JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

13 July 2006 *

In Case T-413/03,

Shandong Reipu Biochemicals Co. Ltd, established in Shandong (China), represented by O. Prost, V. Avgoustidi and E. Berthelot, lawyers,

applicant,

v

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

defendant,

supported by

Commission of the European Communities, represented by T. Scharf and K. Talabér-Ricz, acting as Agents,

* Language of the case: English.

and by

Degussa Knottingley Ltd, established in London (United Kingdom), represented by F. Renard, lawyer,

interveners,

APPLICATION for annulment of Council Regulation (EC) No 1656/2003 of 11 September 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of para-cresol originating in the People's Republic of China (OJ 2003 L 234, p. 1),

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

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2006,

gives the following

Judgment

Legal context

1 Article 1(2) 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), as amended by Council Regulation (EC) No 2238/2000 of 9 October 2000 (OJ 2000 L 257, p. 2) (the 'Basic Regulation'), provides:

'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 Article 2(3) of the Basic Regulation provides:

'When there are no or insufficient sales of the like product in the ordinary course of trade ..., the normal value of the like product shall 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 and for profits ...'

3 Article 2(5) of the Basic Regulation states:

'Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilised. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. ...'

4 Article 2(7)(b) of the Basic Regulation provides:

'In anti-dumping investigations concerning imports from ... the People's Republic of China ..., normal value will be determined in accordance with paragraphs 1 to 6, if it is shown ... that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. ...'

Factual background

5 The applicant is a Chinese company which produces and exports para-cresol.

6 Para-cresol is a toxic organic chemical, available in different purities which all share the same basic physical and chemical characteristics and the same uses. It is used in industry as an intermediary product in the manufacture of other products. Its production, from various chemical products, leads to one or more by-products, depending on the production method. Among those by-products are sodium sulphite and mixed phenol, which are themselves used in industry.

7 In response to a complaint lodged on 13 May 2002 by Degussa Knottingley Ltd ('DKL'), the sole producer of para-cresol in the Community, the Commission initiated an anti-dumping proceeding, pursuant to Article 5 of the Basic Regulation, in respect of imports of para-cresol originating in the People's Republic of China.

8 The notice of initiation of that proceeding was published in the *Official Journal of the European Communities* of 27 June 2002 (OJ 2002 C 153, p. 7).

9 By fax of 12 July 2002, the applicant made itself known to the Commission, with the aim of being included in the sample of producers that might be selected pursuant to Article 17 of the Basic Regulation.

10 By fax of 16 July 2002, the Commission pointed out that a full anti-dumping questionnaire intended for producers and/or exporters to the Community ('the anti-dumping questionnaire') was in the applicant's possession and stated that it should be returned to the Commission, duly completed, by 26 August 2002.

11 By fax of 24 July 2002, the Commission informed the applicant that only sections A (General information), B (Product description), C (Operating statistics), D (Export sales of the product concerned to the European Community) and the relevant parts (Export sales) of sections G (Allowances — fair comparison) and H (Computerised information) of the anti-dumping questionnaire had to be returned by 26 August 2002. The Commission added that if, after examination, the applicant were granted market economy treatment, as it had requested, it would also have to complete, within a time-limit to be specified, sections E and F and the relevant parts (Domestic sales) of sections G and H of the questionnaire.

12 By letter of 26 August 2002, the applicant sent the Commission its response to sections A to D of the anti-dumping questionnaire. It stated that, due to the summer vacation, it had been unable to compile all the information relating to section G of the questionnaire and added that it would do its best to supply this information to the Commission as soon as possible.

13 By letter of 30 September 2002, the Commission informed the applicant that it had been granted market economy treatment. The Commission stated that it had received the applicant's responses to sections A to D of the anti-dumping questionnaire and requested that the applicant submit its responses to sections E to H of the questionnaire by 8 November 2002. The Commission pointed out that the strict time-limits applied not only to submission to the Commission of the responses to the anti-dumping questionnaire but also to any other requests and information which the applicant wished to convey to the Commission. It informed the applicant that its response to the questionnaire would form the main basis on which the Commission would establish whether or not dumping had taken place and stated that officials of the Commission would carry out an on-site inspection to verify the information supplied.

14 By letter of 1 October 2002, the applicant informed the Commission that it needed to make some corrections to the information supplied in its response of 26 August 2002 to the anti-dumping questionnaire and enclosed with that letter various documents containing those corrections.

15 By fax of 2 October 2002, the Commission informed the applicant that the responses to certain parts of sections A, C and D of the anti-dumping questionnaire were incomplete and requested the applicant to send it the missing information by 16 October 2002.

16 The applicant responded to that request by fax of 16 October 2002.

17 On 8 November 2002, the applicant sent the Commission its replies to sections E, F, G and H of the anti-dumping questionnaire.

18 By fax of 15 November 2002, the Commission confirmed that an on-site verification would be carried out and requested the applicant to make available at the time of the verification all the information used in preparing the response to the anti-dumping questionnaire, and also all the applicant's personnel involved in preparing it or knowledgeable about production of the product concerned, its sales and accounting. The Commission added that if, while preparing for the visit, the applicant discovered errors in its responses to the anti-dumping questionnaire, it should provide the Commission with the correct information, clearly indicating the error and explaining why it had occurred.

19 By fax of 18 November 2002, the applicant informed the Commission that some of the responses to certain parts of sections E, F and G of the anti-dumping

questionnaire, sent to the Commission on 8 November 2002, were incorrect or incomplete and supplied the correct information. The applicant indicated inter alia the total manufacturing costs and total costs of production for para-cresol, information which had not been included in the relevant boxes of the anti-dumping questionnaire in the responses sent on 8 November 2002. The applicant stated that those amounts were after deduction of the manufacturing and production costs for the by-products, and provided the amount of those costs.

20 On 25 and 26 November 2002, officials of the Commission carried out the on-site verification visit.

21 On 20 March 2003, the Commission adopted Regulation (EC) No 510/2003 imposing provisional anti-dumping duties on imports of para-cresol originating in the People's Republic of China (OJ 2003 L 75, p. 12; 'the Provisional Regulation'). Recital 25 in the preamble to that regulation, concerning the determination of normal value for cooperating exporting producers granted market economy treatment, stated that '... normal value had to be constructed in accordance with Article 2(3) of the Basic Regulation'.

