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

24 October 2006 *

In Case T-274/02,

Ritek Corp., established in Hsin-Chu, Taiwan,

Prodisc Technology Inc., established in Taipei Hsien, Taiwan,

represented initially by K. Adamantopoulos, V. Akritidis and D. De Notaris, lawyers, and subsequently by K. Adamantopoulos and J. Branton, Solicitor,

applicants,

v

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

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by T. Scharf and S. Meany, acting as Agents,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 1050/2002 of 13 June 2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of recordable compact discs originating in Taiwan (OJ 2002 L 160, p. 2),

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

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2006,

gives the following

Judgment

Legal context

1 Article 1(2) and (3) 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:

'1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

2. 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(10) of the basic regulation provides:

'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. ...'

3 Article 2(11) of the basic regulation provides that 'subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community' ('the first symmetrical method'). It provides, alternatively, for 'a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis' ('the second symmetrical method'). The provision goes on to state that 'however, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions or periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised' ('the asymmetrical method').

4 Article 2(12) of the basic regulation provides:

'The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established.'

5 Article 2(11) of the basic regulation transposes into Community law Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103, 'the 1994 Anti-dumping Code'), which is contained in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3).

6 Article 2.4.2 of the 1994 Anti-dumping Code reads as follows:

'Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.'

Factual background

7 Ritek Corp. and Prodisc Technology Inc. are producers and exporters of recordable compact discs ('CD-Rs'), established in Taiwan.

8 After a complaint was lodged on 16 February 2001 by the Committee of CD-R Manufacturers ('CECMA') on behalf of producers representing more than 25% of the total Community production of CD-Rs, the Commission initiated under Article 5 of the basic regulation an anti-dumping proceeding concerning imports of CD-Rs originating in Taiwan.

9 The notice of initiation of that proceeding was published in the *Official Journal of the European Communities* of 31 March 2001 (OJ 2001 C 102, p. 2).

10 The resulting investigation of dumping and injury covered the period from 1 January to 31 December 2000 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 1997 to the end of the investigation period

11 In view of the large number of exporting producers, the Commission planned to use sampling in accordance with Article 17 of the basic regulation. Ultimately five exporting producers were used as samples, among them the applicants.

12 On 17 December 2001 the Commission adopted Regulation (EC) No 2479/2001 imposing a provisional anti-dumping duty on imports of recordable compact discs originating in Taiwan (OJ 2001 L 334, p. 8; 'the provisional regulation').

13 On 18 December 2001 the Commission sent the applicants two documents headed 'specific disclosure document', informing them of the essential facts and considerations on the basis of which provisional anti-dumping duties had been imposed.

14 By letter of 28 January 2002 the applicants and two other exporting producers affected by the anti-dumping proceeding sent the Commission their comments on the provisional regulation and the disclosure documents sent on 18 December 2001.

15 On 26 February 2002 a meeting between the applicants and the Commission was held at the Commission's premises.

16 By letters of 11 March 2002 the Commission sent the applicants a document headed 'general disclosure document' as well as documents headed 'specific disclosure document' (together referred to as 'the final disclosure document') regarding the essential facts and considerations on the basis of which it was intended to impose definitive anti-dumping duties. The Commission invited the applicants to send it their comments on the final disclosure document by 21 March 2002.

17 By letter of 21 March 2002 the applicants and two other exporting producers affected by the anti-dumping proceeding sent the Commission their comments on the final disclosure document.

18 On 3 June 2002 the Commission adopted its proposal for a regulation imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of recordable compact discs originating in Taiwan (COM(2002) 282 final; 'the proposal for a definitive regulation'). That proposal, which the Commission published on its website, was summarised in the *Official Journal of the European Communities* (OJ 2002 C 227 E, p. 362).

19 On 13 June 2002 the Council adopted Council Regulation (EC) No 1050/2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of recordable compact discs originating in Taiwan (OJ 2002 L 160, p. 2; 'the contested regulation').

20 In the contested regulation, the Council found that the two conditions for applying the asymmetrical method were met (points 29 to 31 of the contested regulation). It therefore used this method in calculating the dumping margin, and, in that context, applied a technique of putting at zero the negative dumping margins found ('zeroing'). Having found there to be for each of the applicants a single dumping margin of 17.7% (points 34 and 35 of that regulation) and injury caused by that dumping, the Council imposed on each of them a definitive anti-dumping duty of the same percentage, in application of the lesser duty rule (point 89 and Article 1 of the contested regulation).

Procedure and forms of order sought

21 The applicants brought the present action by an application lodged at the Registry of the Court of First Instance on 6 September 2002.

22 By a document lodged at the Registry of the Court of First Instance on 6 December 2002, the Commission sought leave to intervene in support of the form of order sought by the Council. By order of 23 January 2003 the President of the Fourth Chamber (Extended Composition) of the Court of First Instance granted leave to intervene. By letter of 31 January 2003, lodged on 3 February 2003, the Commission notified the Court that it was waiving its right to lodge a statement in intervention, but that it would take part in the hearing.

23 Since the composition of the chambers of the Court of First Instance was altered with effect from 13 September 2004, the Judge-Rapporteur was assigned as President to the Fifth Chamber (Extended Composition), to which the present case has consequently been allocated.

24 The applicants claim that the Court should:

— annul the contested regulation;

— order the Council to pay the costs.

