base themselves, at least in part, on the information contained in the complaint, in accordance with Article 7(7)(b) of the basic anti-dumping regulation, which is normally not to the advantage of exporters.

132 Finally, the Court observes that it follows from paragraph 95 of this judgment and from Article 2(14)(b) of the basic anti-dumping regulation that it is possible for the Community institutions to establish a weighted average of the dumping margins and therefore a single dumping margin for an entire country.

133 It follows from the above that the Community institutions did not infringe Article 13(3) of the basic anti-dumping regulation by imposing an anti-dumping duty that was higher than the dumping margin calculated for the applicant, the dumping margin established being the result of the calculation of the weighted average of the margin calculated for the applicant and of the margin calculated for the other exporters.

134 Secondly, the Court finds that in the present case the Community institutions rightly based themselves, in accordance with Article 7(7)(b) of the basic anti-dumping regulation, on the Eurostat statistics and on the information supplied by the applicant, the only other information available being that contained in the complaint.

135 Next, the Court observes that both the calculation of the export price of producers who did not cooperate in the investigation and the calculation of the single dumping margin on the basis of the information available presuppose an appraisal of complex economic situations. Judicial review of such an appraisal must be limited to verifying whether the procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal of the facts or a misuse of power (see the judgments in *Nachi Fujikoshi* v *Council*, cited above, paragraph 21, and *Gestetner Holdings* v *Council and Commission*, cited above, paragraph 63).

136 In that regard, according to the provisional regulation (see point 23 thereof) and to the regulation at issue (see point 17 thereof), the information supplied by the applicant did not relate to all Chinese exports of the product in question, namely photo albums in bookbound form falling under CN Code 4820 50 00. In order to calculate the share of exports to be attributed to the exporters who had not supplied information, the Community institutions based themselves, in accordance with Article 7(7)(b) of the basic anti-dumping regulation, on Eurostat statistics concerning the products imported under CN Code 4820 50 00, which included all types of photo albums, and on the precise volume of albums exported by the applicant to the Community. They estimated that 50% of the balance under that CN code were made up of bookbound photo albums. The Community institutions based that estimate on the fact that since 1989 at least three manufacturers of albums in Hong Kong had relocated their production to the People's Republic of China and that the applicant was apparently the principal exporter of that product to the Community. According to the documents before the Court, the applicant's exports represented 62% of total exports of the product concerned and those of other exporters amounted to 38%.

137 The applicant claims that this calculation is merely an estimate, that the Eurostat statistics also cover album types falling outside the scope of the investigation and that in any event the 62% of the total exports attributed to the applicant, a figure well below the actual figure, were sufficient for the applicant to be considered to be representative.

138 That argument cannot be accepted. The Court observes, first of all, that the applicant has merely called into question the calculation carried out by the Community institutions without adducing the slightest evidence to show that it is incorrect. In any event, the Community institutions based themselves on the information available and it was precisely in order to exclude album types falling outside the scope of the investigation that the institutions took the view that only 50% of the balance of exports were composed of photo albums in bookbound form. As to the representative nature of the applicant's exports, since the purpose of the basic anti-dumping regulation is to protect the Community against dumped imports, the

38% of exports attributed to the other exporters represent a very significant part of all exports and require a separate calculation of the export prices and the dumping margin. Moreover, as the Council has pointed out, to regard the applicant's exports as representative of all Chinese exports would be to reward the lack of cooperation by the other Chinese exporters.

139 As to the method of calculating the export prices of the producers who did not cooperate in the investigation, the Court observes that points 19 to 21 of the regulation at issue show that the Community institutions took account of the subcategories of photo albums sold by the applicant and that they based themselves on the lowest prices at which the applicant sold albums from each sub-category within which sales were considered to be representative.

140 In that regard, the Court considers that the institutions cannot be criticized for having based themselves on the applicant's lowest prices, since the effect of any other approach would be to encourage non-cooperation by exporters. The Court notes, moreover, that in the regulation at issue the calculation method is clearly described. Nothing indicates that this calculation is wrong.

141 It follows from the foregoing that the institutions did not commit any manifest error in their appraisal of the facts, either in calculating the prices and the share of exports of non-cooperating producers or in establishing the single dumping margin.

142 It follows that the third plea must be rejected as unfounded.

143 It follows from all of the foregoing that the application must be dismissed in its entirety as unfounded.

Costs

144 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, in addition to its own costs, the costs incurred by the Council. Article 87(4) of the Rules of Procedure provides that institutions which have intervened in the proceedings shall bear their own costs; the Commission should therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay its own costs and the costs of the Council;

3. Orders the Commission to bear its own costs.

Lenaerts García-Valdecasas Lindh

Azizi Cooke

Delivered in open court in Luxembourg on 18 September 1996.

H. Jung K. Lenaerts

Registrar President