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

14 November 2006 *

In Case T-138/02,

Nanjing Metalink International Co. Ltd, established in Nanjing (China), represented by P. Waer, lawyer,

applicant,

v

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

defendant,

supported by

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

intervener,

* Language of the case: English.

APPLICATION for annulment of Article 1 of Council Regulation (EC) No 215/2002 of 28 January 2002 imposing definitive anti-dumping duties on imports of ferro molybdenum originating in the People's Republic of China (OJ 2002 L 35, p. 1), in so far as it imposes an anti-dumping duty on imports of ferro molybdenum produced by the applicant,

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 16 November 2004,

gives the following

Judgment

Legislative framework

1 Article 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, 'the basic regulation') is entitled 'Determination of dumping'.

2 For the purposes of the determination of dumping, Article 2(1) to (6) of the basic regulation lays down general rules concerning the method of determining the 'normal value' for the purposes of Article 1(2).

3 Article 2(7) of the basic regulation lays down a special rule concerning the method of determining the normal value for imports from non-market economy countries. Subparagraph (a) of that provision, as amended by Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18) and Council Regulation (EC) No 2238/2000 of 9 October 2000 (OJ 2000 L 257, p. 2), at the time of the initiation of the proceeding which gave rise to the regulation challenged in this case, read as follows:

'In the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis ...'

4 Subparagraphs (b) and (c) of Article 2(7) of the basic regulation contain an exception to subparagraph (a). They provide:

'(b) 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) [of Article 2 of the basic regulation], if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in

subparagraph (c), that market economy conditions prevail for this producer or [those] producers ... When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under [paragraph 7] subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is, if:

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

— ...

A determination whether the producer meets the abovementioned criteria [in subparagraph (c)] shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'

5 In addition, Article 6(1) of the basic regulation provides:

'Following the initiation of the proceeding, the Commission ... shall commence an investigation at Community level. Such investigation shall cover both dumping and

injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.'

6 Finally, Article 11(3) of the basic regulation states:

'The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where ... the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury. ...'

Facts giving rise to the proceedings

7 The applicant is a Chinese company which produces and exports ferro molybdenum, particularly to the European Community.

8 On 9 November 2000 the Commission published a Notice of initiation of an anti-dumping proceeding concerning imports of ferro molybdenum originating in the People's Republic of China (OJ 2000 C 320, p. 3).

9 The investigation initiated for the purposes of that proceeding covered the period from 1 October 1999 to 30 September 2000 (hereinafter 'the investigation period').

10 When opening the investigation, the Commission, pursuant to Article 2(7)(b) and (c) of the basic regulation, sent the undertakings concerned questionnaires on market economy treatment. The applicant filled out such a questionnaire and requested the benefit of that treatment. By letter of 21 March 2001, the Commission granted that request.

11 On 3 August 2001 the Commission adopted Regulation (EC) No 1612/2001 imposing a provisional anti-dumping duty on imports of ferro molybdenum originating in the People's Republic of China (OJ 2001 L 214, p. 3, 'the provisional regulation'). Recital 24 in the preamble stated that the applicant alone met the conditions for obtaining market economy treatment.

12 For the applicant, the rate of provisional duty fixed by Article 1 of the provisional regulation was 3.6%. For three other undertakings concerned, the rates of provisional duty were 9.8%, 12.7% and 17.2%. For all the other undertakings concerned, the rate was 26.3%.

13 On 28 January 2002, on a proposal from the Commission, the Council adopted Regulation (EC) No 215/2002 imposing definitive anti-dumping duties on imports

of ferro molybdenum originating in the People's Republic of China (OJ 2002 L 35, p. 1, 'the contested regulation'). Recitals 11 to 17 in the preamble to the contested regulation state:

'(11) It was established that the China Chamber of Commerce and Minmetals ... hosted a meeting shortly after the publication of the Provisional Regulation, that set up a grouping of Chinese [ferro molybdenum] producers ... The producers concerned were granted specific export allocations which appear to have been determined by taking into account the level of their provisional anti-dumping duties. ... The company which had been granted [market economy treatment] and had the lowest duty (3.6 %) [namely the applicant] was allocated an export quota in excess of its production capacity ... Furthermore, the group included as a stated aim the avoidance of anti-dumping duties.

(12) All parties concerned ... were ... given the opportunity to respond to these findings. Replies were subsequently received from all parties with the exception of the Chamber of Commerce. ...

(13) ... [T]he arrangement in question is clearly incompatible with the criterion of the free determination of export prices and quantities that needs to be satisfied if [market economy treatment] is to be awarded or maintained. Moreover, these export constraints which were adopted under the auspices of the Chamber of Commerce, in agreement with several State-owned companies, strongly suggests significant State influence, and a serious risk of circumvention of the duties. Furthermore, such a pact is a clear and deliberate attempt to channel exports of one company via another company with a lower anti-dumping duty for the purposes of avoiding such duties. ...