25 The Council, supported by the Commission, contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

26 The applicants submit two pleas in law in support of their application for annulment. The first plea relates to breach of Article 2(10) and (11) of the basic regulation on the grounds of manifest error in establishing targeted dumping and manifestly unjustified application of the asymmetrical method. The second plea relates to the use of zeroing in breach of Article 2 of the basic regulation.

Preliminary observations on the Council's findings as to the admissibility of the pleas for annulment

27 The Council doubts the admissibility of both the first and the second plea for annulment. By these pleas, the applicants are simply challenging the Commission's provisional findings and its final disclosure document. While the Commission does play a key role in anti-dumping investigations, its findings are relevant only in so far as they are taken up in the definitive regulation. Thus the applicants should have challenged the provisions of the contested regulation.

28 The Council argues further that, even if the pleas for annulment, and, in particular, the first of those pleas, are found by the Court of First Instance to be admissible, the allegations in the application which relate to the second condition for applying the asymmetrical method are redundant, since they are aimed merely at the Commission's findings set out in the provisional regulation and do not make any reference to the far more detailed reasoning contained in the contested regulation.

29 The applicants submit that it is clear from the application that they are asking the Court to annul the regulation adopted by the Council.

30 The Court considers that the Council's doubts directed formally at the admissibility of the pleas for annulment raise a question not so much of admissibility as of the relevance to the subject-matter of the action of the arguments made in those pleas.

31 In this regard, even if the applicants' criticisms are directed more at the Commission than the Council, and are thus at times technically unfounded when they seek to rely on the contested regulation, the fact remains that the action seeks the annulment of Regulation No 1050/2002 and it is indeed the Council which the applicants identify as the ultimate addressee of their arguments. In the present case, by referring frequently to the Commission, the applicants are essentially underlining the fact — which the Council, moreover, admits — that the Commission is a key actor in the anti-dumping proceeding and it is the Commission which proposes to the Council the wording of the definitive regulation.

32 Furthermore, it transpires that in the contested regulation, the Council reproduced verbatim the proposal for a definitive regulation adopted by the Commission and thus simply endorsed without modification the Commission's final conclusions, criticised by the applicants in their written pleadings.

33 Accordingly, the relevance to the subject-matter of the present action of the applicants' arguments in their pleas for annulment is not called into question by the mere fact that they contain frequent references to the Commission and to the proposal for a definitive resolution drawn up by that institution, and the objections raised by the Council in this regard must be dismissed.

34 The Council's objection, referred to in paragraph 28 above, to the applicants' claims in relation to the second condition for applying the asymmetrical method in fact raises the issue of the admissibility of some of the applicants' complaints in relation to Article 48(2) of the Rules of Procedure of the Court of First Instance. This issue will be examined in the context of the analysis of the first plea for annulment.

First plea in law: breach of Article 2(10) and (11) of the basic regulation, on the ground of manifest error in establishing targeted dumping and manifestly unjustified application of the asymmetrical method

Arguments of the parties

35 In relation to this plea, the applicants submit that the first condition for applying the asymmetrical method, concerning the existence of a pattern of export prices differing according to the purchasers, regions or periods, requires there to be targeted dumping, that is, the applicants submit, deliberate treatment by the exporters of certain exports with the aim of disguising them among other transactions. The applicants rely in this regard on point 32 of the Opinion of Advocate General Jacobs in Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, at I-84 ('*Petrotub*'). It is not enough, in order to conclude that a difference in the pattern of export prices exists within the meaning of Article 2(11) of the basic regulation, to make a finding that export prices differed significantly depending on the purchasers, regions or periods. It must also be found that that price variation is the result of intent on the part of the exporter to disguise his dumping practices.

36 In point 30 of the contested regulation, however, the Council only made a finding as to the significant difference in export prices between the first and second halves of the investigation period. It did not consider it relevant to enquire as to the reason for such a difference and thus as to whether that difference was intentional.

37 However, if the Council had agreed to take into consideration the development of world prices of the product in question, it would have come to the conclusion that the fall in the applicants' export prices to the Community during the second half of

the investigation period was not intentional, but simply in line with the development of those prices. According to the applicants, there was thus no difference in the export pricing pattern within the meaning of Article 2(11) of the basic regulation.

38 Furthermore, it was wrong to consider that the first symmetrical method would not reflect the full degree of dumping. The fact that the Commission did not use the first symmetrical method had the effect of increasing the dumping margin. However, contrary to what the Commission claimed in the provisional regulation, that increase did not in any way mean that the true extent of dumping was revealed. It was rather the application of zeroing combined with the asymmetrical method which created a difference in terms of dumping margin, and not the existence of special circumstances justifying the use of the asymmetrical method.

39 In their reply, the applicants deny that the second symmetrical method, given the number of transactions involved, is difficult to apply or yields arbitrary results. They go on to state that it was relevant for the institutions to know the reason for the existence of a difference in the export price pattern, arising from the development of worldwide prices, and to explain why the symmetrical methods could not be used to address the situation stemming from such a difference. In the contested regulation, however, that explanation was insufficient because it did not properly address world price trends.