22 By letter of 21 March 2003, the Commission sent to the applicant, pursuant to Article 14(2) of the Basic Regulation, a copy of the Provisional Regulation and, pursuant to Article 20(1) of the Basic Regulation, a document entitled 'Part II — Explanation of dumping' containing information regarding the essential facts and considerations on the basis of which provisional anti-dumping duties had been imposed ('the provisional disclosure document'). The Commission invited the applicant to submit any comments it might have on those documents by 22 April 2003.

23 The final paragraph of point 1.1.1 of the provisional disclosure document referred to Annex I containing a corrected table of the total manufacturing costs for para-cresol. Apart from amendments resulting from a different distribution of the energy costs and from the allocation of rental costs, the amounts given were those supplied by the applicant on 8 November 2002.

24 By fax of 22 April 2003, the applicant sent the Commission its observations on the Provisional Regulation and the provisional disclosure document. In the first part of those observations, the applicant referred to the by-products resulting from the production of para-cresol, to the fact that the Commission had not deducted the costs of production of the by-products from the total costs of production for para-cresol, and to the fact that, according to the applicant, such a deduction is necessary. The applicant asked the Commission to take account of its comments and to separate the costs of production of the by-products from those of para-cresol.

25 On 19 May 2003, a meeting between the applicant and the Commission was held at the Commission's headquarters.

26 By fax of 26 May 2003, the applicant, further to that meeting, sent the Commission additional information concerning the deduction of the costs of the by-products.

27 By letter of 11 July 2003, the Commission sent to the applicant, pursuant to Article 20(2) to (4) of the Basic Regulation, a 'general disclosure document' on the essential facts and considerations on which the proposal to impose definitive anti-dumping duties was based ('the final disclosure document'), including a part, entitled 'Part II — Explanation of dumping', relating to the observations received from the parties following the adoption of the Provisional Regulation. The Commission invited the applicant to submit its comments on the final disclosure document by 23 July 2003.

28 In the fifth paragraph of point 3.1 of the final disclosure document and point 1.1 of the part of the document relating to the comments received from the parties, the Commission referred to the applicant's claim that the costs of production for the by-products should be deducted. The Commission stated that it had rejected the claim on the ground that it was not substantiated by documented evidence and that the documents collected during the on-site verification indicated, in line with the initial response to the anti-dumping questionnaire, that the direct costs were already allocated to the different products.

29 The table of total manufacturing costs for para-cresol, in Annex I to the part of the final disclosure document relating to the comments received from the parties, contained, in the column headed 'TOTAL PC', the same figures as those given by the Commission in the table, referred to in paragraph 23 above, annexed to the provisional disclosure document.

30 On 22 July 2003, a meeting was held between the applicant and the Commission at the Commission's headquarters.

31 By fax of 23 July 2003, supplemented by a fax of 25 July 2003, the applicant sent the Commission its observations on the final disclosure document, together with certain documents.

32 In the first part of its comments set out in the fax of 23 July 2003, the applicant again referred to the fact that, in the final disclosure document, the Commission had not deducted the costs of the by-products and to the need to deduct them.

33 On 18 August 2003, the Commission adopted and made public its proposal for a Council regulation imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of para-cresol originating in the People's Republic of China (COM(2003) 505 final; 'the proposal for a definitive regulation').

34 By fax of 25 August 2003, the Commission responded to the applicant's comments of 23 and 25 July 2003 on the final disclosure document. With regard to the question of deduction of the costs of the by-products, the Commission stated that the information given by the applicant on 18 November 2002 was submitted after the deadline for submission to the Commission of responses to the anti-dumping questionnaire and only one day before the Commission's team left for the verification visit, and that that information was inadequately substantiated and, furthermore, contradicted by information provided by the applicant during the on-site verification. Finally, the Commission stated that the claim for deduction of the costs of production of the by-products was made after the provisional disclosure of 21 March 2003 and therefore after the verification visit, and that, consequently, the information submitted in Annex II in the applicant's last submission, of 25 July 2003, could no longer be verified and the sales revenues of the by-products could not be deducted from the cost of production of the product concerned.

35 By fax of 29 August 2003, the applicant replied to the Commission's fax of 25 August 2003.

36 On 11 September 2003, the Council adopted Council Regulation (EC) No 1656/2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of para-cresol originating in the People's Republic of China (OJ 2003 L 234, p. 1; 'the Contested Regulation'). The 12th recital in the preamble to

the Contested Regulation, which is identical to the 12th recital in the proposal for a definitive regulation, reads as follows:

'[The applicant] claimed that the cost of production of two other products should be deducted from the total cost of production as they result from the same production process and are sold separately. The [applicant] could not substantiate this claim by documented evidence. Indeed the documents collected on the spot indicated that the direct costs were already allocated to the different products which were in line with the initial questionnaire response. Therefore, the claim had to be rejected.'

Procedure and forms of order sought

37 By application lodged at the Court Registry on 15 December 2003, the applicant brought the present action.

38 By document lodged at the Court Registry on 2 April 2004, the Commission applied for leave to intervene in support of the form of order sought by the Council. By order of 16 June 2004, the President of the Fourth Chamber of the Court of First Instance granted leave. By letter of 24 August 2004, the Commission informed the Court of First Instance that it waived its right to submit a statement in intervention but that it would appear at the hearing.

39 By document lodged at the Court Registry on 7 May 2004, DKL applied for leave to intervene in support of the Council.

40 By separate documents lodged at the Court Registry on 8 July 2004, the applicant objected to the application to intervene made by DKL and, in the alternative, applied for confidential treatment, vis-à-vis DKL, of parts of the application, the defence and the reply. By a document of the same date, the Council requested confidential treatment for certain information in the file vis-à-vis DKL, stating that this application had been agreed with the applicant and was essentially the same as the application for confidential treatment lodged by the latter.

41 Following the changes made to the composition of the Chambers of the Court of First Instance with effect from 13 September 2004, the Judge-Rapporteur was assigned, as President, to the Fifth Chamber, to which this case was accordingly allocated.

42 By order of 11 November 2004, the President of the Fifth Chamber of the Court of First Instance granted DKL leave to intervene. Since leave was granted pursuant to Article 116(6) of the Rules of Procedure of the Court of First Instance, relating to late applications to intervene, the President of the Fifth Chamber did not adjudicate on the applications for confidential treatment, but stated that those applications would be taken into account, in so far as necessary, in the preparation of the Report for the Hearing and the judgment.