40 The applicants also criticize the argument of the Council set out in the defence that a difference of two percentage points between the dumping margins, calculated according to either the first symmetrical method or the asymmetrical method, is to be considered significant where those margins are 4% and 6%, while this is not the case if those margins are 52% and 54%. That method of comparing the results obtained from using those methods cannot be deduced from the basic regulation and ought to have been clearly explained in advance by the institutions.

41 Finally, the applicants take the view that, in the light of the substantial number of dumped transactions in the first half of the investigation period, there is no clear distinction between the first and second halves of the investigation period warranting the conclusion that there is a difference in the export price pattern within the meaning of Article 2(11) of the basic regulation.

42 The Council contends that Article 2(11) of the basic regulation, in relation to the first condition for applying the asymmetrical method, requires only the existence of an export pricing pattern which varies according to the purchasers, regions and periods, and that that notion is a purely objective one. In addition, the notion of intent is, in general, alien to the anti-dumping rules. Nowhere in the basic regulation are the institutions required to prove intent in order to establish the existence of dumping or injury. Finally, in the context of the dumping calculation, it is not necessary to know which factors influenced the price level on the exporter's domestic market and the Community market. Given that the purpose of the asymmetrical method is to reveal the full extent of dumping being practised, it would not make sense to seek the causes of the difference in the export pricing pattern. To do so would be at odds with the system and defy the very purpose of the asymmetrical method.

43 That does not mean, however, that a worldwide decline in prices is not taken into account at all in an anti-dumping investigation. It can be, and was in the present case, assessed on the basis of other factors in the context of the analysis of injury and causation.

44 The Council notes that the applicants do not challenge the Council's finding in point 30 of the contested regulation that the fact that export prices were significantly lower during the second half of the investigation period constituted a 'pattern of export prices' within the meaning of Article 2(11) of the basic regulation. It is only in the reply that the applicants dispute this finding, alleging that some of the export sales in the first half of the investigation period were also dumped. As the Council

explained in point 28 of the contested regulation, the applicants admitted during the investigation that export prices differed significantly according to periods. Since the applicants did not challenge this statement in the application, their allegation must, for that reason alone, be dismissed.

45 Moreover, the applicants' allegation is unsubstantiated. The applicants do not identify the non-dumped export transactions and do not explain why these transactions call into question the existence of a pattern of export prices differing between periods. Finally, even if some transactions in the first half of the investigation period were also dumped, there would still be a pattern of export prices differing between periods. Nothing in the basic regulation supports the assumption that a pattern of export prices differing between periods exists only if all transactions fit the same pattern. On the contrary, the reference to 'pattern' makes clear that while prices must follow the same trend, there may be some transactions that do not fit in. The Council points out that its finding is based on the fact the prices were significantly lower (sometimes below 50%) in the second half of the investigation period. A total of 2 305 export transactions for both applicants were investigated. Given this huge number of transactions, single transactions that do not fit into the overall picture cannot call into doubt the conclusion that an export price pattern existed differing between periods.

46 The applicants deal with the second condition for applying the asymmetrical method only briefly, merely referring to the provisional findings of the Commission. The reasoning provided by the Council in point 31 of the contested regulation is different and much more detailed than that provided by the Commission in point 29 of the provisional regulation.

47 In response to the applicants' criticism of the method of comparing the results yielded by the first symmetrical method and by the asymmetrical method, the Council submits that that argument ignores the fact that the institutions enjoy a wide margin of discretion in the application of the basic regulation. In addition, when exercising their discretion, the institutions are not obliged to explain in detail and in advance the criteria which they intend to apply in every situation. The applicants do not, moreover, argue that their rights of defence have been infringed.

48 Finally, in response to the applicants' claims that the Council, by failing to take proper account of the worldwide price development, did not sufficiently explain why the symmetrical methods failed to reflect the situation resulting from the existence of an export price pattern differing between periods, the Council argues that the requirement of a specific explanation under Article 2(11) of the basic regulation and Article 2.4.2 of the 1994 Anti-dumping Code, concerning the second condition for applying the asymmetrical method, relates to whether the symmetrical methods reflect the full degree of dumping. Contrary to the situation in *Petrotub*, a specific explanation was provided by the Council in relation to the symmetrical methods.

Findings of the Court

49 It is clear from the wording of Article 2(11) of the basic regulation that the Community institutions' use of the asymmetrical method to calculate the dumping margin requires that two conditions be fulfilled. First, the pattern of export prices must differ significantly among different purchasers, regions or periods. Secondly, the symmetrical methods must not be able to reflect the full degree of dumping being practised.

50 As regards, first, the condition as to the existence of a difference in the pattern of export prices, it should be determined whether, as the applicants claim in essence, the Council's finding that there was such a difference infringed the basic regulation.

51 The reasoning provided in the contested regulation relating to that first condition is set out in point 30 as follows:

'As to the first requirement, it has been found that export prices were significantly lower during the second half of the investigation period as compared to the first half and this finding was not disputed by the exporting producers concerned. They have contested, however, whether the difference in prices constituted a pattern, which they alleged was the result of a worldwide fall in prices including normal values. It was considered that the decline in export prices constituted a pattern for two reasons: firstly, because the decline prevailed throughout the second half of the investigation period; and secondly, because of its extent, which was found to be very substantial and in some cases reached 50%. As to the claim that the differences in export prices were because of worldwide trends in prices including normal values, this was considered irrelevant as the appropriate analysis has to be made on export prices to the Community. It is also noted that Article 2(11) of the basic regulation requires a demonstration of a pattern of export prices and not an explanation of why such a pattern existed.'

52 The applicants' principal complaint, alleging that the Council's finding of an export price pattern differing according to the periods without having established intent on the part of the applicants to disguise dumping is unlawful, must be dismissed.

53 The Court of First Instance observes, first of all, that the applicants' reference to point 32 of the Opinion of Advocate General Jacobs in *Petrotub*, referred to in paragraph 35 above, is misguided, as that paragraph merely recounts the arguments of Petrotub. Furthermore, in his assessment, set out in point 58 et seq. of his Opinion, the Advocate General does not suggest that evidence of the exporter's intent to disguise dumping is required for a price pattern to be found which varies according to the purchasers, regions or periods within the meaning of Article 2(11) of the basic regulation.

54 Next, the Court considers that the purpose of the asymmetrical method is to enable the full degree of the dumping practised to be reflected where, in the event that a difference in the export price pattern has been found, irrespective of its cause, this would not be possible using the two other methods. The question as to whether there is an export price pattern differing according to the purchasers, regions or purchasers is a purely objective one, irrespective, therefore, of the presence or absence of any fraudulent intent underlying that situation. Requiring proof of intent would prevent use of the asymmetrical method in situations where that method alone would enable the full degree of the dumping practised to be reflected, and thus, by introducing a requirement not provided for under Article 2(11) of the basic regulation, would prevent that provision from operating correctly.

55 These considerations do not alter the fact that dumping may be a deliberate act, likely to be the subject of attempts to disguise, so that the difference in the export price pattern found may be the result of manoeuvring by the exporters. The fact remains that there is no indication — quite the contrary, in fact — that the asymmetrical method was provided for only to be used against deliberately disguised dumping. As the Council points out, use of the asymmetrical method does not depend on the institutions' making a finding of an intention to disguise dumping, but only on finding that the result of using the symmetrical methods would be to 'disguise' technically or even to 'mask' the full degree of dumping (Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 23, and Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 25), that is, to prevent it from being correctly assessed.

56 The Court has furthermore had the opportunity to confirm this, in a case in which the exporter criticised the Council for having applied the asymmetrical method without having established fraudulent intent on its part. The Court replied that '[the] argument that application of the [asymmetrical] method is justified only where the exporter has been guilty of manoeuvres aimed at disguising dumping cannot be accepted' since 'although that method is appropriate to deal with such manoeuvres, its adoption is by no means confined to cases in which such conduct has been observed by the institutions' (Case C-178/87 *Minolta Camera* v *Council* [1992] ECR I-1577, paragraph 42; see also, to that effect, Advocate General Mischo's Opinion in that case, at ECR I-1603, points 53 to 55).

57 It follows from the foregoing that the existence of an export price pattern differing according to the purchasers, regions or periods, the first condition for applying the asymmetrical method, is by no means conditional on establishing intent on the part of the exporters to disguise dumping.

58 The view is also supported by the fact that the concept of intent is generally alien to the anti-dumping rules. There is nothing in the wording of the basic regulation requiring the institutions to prove intent in order to establish that there is dumping or injury.

59 In this respect, and more generally, it should be recalled that a finding of dumping, the first stage in the assessment of whether an anti-dumping duty should be imposed, is a purely objective comparison between the normal value and export prices. That comparison, conducted in accordance with Article 2 of the basic regulation, is based on an examination of the economic and accounting data of the undertakings concerned and in no way extends to looking into the reasons for domestic and export price levels. As the Council points out, the reasons which might have led an exporter to make sales on his domestic market at prices below his production costs, or to make sales to the Community at prices below the normal value, are irrelevant to the dumping calculation. The exporter cannot therefore

claim, as the applicants are essentially arguing, that the domestic prices actually practised should be used as opposed to a constructed normal value, on the ground that the pressure which competitors exerted on prices left that exporter with no choice but to sell on his domestic market at below the cost of production. He can also not deny that there is dumping on the ground that the level of prices in the Community forced him to export at below the normal value (see, to that effect and by analogy, Joined Cases T-159/94 and T-160/94 *Ajinomoto and The NutraSweet Company* v *Council* [1997] ECR II-2461, paragraphs 126 to 129).

60 Accordingly, the Council, having pointed out, in point 30 of the contested regulation, that export prices were appreciably lower during the second half of the investigation period than during the first, a fact not disputed by the applicants, was entitled to conclude that there was a pattern of export prices differing according to the periods within the meaning of Article 2(11) of the basic regulation, and to dismiss the applicants' objections in this regard alleging in essence that that reduction had been caused by the fall in worldwide prices and not by any intent on their part.

61 For the same reasons, the applicants are wrong to claim that the explanation provided in the contested regulation is insufficient on the ground that the Council did not properly take into account the worldwide price development.

62 The applicants' arguments alleging that a substantial number of exports were dumped during the first half of the investigation period and that the nature of the price development of CD-Rs was cyclical must be dismissed. The first of those arguments, advanced only at the reply stage and not substantiated further, in no way calls into question the Council's finding in point 30, which was not disputed, that export prices to the Community had fallen between the first and second halves of the investigation period, a finding on which that institution based its conclusion that

there was a pattern of export prices which differed between periods. The second argument, raised at the hearing, is not substantiated either, and, in any event, is at odds with the fact that export prices were not subject to cyclical variations during the first investigation period, but simply fell during that period.