43 The applicant requested the Court of First Instance to order, as a measure of organisation of procedure, disclosure by the Commission of the calculations on which it based its assessment of the damage suffered by the Community industry.

44 The applicant claims that the Court should:

— annul the Contested Regulation;

— order the Council to pay the costs.

45 The Council, supported by the Commission and DKL, contends that the Court should:

— dismiss the application;

— order the applicant to bear the costs.

Law

46 The applicant puts forward three grounds in support of its application for annulment. The first ground alleges infringement of the duty to determine the normal value in an appropriate and not unreasonable manner and of the duty of due care. The second ground alleges infringement of the principle of good administration and of the rights of the defence. The third ground alleges that, in breach of Article 2(3) of the Basic Regulation, the normal value calculated is not that of the like product only.

47 The first ground should be examined first.

Arguments of the parties

48 The applicant maintains that it provided all the required information in a timely manner and does not accept that the information regarding deduction of the cost of production of the by-products was submitted after the on-site verification. It submits, in the alternative, that, according to Community case-law and decisions of the bodies of the World Trade Organisation (WTO), the Commission may take late responses into account provided the procedural rights of other parties are not prejudiced and the procedure is not unduly prolonged.

49 Furthermore, the Council failed to fulfil its duty of due care or due diligence. It is apparent from the case-law, first, that when a fact relating to the normal value determination is made known to the authority during the investigation and is such as to raise doubts as to the appropriateness of the methodology followed by the authority, the latter must examine the point made by the interested party in great depth and, second, while a party has to comply, as regards the responses to the Commission's questions, with the format requested by the Commission and, if it does not do so, provide the necessary explanations, the Commission is to exercise due care or due diligence in interpreting correctly the data provided by that party. The applicant refers in particular to the judgments in Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, and Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359.

50 It follows from the above that the Commission should not have ignored the anti-dumping rule according to which costs of by-products should not be taken into account, but instead should be deducted. However, the Commission remained totally impervious to the numerous efforts made by the applicant to correct the Commission's error in that regard.

51 In its reply, the applicant refers to Article 6(8) of the Basic Regulation. That provision places on the Commission a heavy duty of care, which is apparent from the case-law of the Court of Justice concerning protection of the rights of the defence. According to the applicant, since the Commission was not faced with an exporter which was unwilling to cooperate, it did not have to apply the 'facts available rule' (Article 18(1) of the Basic Regulation), but had to take the appropriate steps during the investigation in order to examine all the evidence submitted using its best endeavours and had to vary the format of the questionnaire and the verification by it, according to the specific product under investigation. The applicant also relies on Article 18(3) of the Basic Regulation, pointing out that, in any event, the information submitted to the Commission in the present case was not lacking in quality.

52 The applicant sets out that information in detail, denies that it was incorrect or insufficient and maintains that it was the Commission that was unable to assess it properly. In particular, it argues that its application of 8 November 2002, as corrected on 18 November 2002, clearly showed the deduction of the costs of the by-products. It argues that it touched on that question during the verification visit and submitted various probative documents to the Commission, particularly sales invoices for by-products. After the Provisional Regulation, it tried, but in vain, to explain to the Commission once again the question of the by-products and sent it additional documents.

53 The Council, supported by the Commission and DKL, denies that the applicant submitted all the information on the two by-products from the manufacture of para-cresol in time. The case-law cited by the applicant in that regard addressed only the issue of whether the Commission may accept information submitted out of time. As regards the references to certain decisions of the WTO, the applicant does not explain what conclusions should be drawn from those decisions or their relevance. In any event, such decisions, which do not bind the Community Courts, bear out the Council's case.

54 So far as concerns the alleged infringement of the duty of due diligence, the judgments cited by the applicant do not support its case because the Commission and the Council complied with all the procedural obligations following from those cases.

55 First, this case is not about whether the institutions ignored the anti-dumping rule according to which the costs of by-products should not be taken into account, but about whether the applicant had explained properly whether or not the costs of production of para-cresol as reported in the response of 8 November 2002 included the costs of the by-products.

56 Secondly, the Commission took into account the information relating to the by-products supplied by the applicant in its letters of 8 and 18 November 2002 and during the verification visit. Since the applicant confirmed that the costs of the by-products were separately allocated and this was apparent from the documents collected on the spot, the Commission concluded that those costs could not be included in the costs of production of para-cresol. The result might have been different had the applicant explained at that time that the costs of production of the by-products were not separately and directly allocated and that the amount of [*confidential*] [1] Chinese yuan (CNY) was the sales value (as the applicant claimed well after the provisional disclosure).

57 Third, the information provided after the verification visit was not accepted because it could not be verified. Nothing in the case-law cited by the applicant suggests that the institutions must accept non-verifiable information submitted out of time, and notably after the verification visit.

1 — Confidential data omitted.

58 In its rejoinder, the Council states that the reasons why the Commission did not accept the deduction of the by-products' costs were (1) that the applicant's response to the anti-dumping questionnaire was incomplete, (2) that during the verification visit the applicant had not, again, explained the issue or shown invoices, and (3) that the further submissions made during the hearings following the verification visit contradicted previous submissions and could not be verified within the statutory time-limits laid down by the Basic Regulation. Also, none of the Chinese languages is an official Community language, and it is not the task of the Commission to translate from Chinese into a Community language documents submitted by an exporter to support a claim for the reduction of its costs of production.

59 The applicant, contrary to what it claims, did not collaborate perfectly with the Commission. What matters is the quality of the information provided, not the quantity. The Council adds that the Commission examined the evidence for accuracy to the degree possible, exercising appropriate diligence. Without a second verification visit, it was not possible to examine the newly submitted material, which contradicted previous information.

60 With regard to the applicant's reference to the rights of the defence, the Council considers that the Commission in no way infringed the applicant's right to a fair hearing. The Commission gave the applicant numerous opportunities to make its views known. Rather, it was the applicant which, by supplying late, contradictory and incomplete information, did not exercise its rights of defence properly.

Findings of the Court

61 It is clear from the case-law that in the sphere of measures to protect trade the Community institutions enjoy a wide discretion by reason of the complexity of the

economic, political and legal situations which they have to examine (Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 19; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; Case T-118/96 *Thai Bicycle Industry* v *Council* [1998] ECR II-2991, paragraph 32; Case T-340/99 *Arne Mathisen* v *Council* [2002] ECR II-2905; Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 48).