63 Finally, the Court of First Instance points out that the applicants' claim that they were powerless to resist the fluctuation of worldwide prices and thus not responsible for the level of their export prices to the Community is, in any event, contradicted by the fact, pointed out in point 64 of the contested regulation and not seriously disputed in the present proceedings, that the overcapacity at global level was caused, at least in part, by the applicants' own behaviour, since that behaviour had involved hugely increasing their production capacities at a time when prospects for market prices were bleak.

64 In the light of the foregoing, the applicants' complaint that the contested regulation breached the first condition for applying the asymmetrical method, concerning the existence of a difference in the export price pattern within the meaning of Article 2(11) of the basic regulation, must be rejected.

65 Secondly, it is necessary to examine the second condition for applying the asymmetrical method, concerning the inability of the symmetrical methods to reflect the full degree of dumping.

66 The Court recalls that in paragraphs 58 and 60 of *Petrotub* (paragraph 35 above) the Court of Justice found that Article 2(11) of the basic regulation did not lay down an express obligation on the institutions to provide, where the asymmetrical method is applied, an explanation as to the second condition for applying that method, but

held nevertheless that 'a Council regulation imposing definitive anti-dumping duties and having recourse to the asymmetrical method for the purposes of calculating the dumping margin must in particular contain, as part of the statement of reasons required by Article [253 EC], the specific explanation provided for in Article 2.4.2 of the 1994 Anti-dumping Code'.

67 In this respect, the Council provided, in points 29 and 31 of the contested regulation, the following reasoning.

68 As regards, first of all, the second symmetrical method, the Council 'noted that the Community [did] not use this methodology because the process of selecting individual transactions in order to make [the transaction by transaction] comparison is considered too impracticable and arbitrary, at least in cases such as this one, where thousands of export and domestic transactions existed'. The Council therefore concluded that '[the second symmetrical method] could not be an appropriate alternative comparison method' (point 29 of the contested regulation).

69 In relation, next, to the first symmetrical method, the Council stated that 'the application of [the asymmetrical method] gave a significantly higher dumping margin than a comparison of a weighted average normal value with a weighted average of export prices, which would not take into account the effect of the significant decline of export prices into the Community during the second half of the [investigation period]'. Therefore, the Council went to say, 'unless a comparison of a weighted average normal value to prices of all individual export transactions had been used, the significantly higher or targeted dumping which took place during the second half of the investigation period would have been inappropriately disguised by the use of a comparison of a weighted average normal value with a weighted average of export prices'. By the same token, the Council added, 'it was appropriate to reflect

in the calculation of dumping, via a comparison of a weighted average normal value to prices of all individual export transactions, the fact that export prices in the second half of the investigation period were below cost of production and thus constituted a very predatory form of dumping' (point 31 of the contested regulation).

70 Having referred to those reasons concerning the second condition for applying the asymmetrical method, the Court observes, as did the Council, that the first plea of the application alludes to the second condition only briefly and partially, and, in addition, only in relation to the reasoning contained in the provisional regulation.

71 Thus, in paragraph 25(ii) of the application, the applicants challenge the Commission's appraisal, conducted at the stage of the provisional regulation, to the effect that the first symmetrical method did not reflect the full degree of dumping. The applicants in no way refer, in this context, to the second symmetrical method.

72 In the following part of their arguments under the first plea for annulment, in paragraphs 29 to 33 of the application, which disputes the definitive measures adopted by the Council, the applicants do not return to the second condition for applying the asymmetrical method, and this despite the fact that the reasoning set out in points 29 and 31 of the contested regulation, reasoning which responds to the applicants' criticisms at the stage of the provisional regulation, is both new (see point 29 of the contested regulation) and more detailed (see point 31 of that regulation) than the reasoning contained in point 29 of the provisional regulation. The applicants focus their arguments only on the first condition for applying the asymmetrical method, concerning the existence of an export price pattern differing according to the purchasers, regions or periods.

73 In other words and without prejudice to the arguments set out below in paragraph 76 et seq., the first plea put forward by the applicants in their application does not, in essence, challenge the lawfulness of the reasoning contained in the contested regulation relating to the second condition for applying the asymmetrical method. The Court points out, in addition, that such a challenge is equally absent in the part of the application concerning the second plea for annulment, which relates to the lawfulness of zeroing under the asymmetrical method. At the hearing, the applicants essentially confirmed to the Court that their application contained no such challenge.

74 It is only in their reply that the applicants dispute for the first time before the Court the lawfulness of the reasoning contained in the contested regulation in relation to the second condition for applying the asymmetrical method.

75 However, such submissions, relating to the fact that the second symmetrical method, even where there are thousands of transactions, is easy to implement, are not based on new matters which came to light in the course of the procedure before the Court and do not constitute an amplification of a submission previously made in the application or closely linked to it. Those submissions, therefore, are new and must be declared inadmissible under Article 48(2) of the Rules of Procedure (see, to that effect, Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraphs 156 to 158, and Case T-40/01 *Scan Office Design* v *Commission* [2002] ECR II-5043, paragraph 96).

76 However, as stated in paragraph 73 above, the Court observes that certain arguments as to the lawfulness of the reasoning contained in the contested regulation as regards the second condition for applying the asymmetrical method must be examined on their merits.