62 Review by the Community Courts of the institutions' assessments must therefore be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the disputed choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (*NTN Toyo Bearing and Others* v *Council*, paragraph 61 above, paragraph 19; Case C-16/90 *Nölle* [1991] ECR I-5163, paragraph 12; Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 67; *Thai Bicycle Industry and Others* v *Council*, paragraph 61 above, paragraph 33; *Arne Mathisen* v *Council*, paragraph 54; and *Shanghai Teraoka Electronic* v *Council*, paragraph 61 above, paragraph 49).

63 The Court notes that, according to the case-law of the Court of Justice, where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and *Nölle* v *Council and Commission*, paragraph 49 above, paragraph 73).

64 Whilst in the area of commercial defence measures, and anti-dumping measures in particular, the Community Courts cannot intervene in the assessment reserved for the Community authorities, it is nevertheless for them to satisfy themselves that the

institutions took account of all the relevant circumstances and appraised the facts of the matter with all due care, so that normal value may be regarded as having been determined in a reasonable manner (*Nölle*, paragraph 62 above, paragraph 13; *Ferchimex* v *Council*, paragraph 62 above, paragraph 67; Case T-48/96 *Acme* v *Council* [1999] ECR II-3089, paragraph 39; *Fresh Marine* v *Commission*, paragraph 49 above, paragraphs 73 to 82). In that respect, it follows clearly from the wording of Article 2(3) of the Basic Regulation that each of the methods of calculating the constructed normal value there listed must be applied in such a way as to keep the calculation reasonable, an idea which is also expressly mentioned in that paragraph 3 (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 35, and *Acme* v *Council*, paragraph 37).

65 Although, under the Basic Regulation, it is for the Commission, as the investigating authority, to determine whether the product involved in the anti-dumping procedure has been dumped and causes injury when put into free circulation in the Community, and it may not therefore offload part of the burden of proof which it bears in that regard (see, to that effect, Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, paragraph 74, and *Acme* v *Council*, paragraph 64 above, paragraph 40), the fact remains that the Basic Regulation does not give the Commission any power of investigation allowing it to compel the producers or exporters complained of to participate in the investigation or to produce information. In those circumstances, the Council and the Commission depend on the voluntary cooperation of the parties in supplying the necessary information within the time-limits set. In that context, the replies of those parties to the questionnaire referred to in Article 6(2) of the Basic Regulation, and the subsequent on-the-spot verification which the Commission may carry out under Article 16 of that regulation, are essential to the operation of the anti-dumping procedure. The risk that, where the undertakings concerned in the investigation do not cooperate, the institutions may take into account information other than that supplied in reply to the questionnaire is inherent in the anti-dumping procedure and is designed to encourage the honest and diligent cooperation of those undertakings (see, to that effect, *Acme* v *Council*, paragraph 64 above, paragraphs 42 to 44, and Case T-210/95 *EFMA* v *Council* [1999] ECR II-3291, paragraph 71).

66 The case-law of the Court of Justice further shows that, in interpreting the provisions of the Basic Regulation concerning information of the parties concerned, account must be taken, in particular, of requirements flowing from the need to comply with the rights of the defence. Those requirements must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them (Case C-49/88 *Al-Jubail Fertiliser* v *Council* [1991] ECR I-3187, paragraph 15).

67 Finally, the case-law shows that whilst, in an anti-dumping procedure, it is justified to set time-limits for the undertakings concerned to send answers and information to the institutions, so as to ensure the smooth running of the procedure within the time-limits laid down in the Basic Regulation, the institutions have a very wide discretion as to whether it is appropriate to take account of answers and information which have been sent to them out of time. In so far as taking them into account is not liable to infringe the procedural rights of the other parties and does not have the effect of unduly prolonging the procedure, it cannot be regarded as improper (*Euroalliages and Others*, paragraph 49 above, paragraph 81).

68 It is in that context, therefore, that the Court must examine whether, as the applicant claims, the Council has infringed its obligation to make a diligent investigation and failed in its obligation to determine the normal value in a reasonable manner.

69 Article 2(3) of the Basic Regulation establishes two alternative methods of calculating the constructed normal value of a product. According to the first method, which is relevant in this case, the normal value is calculated on the basis of the cost of production, plus a reasonable amount for selling, general and administrative costs and for profits.

70 In this case, the question that arises is whether the Commission and the Council were right, on the basis of the information which they had, to hold that the production costs of para-cresol by-products were not to be deducted from the costs of producing para-cresol because they had been directly allocated to those by-products.

The applicant's reply of 8 November 2002 to the anti-dumping questionnaire and its fax of 18 November 2002

71 In this case, the applicant informed the Commission, before the verification visit, that the production of para-cresol gave rise to that of two by-products, mixed phenol and aluminium sulphite — actually sodium sulphite, as the applicant corrected itself during the verification visit — and that those by-products had their own economic outlets. The applicant also stated to the Commission that the production costs of those two by-products amounted, for the investigation period, to CNY [*confidential*]. That information appeared in sections E to G of the applicant's reply of 8 November 2002 to the anti-dumping questionnaire and in particular, in relation to that latter amount, in the tables 'ECCOP (F-4,6)' and 'DMCOP (F-4,7)' annexed to points 6 and 7 of section F-4, headed 'Production cost', of that questionnaire, and the applicant's fax of 18 November 2002 making corrections to that reply as regards specifically the taking into account of the costs of those by-products.

72 More particularly, the fax of 18 November 2002 was designed, on the one hand, to fill in the gaps left, at the time of the reply of 8 November 2002, in certain boxes of the table of costs appearing at point 1 of section F-4 headed 'Production cost' of the anti-dumping questionnaire ('table F-4.1') and, at the same time, to inform the Commission that the amounts henceforth shown in that table included the deduction of the production costs for the by-products. Thus it is that, whereas the total production cost of para-cresol for the investigation period amounted, according to the figures supplied in table F-4.1, in its version of 8 November

2002, to an amount of CNY [*confidential*], that total cost was reduced, in the version of that table sent to the Commission on 18 November 2002, to an amount of CNY [*confidential*].

73 It follows from the above that, by the fax of 18 November 2002, the applicant asked that the production cost of para-cresol for the investigation period be fixed at CNY [*confidential*] and not at CNY [*confidential*], namely a reduction of CNY [*confidential*] corresponding, according to the applicant, to the production costs of the by-products for the investigation period.