77 Thus, the complaint made in paragraph 25(ii) of the application, that, in essence, the fact that the asymmetrical method gives a higher dumping margin than the first symmetrical method does not justify the conclusion that the asymmetrical method better reflects the full degree of dumping, is not entirely irrelevant to the contested regulation. Even if that complaint was made, in the application, only in relation to the provisional regulation and the contested regulation contains in point 31, as regards the second condition for applying the asymmetrical method, much more detailed reasoning than in the provisional regulation, the fact remains that in point 31 the Council continued to refer in particular to the difference found between the dumping margin calculated according to the asymmetrical method and that calculated according to the first symmetrical method. It follows that that complaint, raised by the applicants against the reasoning contained in the provisional regulation, is equally valid as against the definitive regulation.

78 Furthermore, certain arguments, raised only in the reply, must also be considered to be admissible, since they are closely linked to the complaint referred to above, of which they constitute a development.

79 Those additional arguments consist of criticism by the applicants of certain views expressed by the Council in the defence to the effect that a difference of two percentage points between the dumping margins, resulting from the first symmetrical method and those resulting from the asymmetrical method is to be considered significant where those margins are 4% and 6%, while this is not the case if those margins are 52% and 54%. According to the applicants, the method of comparing the results yielded by the first symmetrical method and the asymmetrical method cannot be deduced from the basic regulation and ought to have been clearly explained in advance by the institutions.

80 First of all, it should be borne in mind that, according to settled case-law, 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 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, paragraph 53; T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 48; see also, to that effect, *NTN Toyo Bearing and Others* v *Council*, paragraph 55 above, paragraph 19, and Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51).

81 It follows that review by the Community judicature of assessments made by the institutions must be limited to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power (*NTN Toyo Bearing and Others* v *Council*, paragraph 55 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* v *Council*, paragraph 80 above, paragraph 33; *Arne Mathisen* v *Council*, paragraph 80 above, paragraph 54; and *Shanghai Teraoka Electronic* v *Council*, paragraph 80 above, paragraph 49).

82 However, the implementation by the institutions of Article 2(11) of the basic regulation, and, in particular, of the second condition for applying the asymmetrical method, relating to the inability of the symmetrical methods to reflect the full degree of the dumping practised, entails complex economic assessments on the part of the institutions.

83 In addition, even if the second condition for applying the asymmetrical method is certainly not designed to ensure that the method of calculating the dumping margin applied is not that which leads to the highest outcome but that which reflects the full degree of dumping, the asymmetrical method, provided it includes the zeroing described in paragraph 97 below, will still always lead, where certain export transactions have been made without dumping, to a higher dumping margin than that yielded by the first symmetrical method (see, to that effect, the Opinion of Advocate General Jacobs in *Petrotub*, paragraph 35 above, points 8 to 15). Thus, according to the asymmetrical method, obtaining a dumping margin higher than that yielded by the first symmetrical method is bound to reflect the fact that transactions were carried out without dumping in parallel with dumped transactions. The Court considers, in those circumstances, that the fact of obtaining a dumping margin that is higher under the asymmetrical method than that obtained under the first symmetrical method is not entirely irrelevant to establishing whether that latter method reflects the full degree of dumping practised.

84 However, it is clear from the contested regulation, as explained in the final disclosure document, that, as regards Ritek, the dumping margins calculated according to those two methods varied by a factor of two (7.16% according to the first symmetrical method and 15.28% according to the asymmetrical method) and that, in relation to Prodisc Technology, the margins varied by nearly six percentage points (21.15% according to the first symmetrical method and 26.98% according to the asymmetrical method). In addition, point 31 of the contested regulation states in essence that on account of their appreciable reduction, export prices during the second half of the investigation period were lower than production costs for the product concerned and therefore constituted a particularly serious form of dumping.

85 In those circumstances, the Court considers that the Council did not make a manifest error of assessment in point 31 of the contested regulation in concluding that the use of the first symmetrical method would have had the effect of inappropriately disguising the significantly higher or targeted dumping which took place during the second half of the investigation period and by finding the asymmetrical method preferable to that method.

86 The applicants' argument that the method of comparing the dumping margins yielded by the first symmetrical method and by the asymmetrical method followed by the institutions and explained in the defence was neither described in advance nor published must be rejected. When they exercise the discretion conferred on them by the basic regulation, the institutions are not obliged to explain in detail and in advance the criteria which they intend to apply in every situation, even where they create new policy options (*Thai Bicycle Industry* v *Council*, paragraph 80 above, paragraph 68 and the case-law cited therein).

87 Accordingly, the applicants' complaints concerning the second condition for applying the asymmetrical method must be rejected, first, as being inadmissible, and, secondly, as being unfounded.

88 It follows from all the foregoing that the first plea for annulment is rejected.

The second plea in law: use of the zeroing technique in breach of Article 2 of the basic regulation

Arguments of the parties

89 In their second plea for annulment, the applicants submit, in essence, that the Council was wrong to use the zeroing technique in the present case.

90 They claim that this mechanism was condemned by the Appellate Body of the World Trade Organisation (WTO) in its report of 1 March 2001 (WT/DS141/AB/R) ('the *Bed linen* report') delivered in Case WTS/DS141 *European Communities — anti-dumping duties on cotton-type bed linen from India* ('*Bed linen*').

91 According to the applicants, that condemnation applies not only in the particular context of the *Bed linen* case (application of the model-zeroing technique in the context of the first symmetrical method), but also in the present proceedings (application of the zeroing technique at the level of each individual comparison and in connection with the asymmetrical method). According to the applicants, application of the zeroing technique can be justified neither by Article 2.4.2 of the 1994 Anti-dumping Code nor by Article 2(11) of the basic regulation, irrespective of whether the export price is taken as a weighted average of all comparable transactions or individually for each transaction. According to the applicants, distorting the prices of individual export transactions infringes the 'principle of fair comparison' in the asymmetrical method, and even more flagrantly than in *Bed linen*, in which export prices of different models were taken as a weighted average.

92 The applicants submit that zeroing is not the only technique to remedy a situation of targeted dumping. They proposed to the Commission some alternatives to the asymmetrical method applying zeroing for assessing the alleged targeted dumping. They suggested combining the first symmetrical method with the second symmetrical method or the asymmetrical method with a symmetrical method. The Council, however, ignored these arguments.

93 The Council contends that the *Bed linen* report is irrelevant as it is directed at the model-zeroing mechanism which the institutions used to apply in the context of the first symmetrical method and without establishing in advance whether a difference in the export price pattern existed. That report deals with a different situation from that in the present case, in which the zeroing technique was applied at the level of each individual comparison in the context of the asymmetrical method, and there was a difference in the export price pattern.

94 The Council adds that the asymmetrical method, as compared with the first symmetrical method, makes sense only if the zeroing technique is applied. Without that mechanism, that method would mathematically lead to the same result as the first symmetrical method and it would be impossible to prevent the non-dumped exports from disguising the dumping of the dumped exports.

95 The Council points out that, contrary to what the applicants claim, when making the individual comparisons between each export price and the normal value it did not reduce the export price to the level of the normal value where that price exceeded that value. On the contrary, the comparison with the average normal value was carried out on the basis of the actual price of each individual export. It was only the dumping margin resulting from this comparison between the export price and the normal value which, if appropriate, was set at zero, precisely in order to prevent that margin, where it was negative and thus corresponded to a non-dumped export transaction, from disguising the full degree of dumping practised elsewhere. According to the Council, this is neither arbitrary nor unfair.

96 As regards the proposals for other methodologies put forward by the applicants, the Council states that they were taken into consideration, but ruled out, because of the great number of transactions involved. In addition, the basic regulation does not provide for the possibility of combining two methods of calculating the dumping margin.

Findings of the Court

97 First of all, the zeroing mechanism should be described. Zeroing is the technique by which a dumping margin of a negative amount, a sign that an export sale has been made at a price above the normal value, is set to zero in order to prevent the disguising effect that taking that dumping margin into account would have on the positive dumping found to have taken place elsewhere. As Advocate General Jacobs points out in his Opinion in *Petrotub*, paragraph 35 above (point 16), the zeroing technique, although not mentioned in the 1994 Anti-dumping Code or the basic regulation, is commonly used by importing countries and customs unions, including the European Union.

98 As regards the *Bed linen* report, and without even needing to rule on whether the Community judicature is bound by the recommendations and decisions contained in the reports of the Dispute Settlement Body established within the WTO, the Court considers that the applicants' argument that the solution applied in that report is also applicable to the zeroing technique used in connection with the asymmetrical method is wrong.

99 In that report, the Appellate Body of the WTO based its reasoning for condemning model-zeroing in the first symmetrical method essentially on the wording in the part of Article 2.4.2 of the 1994 Anti-dumping Code relating to that first method. In paragraph 55 of the *Bed linen* report, the Appellate Body stated that, '[u]nder this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions', and expressly emphasised the word 'all'. It is because of the presence of that word that the Appellate Body considered that zeroing, which, in its view, did not allow the price of all the export transactions to be properly reflected, was not applicable in the context of the first symmetrical method.

100 The Court points out, as regards the asymmetrical method, that nothing in the wording of Article 2.4.2 of the 1994 Anti-dumping Code provides for a comparison of the weighted average normal value with all individual exports, which provides instead that that normal value 'may be compared to prices of individual export transactions'. The Appellate Body's reasoning, developed in connection with the first symmetrical method, is therefore not applicable to the asymmetrical method. On the contrary, that reasoning, which the Appellate Body based with emphasis on the word 'all', suggests rather the opposite: that in the context of the asymmetrical method, the authorities of the importing country may make a selection of the export transactions to be compared with the normal value.

101 This is moreover what Advocate General Jacobs suggests in his Opinion in *Petrotub*, paragraph 35 above (point 11). It is also what the Council argues in its defence, when it points out, in essence, that in the light of the wording of Article 2.4.2 of the 1994 Anti-dumping Code in relation to the asymmetrical method, the Community institutions could proceed in the context of this method in one of two ways: either by making a selection of individual export transactions to be compared with the weighted average normal value and, thereby, excluding entirely from that comparison certain exports (those not dumped) or by taking into account all the exports in that comparison, but subject to zeroing of the individual negative dumping margins, precisely in order to prevent those margins from masking the dumping practised elsewhere. The Council states that it is that second approach, which is less severe on the exporters, which was finally adopted by the institutions when Article 2.4.2 of the 1994 Anti-dumping Code was transposed into Community law. It explains that, as an expression of the choice not to exclude certain export transactions, the second sentence of Article 2(11) of the basic regulation provides, in relation to the asymmetrical method, that the weighted average normal value is 'compared to prices of all individual export transactions'.