74 The Court further notes that, just like the amount of CNY [*confidential*], the amount of CNY [*confidential*] already appeared in the reply of 8 November 2002. Thus, that latter amount appeared in the box 'Investigation period/Total production cost') of the summary table of costs situated in section F-4, point 2, of the anti-dumping questionnaire sent to the Commission on 8 November 2002 ('table F-4.2') .

75 The Court finds, however, that both the Provisional Regulation and the provisional disclosure document are based solely on the data submitted in table F-4.1 in its version of 8 November 2002 and do not make any reference, even for the sake of dismissing them, to the fax of 18 November 2002 and the corrections which it made.

76 The Court considers that that absence of reference, in the Provisional Regulation and in the provisional disclosure document, to the fax of 18 November 2002 is explained by the interpretation which the Commission made of that fax and by the position which it took at the time of the verification visit of 25 and 26 November 2002.

The Commission's interpretation of the fax of 18 November 2002

77 It is apparent from the Council's pleadings before the Court and its answers to the Court's questions at the hearing that the Commission took the view, when reading the fax of 18 November 2002, that the applicant directly allocated the production costs of its by-products to those by-products according to an analytic accounting method known as the 'yield method'.

78 That method consists, according to the Council, in a direct allocation of the production costs, on the basis of yield, between the various products emerging from the production process. Use of this method results in the production costs of the product concerned not including any production cost of the by-products. That method, the Council maintains, is to be distinguished from another method, known as the 'market value method', based on the market value or sales price of the by-products. That method involves no direct allocation of the costs of those by-products, but involves a deduction of those costs from the production costs of the product concerned.

79 The reason for the Commission considering, at first analysis and on reading the fax of 18 November 2002, that the applicant used the yield method is that, in the two footnotes inserted by the applicant in that fax and in which it explained the reasons for the corrections made to its answers to the anti-dumping questionnaire, the applicant expressed itself in terms of costs of production of its by-products and not in terms of market value or sales price.

The verification visit and the Provisional Regulation

80 The Court finds that the parties are in disagreement as to the content of their exchanges on the subject of the by-products at the time of the verification visit.

Whereas the applicant argues that, at the time of that visit, it clearly reiterated its request for deduction already made in writing on 18 November 2002 and that it was reassured that the Commission had understood that request, the Council argues that the applicant confirmed to the Commission that the production costs of the by-products had been allocated directly to the by-products, which gave the Commission grounds for its view that there was no occasion to deduct them.

81 As for the question how that misunderstanding could or should have been dispelled, it should be noted that although, when tackling the question of the by-products during the verification visit, the Commission necessarily had in mind its own reading of the fax of 18 November 2002, based on the wording of the footnotes of that fax, it could not ignore the terms of the corrections in figures made by that fax to the reply of 8 November 2002. The Commission therefore must have been, or should have been, aware of the contradiction between its a priori reading of the fax of 18 November 2002, referred to in paragraph 77 above, and the request backed by figures for reduction of the amount of the production cost of para-cresol expressed in that fax and referred to in paragraph 73 above.

82 The Court finds, however, that the Commission did not seek to dispel the contradiction referred to above.

83 Indeed, it is apparent from the Council's pleadings that the Commission put 'a precise question' to the applicant, namely whether the applicant directly allocated related costs by reference to the yields obtained when producing para-cresol. The applicant replied in the affirmative. That reply 'confirmed' the Commission in its view that there was no cause to deduct the costs of the by-products. Therefore, the Commission considered it unnecessary to enquire further into the costs of the by-products. The applicant's pleadings also refer to the Commission's lack of interest in the question of the by-products as from the applicant's answer to the Commission's

question on that subject. The terms of the minutes of the verification visit, drawn up by the Commission on 3 December 2002 and produced by the Council in reply to a written question of the Court, and the statements made at the hearing also corroborate that description of the exchanges between the parties on the subject of the by-products during the verification visit.

84 It follows from the above that, after the applicant's reply to the question concerning the taking into account of the by-products, the Commission did not indicate to the applicant the consequences which it drew from that answer, namely the non-deduction of the costs of those by-products, even though those consequences were in contradiction to the figures in the fax of 18 November 2002, which envisaged the determination of the production cost of para-cresol at CNY [*confidential*] and not at CNY [*confidential*], namely a reduction of CNY [*confidential*] corresponding, according to the applicant, to the production costs of those by-products, and thus containing, essentially, a request for deduction of the costs of the by-products.

85 The Court finds that, in the absence of any indication by the Commission of that difficulty, the applicant was not in a position, at that point in the investigation, to know that the Commission had concluded that there was no occasion to deduct the costs of the by-products. Only the Commission could be aware of — and thus to report — the contradiction between the requests backed by figures contained in the fax of 18 November 2002 and the treatment which it intended to apply to the costs of the by-products. In those circumstances, the Commission's silence at the time of its verification visit gave the applicant reason to believe that its request for deduction had been understood and gave rise to no difficulties.

86 At the hearing, however, the Council and the Commission argued that the reason for the Commission not deducting the costs of by-products in the Provisional Regulation lies in the fact that, in its reply to the anti-dumping questionnaire, the applicant did not supply sufficient evidence to justify such a deduction. They argue

that it is not for the institutions to substitute themselves for the parties in the replies to be given to the anti-dumping questionnaire, or to carry out an 'investigation in all directions'. The Council and the Commission also argue that the Commission was right, at the time of the verification visit and having regard to the short time it had at its disposal, to limit itself to recording the applicant's replies without having to react to them.

87 It is true that, as is shown by the case-law referred to in paragraph 65 above, it is not the function of the Commission to substitute itself for the parties concerned in obtaining information which it is for those latter to supply to it in the context of an anti-dumping investigation. In particular, whilst the Commission is required to verify, as far as possible, the accuracy of the information provided by the parties concerned and on which its conclusions are based (see Article 6(8) of the Basic Regulation), that obligation presupposes that the parties cooperate with the Commission within the meaning of Article 18 of the Basic Regulation. Thus, where an interested party refuses access to, or otherwise does not provide, necessary information within the time-limits laid down by the Basic Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. The same applies where it is found that any interested party has supplied false or misleading information.

88 In this case, however, the Court finds, first, that there is no dispute that the applicant has not, at any time during the anti-dumping procedure, been guilty of any lack of cooperation for the purposes of Article 18 of the Basic Regulation.