102 The Court considers the Council's explanation to be correct. When the 1994 Anti-dumping Code was transposed into Community law, the zeroing technique was used by the Community institutions not only in the asymmetrical method but also in the first symmetrical method. Therefore, the insertion of the word 'all' into the second sentence of Article 2(11) of the basic regulation — an insertion which, moreover, was in no way dictated by the wording of the second sentence of Article 2.4.2 of the Anti-dumping Code — could not be an expression of a decision by the institutions no longer to use the zeroing technique in the asymmetrical method. That insertion could only be the expression, as the Council explained in its written pleadings and confirmed at the hearing, of the Community institutions' choice not to exclude certain individual export transactions from the comparison made in the context of the asymmetrical method.

103 It follows from those considerations that neither the wording of Article 2.4.2 of the 1994 Anti-dumping Code, interpreted in the light of the *Bed linen* report, nor that of Article 2(11) of the basic regulation prohibits use of the zeroing technique in the context of the asymmetrical procedure.

104 In addition, the Court observes that the WTO Appellate Body was careful to state, in particular in paragraphs 46, 47 and 66 of the *Bed linen* report, that its assessment and report concern the question of whether the zeroing method, 'as applied by the European Communities in the anti-dumping investigation at issue in this dispute', is compatible with Article 2.4.2 of the 1994 Anti-dumping Code. This is a further indication that the WTO Appellate Body did not wish to extend the scope of its report beyond the first symmetrical method.

105 As regards, finally, the WTO Appellate Body's reference at the end of paragraph 55 of the *Bed linen* report to the unfairness of a comparison that does not take into account all comparable export transactions, the Court considers that this reference, despite its apparent generality, cannot, in the light of the abovementioned considerations, be interpreted as meaning that zeroing is wrong in every context.

106 It follows from the foregoing that, contrary to what the applicants claim, the *Bed linen* report concerns only the model-zeroing technique in the context of the first symmetrical method and cannot be considered to deal with this mechanism also when it is used in the context of the asymmetrical method.

107 Therefore, even if, as the WTO Appellate Body found, it might indeed be contrary to Article 2.4.2 of the 1994 Anti-dumping Code and unfair to employ the model-zeroing technique in the context of the first symmetrical method, and especially in the absence of a difference in the export price pattern, it is not contrary to that provision or to Article 2(11) of the basic regulation, or unfair within the meaning of Article 2(10) of that regulation, to employ the zeroing technique in the context of the asymmetrical method, where the two conditions for applying that method are met.

108 It follows that the applicants are wrong to rely on the *Bed linen* report and to refer, in their written pleadings, to the model-zeroing technique in the context of the first symmetrical method, in order to criticise the Council's application, in the contested regulation, of the zeroing technique in the context of the asymmetrical method.

109 In any event, and as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method (see, to that effect, the Opinion of Advocate General Jacobs in *Petrotub*, paragraph 35 above, points 8 to 15).

110 In addition, contrary to what the applicants claim, the zeroing technique in the context of the asymmetrical method, as performed in the present case, did not consist in distorting the prices of the individual export transactions. The actual value of each export transaction was taken into account by the Council in the comparison with the normal value. It was only where the dumping margin yielded by that individual comparison proved to be negative that that margin was set at zero to prevent it from disguising dumping found to have taken place elsewhere.

111 Finally, the applicants' argument that the zeroing technique is not the only way of taking targeted dumping into account and that they proposed other possible solutions to the Commission which were ignored, namely combining the symmetrical methods or the asymmetrical method with a symmetrical method, must be rejected.

112 First, by that argument, the applicants set out alternatives that they proposed to the Commission. They do not claim that the institutions committed a manifest error of assessment by electing to apply the asymmetrical method rather than those alternatives.

113 Secondly, the possibility of combining the methods referred to in Article 2(11) of the basic regulation does not correspond, in any event, to the scheme established by that provision. That article provides for the application, in the calculation of the dumping margin, of one of three possible methods, of which two — the symmetrical methods — are the normal methods, and one — the asymmetrical method — is an exceptional method. The condition relating to the existence of a pattern of export prices differing according to the periods, purchasers or regions is only one of the conditions for applying the asymmetrical method. The fact of laying down that

condition is therefore in no way intended to allow the institutions to break up the investigation period according to the periods, purchasers or regions, in order to combine, according to those periods, purchasers or regions, one method of calculation with another. The institutions thus could not, in any event, combine the methods for calculating the dumping margin.

114 The second plea must therefore be dismissed as unfounded.

115 Since the two pleas for annulment have been rejected, the appeal must be dismissed.

Costs

116 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 applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council.

117 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. The Commission, which has intervened in support of the Council, is therefore ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders Ritek Corp. and Prodisc Technology Inc. to bear their own costs and those incurred by the Council;**

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

Vilaras Martins Ribeiro Dehousse

Šváby Jürimäe

Delivered in open court in Luxembourg on 24 October 2006.

E. Coulon M. Vilaras

Registrar President