89 In addition, and above all, it finds that the argument of the Council and the Commission that the Commission's non-deduction of the costs of the by-products in the Provisional Regulation was due to failure by the applicant, in its reply to the anti-dumping questionnaire or at the time of the verification visit, to produce sufficient evidence to justify such a deduction does not take account of the facts.

90 The Commission's not deducting the costs of the by-products was due not to any alleged insufficiency of the evidence produced by the applicant but to the fact that the Commission had understood from the information and replies of the applicant that the latter did not want that deduction. As stated in paragraph 83 above, the Commission felt 'confirmed', at the verification visit, in its assessment, adopted a priori on reading the fax of 18 November 2002, that the costs of the by-products were not to be deducted.

91 If the position of the Council and the Commission, based on the contention that it was the insufficiency of the evidence adduced in support of the request for deduction that justified the deduction not being made, were correct, then the Commission would, at the time of the verification visit, have indicated to the applicant at the outset that that request for deduction, identified as such, was not accompanied, in this case, by sufficient supporting evidence to be usefully taken into consideration. Moreover, and even if the Commission had omitted to warn the applicant of that insufficiency at the verification visit, it was at least required, in discharging its obligations of detailed information and reasoning expressly referred to in, respectively, Article 20(1) and Article 14(2) of the Basic Regulation and reiterated in the case-law cited, respectively, in paragraphs 66 and 63 above, to indicate in the provisional disclosure document and the Provisional Regulation that the request for deduction of the costs of the by-products was rejected in the absence of sufficient proof. In the event, the Court finds that both the provisional disclosure document and the Provisional Regulation are totally silent on the question of the deduction of the costs of the by-products.

92 The terms in which the Commission interpreted the fax of 18 November 2002 and the fact that it did not point out to the applicant the contradiction which existed between the treatment which it was preparing to apply to the costs of the by-products and the figures appearing in that fax meant that the Commission did not place itself in a position, when making that visit, to carry out any of the verifications which would however have been necessary if, the contradiction referred to above having been exposed, a discussion had opened between the parties, leading to the clearing-up of the misunderstanding and causing the Commission to find that the applicant was requesting a deduction of the costs of its by-products.

93 In that respect, the Court cannot accept the arguments, put forward at the hearing, that, having regard to the limited time available for the verification visit and to the volume of information to be verified, the Commission was not required, at the time of that visit, to do anything more than take passive note of the applicant's replies, with a view to subsequent analysis.

94 Whilst it is true that the Commission cannot be required, in the context of an anti-dumping investigation and in particular at a verification visit, to substitute itself for the parties, which are under a duty to cooperate honestly and effectively with the Commission in supplying it with necessary and precise information, the fact remains that, in the particular circumstances of this case, the Commission could not, without failing in its duty to make a diligent investigation, omit to point out to the applicant the contradiction which it had found, or ought to have found, between, on the one hand, the figures in the fax of 18 November 2002 and, on the other hand, the fact that it understood from the applicant's reply that the latter was not requesting deduction of the costs of the by-products.

95 Moreover, in so far as the arguments referred to above might suggest that the Commission needed to carry out a subsequent analysis of the applicant's replies in order finally to establish its position concerning the treatment to be given to the costs of the by-products, the Court finds that that is contradicted by the fact that, at the time of the verification visit, the Commission considered itself confirmed in its position as to the treatment to be applied to those costs, and that it therefore considered it no longer necessary to enquire on that subject.

96 It follows from the whole of the above considerations that, having regard to the particular circumstances of this case, the Commission made an obvious error of assessment in its evaluation of the wording of the fax of 18 November 2002 and infringed its obligation, recalled in the case-law cited in paragraph 64 above, to take account of all the relevant circumstances and to appraise the facts of the matter with

all due care, so that the constructed normal value may be regarded as having been determined in a reasonable manner.

97 It therefore needs to be examined whether those illegalities, which took place at the stage of the Provisional Regulation, have had the consequence of rendering the Contested Regulation unlawful. The fact that the Commission made an obvious error of assessment and failed in its obligation to investigate diligently at the initial stage of the anti-dumping procedure does not automatically entail the illegality of the definitive regulation adopted by the Council.

The Contested Regulation

98 In the 12th recital in the preamble to the Contested Regulation, the Council, reproducing exactly the formulation of the proposal for a definitive regulation prepared by the Commission, dealt with the question of by-products in the following terms:

'[The applicant] claimed that the cost of production of two other products should be deducted from the total cost of production as they result from the same production process and are sold separately. The [applicant] could not substantiate this claim by documented evidence. Indeed the documents collected on the spot indicated that the direct costs were already allocated to the different products which were in line with the initial questionnaire response. Therefore, the claim had to be rejected.'

99 The Court finds that, in the proposal for a definitive regulation and in the Contested Regulation, the Commission and the Council maintained the treatment applied to the costs of the by-products at the stage of the Provisional Regulation.

100 Thus, the Commission and the Council stood by the amount of CNY [*confidential*], held at the Provisional Regulation stage as the production cost of para-cresol, and by the choice not to deduct the costs of the by-products, the existence and marketing of which those institutions do not deny, as they confirmed in reply to a question by the Court at the hearing, and which has been recorded in the minutes of the hearing.

101 It therefore needs to be examined whether or not the choice not to deduct the costs of the by-products has arisen, when reiterated at the stage of the proposal for a definitive regulation and, above all, at the stage of the Contested Regulation, from an infringement of the obligation to take account of all the relevant circumstances and to appraise the facts of the matter with all due care, so that the constructed normal value may be regarded as having been determined in a reasonable manner, within the meaning of the case-law cited in paragraph 64 above.

102 The Council makes essentially four arguments before the Court in order to justify maintaining in the Contested Regulation the solution adopted at the stage of the Provisional Regulation.

103 The Council's first argument consists in maintaining that the applicant's reply to the anti-dumping questionnaire was incomplete.

104 The Court finds, however, that that argument concerns facts prior to the Provisional Regulation, and that, therefore, it pre-existed that regulation. Whether true or not, that argument did not prevent the Commission from admitting, implicitly but necessarily, at the stage of the Provisional Regulation, the existence and marketing of the by-products and from reserving for the costs of those products a particular treatment consisting in their non-deduction on the ground that those costs had

been directly allocated to the by-products. That argument therefore offers no enlightenment as to the reasons why the Commission and the Council maintained, in the proposal for a definitive regulation and in the Contested Regulation, the solution adopted, on the basis of an obvious error of assessment and an infringement of the obligation of diligence, at the stage of the Provisional Regulation.

105 The Council's second argument consists in maintaining that, during the verification visit, the applicant did not once again explain the problem of the by-products or show the invoices for them.

106 The Court cannot accept that argument either, because, once again, it concerns facts prior to the Provisional Regulation and thus itself pre-existing that regulation. The allegation that the applicant did not once again explain the problem during the verification visit and show the sales invoices of the by-products, even if true, which the applicant strongly denies, has not prevented the Commission from admitting, there again, the existence and marketing of the by-products at the Provisional Regulation stage and does not in any way explain why the treatment reserved for the costs of the by-products at that stage was maintained in the Contested Regulation.

107 The Court would add for the sake of completeness that, even if, as the Council claims, the applicant did not supply additional evidence at the stage of the verification visit, that was only because the attitude of the Commission at that visit gave it reason to suppose that its request for deduction had been well understood and did not raise difficulties in the circumstances (see paragraph 85 above). The Court considers, and the parties have not in any way challenged it at the hearing, that, if the Commission had referred to the contradiction which existed between the figures in the fax of 18 November 2002 and what it understood from the applicant's replies, discussion would have taken place between the parties and the question of the by-products would have been clarified.

108 The Court is not in any way stating, by these considerations, that the Commission should have conducted an 'investigation in all directions'. It is simply a question of drawing the consequences from the obligations, recalled in paragraphs 63 and 64 above, upon an institution, which, as in this case, has a wide discretion, to examine all the relevant circumstances of the case with care and impartiality and to appraise the evidence on file with all the diligence required for it to be considered that the constructed normal value has been determined in a reasonable manner. It follows from these obligations that, save where there is a lack of cooperation within the meaning of Article 18 of the Basic Regulation, which is not the case here, the institutions must, where they cannot reasonably consider themselves sufficiently enlightened on a question which is directly relevant to determining the normal value, point that out clearly to the operator concerned. That obligation echoes the obligation, under Article 6(8) of the Basic Regulation, to verify, as far as possible, the accuracy of the information supplied by the parties concerned and on which the conclusions of the institutions are based.

109 The Council's third argument is in two parts. First, it argues, the information supplied by the applicant contradicted that previously submitted, and, secondly, it was sent late or in an impenetrable language.

110 Concerning the allegation of contradiction, the Court considers that this cannot succeed, for the following reasons.

111 First, this allegation is put forward by the Council only for the purpose of criticising items of evidence produced by the applicant. It is in no way the occasion for that institution to supply a justification for the solution finally adopted by it for the treatment of the by-products. A solution based, at the stage of the Provisional Regulation, on an obvious error of assessment and a failure diligently to examine the file cannot be maintained, at the stage of the definitive regulation, on the ground that the items which the applicant put forward subsequently contained contradictions. Such an argument does not constitute a justification of the treatment

finally adopted by the Council any more than do the first two arguments examined above.

112 Furthermore, and for the sake of completeness only, the reality of some of the contradictions alleged by the Council and relied on in its defence has not been proven.

113 For example, the fact that the applicant indicated 'that the costs of production for the by-products have not been separated from the costs of production of para-cresol' and requested 'that the specific costs related to the production of the by-products be deducted from the costs of production for para-cresol', or the fact that the applicant hesitated between the yield method and the market value method do not constitute genuine contradictions in the successive contentions of the applicant. The contradiction, in so far as it exists, is in reality between the requests of the applicant and the understanding which the Commission had of them at the stage of the Provisional Regulation. It also appears to arise from the fact that the Commission and the Council adhere, in a restrictive manner, to the typology of the methods of taking into account the costs of the by-products referred to in paragraphs 77 and 78 above. The Court finds, however, that, provided generally accepted accounting principles of the country concerned are complied with, Article 2(5) of the Basic Regulation does not lay down any particular restriction as to the methods which may be used for the assessment and accounting treatment of costs.

114 As for the Council's allegation that the information supplied by the applicant was late and unverifiable, either for reasons of time-limits or for linguistic reasons, this is likewise not capable of justifying maintaining, at the stage of the Contested Regulation, an initial solution that was based on an obvious error of assessment and failure to make a diligent examination of the file.

115 Moreover, the Court considers that that allegation is unfounded.

116 Concerning, first, the alleged lateness, referred to by the Commission in its fax of 25 August 2003, of the information given by the applicant on 18 November 2002 concerning the by-products, the Court notes that, at the hearing, the Council refrained from relying on it.

117 However, the fact remains that the position adopted by the Commission in its proposal for a definitive regulation and that adopted by the Council in the Contested Regulation were based, in particular, on that alleged lateness.

118 On that point, it is undisputed, first, that the fax of 18 November 2002, though (only) a few days later than the time-limit for submitting the reply to the anti-dumping questionnaire, nevertheless arrived at the Commission seven days after the verification visit. Secondly, that fax was in reply to a fax from the Commission of 15 November 2002, expressly inviting the applicant to point out all the errors becoming apparent on the occasion of the preparation of the verification visit. Finally, it is undisputed that the fax of 18 November 2002 was taken into consideration by the Commission in its own time. By doing that, the Commission did no more than use the facility, recognised by the case-law cited in paragraph 67 above, of taking account of information reaching it after the expiry of the time-limits set. In those circumstances, the Commission could not reasonably claim, as it nevertheless did in its fax of 25 August 2003 seeking to justify its refusal to re-examine the question of the by-products, that the fax of 18 November 2002 was out of time.

119 Concerning, secondly, the alleged lateness, referred to by the Commission in its fax of 25 August 2003, of the request for deduction of the sales value of the by-products, which the Commission claims was formulated only on 22 April 2003, that is to say after the Provisional Regulation, the Court finds that, even if the applicant could have expressed itself in greater detail in its replies to the anti-dumping questionnaire, the application for deduction of the costs of the by-products was nevertheless clear from the fax of 18 November 2002, which, as mentioned in paragraph 73 above, contained a request that the production cost of para-cresol for the investigation period be fixed at CNY [*confidential*] and not at CNY

[*confidential*], namely a reduction of CNY [*confidential*] corresponding, according to the applicant, to the production costs of the by-products for the investigation period. The Court therefore considers that, in the particular circumstances of the case, the Commission and the Council cannot blame the applicant for sending additional items of information after the latter had been informed, only at the stage of the Provisional Regulation, of the fact that the Commission had not understood that request for deduction. It follows that the applicant could produce such items of information after that regulation, in support of its request for deduction of the costs of the by-products, in particular in its letter of 22 April 2003, it being for the Commission to carry out a diligent re-examination, including further verifications if necessary. To hold otherwise would, in the particular circumstances of this case, amount to depriving the part of the anti-dumping procedure subsequent to the Provisional Regulation of its meaning and effect.

120 As for the Council's objection that certain documents — essentially accounting documents communicated by the applicant on 23 and 25 July 2003 — were produced only in Chinese, this must also be dismissed for the following reasons. Leaving aside the question as to who had responsibility for any translation of those documents, that objection cannot overcome the fact that, in the particular context of this case, it was the responsibility of the Commission, as the investigating authority and in view of the applicant's comments of 22 April 2003 on the Provisional Regulation, to begin without delay a complete and diligent re-examination of the position adopted in that regulation concerning the by-products. It is at that stage that the Commission could, supposing the applicant had been under such an obligation, have required it to accompany the documents produced with a translation. In the event, the Commission took no initiative towards such a re-examination. It was the applicant which sent the Commission documents which the latter had not requested. The Council and the Commission cannot therefore rely before the Court on a lack of translation in order to justify the refusal to examine the documents produced by the applicant after the Provisional Regulation, that ground being, moreover, not the one put forward by the Commission in its fax of 25 August 2003.

121 The Council's fourth argument is to the effect that the documents obtained on the spot indicated that the costs of the by-products were directly allocated to those by-products. The documents handed over to the Commission during the verification visit and to which that argument might be applied are four in number. The first is headed 'Product cost calculation table of Shandong Reipu Biochemicals Ltd', and appears in Annex A19 to the application ('document A19'), the second is headed 'Cost of production — Investigation period', and appears in Annex A20 to the application ('document A20'), the third is headed 'Ledger of finished products for para-cresol', and appears in Annex A21 to the application ('document A21'), and the fourth is headed 'Cost statistics of products concerned during the investigation period', and appears in Annex A22 to the application ('document A22'). Those documents are all tables of figures.

122 Concerning document A19, the Court finds that the criticisms made of it by the Commission, and echoed by the Council in its defence, do not in any way explain why the Commission considered that that document indicated that the costs of the by-products were directly allocated to those by-products. It should be noted in that regard that, immediately after those criticisms in its defence, the Council adds that 'in order to clarify the issue of the by-products and to decide how to proceed, the Commission's case-handlers asked the applicant ... whether it directly allocated the related costs according to the yields'. It was only in the light of the applicant's reply that 'the Commission understood ... that all costs [indicated in document A19]

related only to the product concerned and concluded that there was no reason to deduct anything from the amounts indicated as costs of production of para-cresol'.

123 It is therefore clear that it was not the content of document A19 which led the Commission to conclude that the costs of the by-products were directly allocated to them, but only the understanding which the Commission had of the applicant's reply to the question asked on that subject.

124 Concerning documents A20 and A21, it is clear from the Council's defence that they were neither requested nor examined by the Commission for the purposes of answering the question of the by-products.

125 As regards document A22, the Council itself states, in its defence, that the Commission 'did not refer to this specially prepared document when concluding that the costs for the by-products were already allocated to the by-products'.

126 More generally, and as set out in paragraph 83 above, the Council's description of the conduct of the verification visit reveals that, once it thought it had received confirmation from the applicant of the direct allocation of the costs of the by-products, the Commission was not interested in the four documents referred to above.

127 It follows that the Commission's statement, in particular at the hearing on 19 May 2003, reproduced verbatim in recital 12 of the Contested Regulation, to the effect that the documents produced at the time of the verification visit showed that the costs of the by-products should not be deducted, is without foundation.

128 The final conclusion, after examining the Council's four arguments above, is that the Commission, then the Council, wrongly refused seriously to re-examine, after the Provisional Regulation, whether the treatment given at that stage to the costs of the by-products was appropriate, thereby perpetuating, at the stage of the Contested Regulation, the effects of the obvious error of assessment and the infringement of the obligation to examine diligently committed at the stage of the Provisional Regulation.

129 The Court would emphasise that this is not to say that, in this case, the Council should have made the deduction requested by the applicant on the strength only of the information given by the latter before and after the Provisional Regulation. The Court cannot prejudge the solution to which a diligent re-examination would have led. Nor does the Court rule that that information was of perfect quality and could be accepted without verification; it merely holds that, in the particular circumstances of the case and in the light of that information, the Commission and the Council should have concluded that the position adopted at the stage of the Provisional Regulation had been adopted hastily, and that it was necessary, given their obligation to make a diligent examination and in order to reach a reasonable calculation of the normal value, to re-examine the question of the by-products with care.

130 It follows from the above considerations as a whole that, in the particular circumstances of this case, the Commission and the Council have failed, both before

and after the Provisional Regulation, in their obligations, referred to by the case-law cited in paragraph 64 above, to take account of all the relevant circumstances and appraise the facts of the matter with all due care, so that the constructed normal value may be regarded as having been determined in a reasonable manner.

131 The Contested Regulation must therefore be annulled in so far as it concerns the applicant, without there being any need for the Court to rule on the second and third grounds for annulment, or to grant the applicant's request for production by the Commission of the calculations on which it based its assessment of the injury suffered by the Community industry.

Costs

132 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 Council has been unsuccessful, it must be ordered to pay the costs of the applicant, as the latter has claimed.

133 Under the first subparagraph of Article 87(4) of the Rules of Procedure, institutions which intervene in the proceedings are to bear their own costs. Under the third subparagraph of Article 87(4), the Court of First Instance may order an intervener other than those mentioned in the second subparagraph to bear its own costs. The Commission and DKL, which have intervened in support of the Council, are therefore ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby rules:

1. **Council Regulation (EC) No 1656/2003 of 11 September 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of para-cresol originating in the People's Republic of China is annulled in so far as it concerns the applicant.**

2. **The Council is ordered to bear its own costs and those incurred by the applicant.**

3. **The Commission and Degussa Knottingley Ltd are ordered to bear their own costs.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 13 July 2006.

E. Coulon M. Vilaras

Registrar President