(15) With regard to the [market economy treatment] granted to [the applicant], it is recalled that the company declared in its questionnaire response that its decisions

concerning inter alia prices, output and sales were made in response to market signals reflecting supply and demand and without significant State interference. It is also stressed that the granting of [market economy treatment] must, in line with the applicable provisions of Article 2(7) of the Basic Regulation, be based on clear evidence that the producer operates under market economy conditions. However, in this case the [applicant] is seen to be aligning its operations and business decisions not only with companies that failed to satisfy the [market economy treatment] criteria but also with State owned firms that did not cooperate in the proceeding. ... Clearly, this is contrary to its prior declarations and incompatible with one of the main criteria for granting [market economy treatment] that inter alia decisions regarding prices, output and sales are made in response to market signals.

(16) In its assessment of whether or not a company should be granted [market economy treatment] the Commission bases its conclusions mostly on the situation during the investigation period ... If the criteria set out in Article 2(7) of the Basic Regulation have been complied with during this period, the Commission can reasonably assume that the company will operate in the future with a sufficient degree of independence from the State and according to market economy standards. However, in the present case the company that appeared to act according to market economy standards during the [investigation period] has modified its behaviour since it received its individual dumping margin. Consequently, it is now apparent that this company no longer operates in accordance with market economy principles in accordance with Article 2(7)(c) of the Basic Regulation, but that it is subject to external interference and party to export constraints in terms of prices and quantities. It also appears that the company does not operate without significant State interference. Whilst information relating to a period subsequent to the [investigation period] should not normally be taken into account, in these exceptional circumstances, it is appropriate to take account of the new developments which have the effect of rendering the previous conclusions manifestly unsound.

(17) In the light of this new information therefore, it is concluded that the [market economy treatment] finding concerning this company can no longer stand.

Furthermore, an individual duty is no longer appropriate for this company. The [market economy treatment] previously awarded to [the applicant] therefore is hereby revoked and it also will henceforth be subject to the countrywide margin for China.'

14 Articles 1 and 2 of the contested regulation provide:

'*Article 1*

1. A definitive anti-dumping duty is hereby imposed on imports of ferro molybdenum ... originating in the People's Republic of China.

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, for the product described in paragraph 1 shall be 22.5%.

...

Article 2

The amounts secured by way of the provisional anti-dumping duty imposed by the Provisional Commission Regulation shall be definitively collected at the rate of the duty set out in Article 1, or at the rate of the provisional duty where this is lower. Any amount secured in excess of the definitive rate of anti-dumping duties shall be released.'

Procedure

15 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 26 April 2002.

16 On 4 July 2002, the Council lodged its defence.

17 On 6 August 2002, the Commission applied for leave to intervene in support of the Council.

18 On 3 September 2002, the applicant lodged its reply.

19 By order of 7 October 2002, the President of the Second Chamber (Extended Composition) of the Court of First Instance granted the Commission leave to intervene. The Commission waived its entitlement to lodge a statement in intervention, however.

20 On 23 October 2002, the Council lodged its rejoinder.

21 By letters of 27 November and 19 December 2003, the Council, at the Court's request, lodged annexes to its defence. The President of the Second Chamber of the Court of First Instance also fixed a time-limit for the applicant to supplement its reply to the extent that those annexes raised new matters. However, the applicant lodged no observations.

22 The parties presented argument and replied to the Court's written and oral questions at the hearing on 16 November 2004.

Forms of order sought by the parties

23 The applicant claims that the Court should:

— annul Article 1 of the contested regulation in so far as it imposes an anti-dumping duty on imports of ferro molybdenum produced by the applicant;

— order the Council to pay the costs.

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

— dismiss the action;

— order the applicant to pay the costs.

Law

25 The applicant relies on two pleas in law in support of its application. The first falls into two parts, alleging infringement of Article 2(7)(c) and Article 6(1) of the basic

regulation respectively. The second plea in law alleges that the Council exceeded its powers.

Arguments of the parties

26 As a preliminary point, the applicant states that it disputes the facts stated in the contested regulation in relation to market economy treatment. The fact that it did not devote a plea in law to them should not be construed as an admission of those facts.

27 The Council, supported by the Commission, replies that those facts must be assumed to be correct, since the applicant attaches no legal significance to their denial.

The first plea in law

— First part, alleging infringement of Article 2(7)(c) of the basic regulation

28 The applicant submits that by revoking, in the course of the investigation, the market economy treatment previously granted to it, the Council infringed Article 2(7)(c) of the basic regulation, since the last sentence of the provision provides,

without exception, that the determination in relation to market economy treatment is to remain in force throughout the investigation.

29 The applicant maintains that Article 11(3) of the basic regulation provides a clearly appropriate procedure for the review of earlier decisions, at any time and on the institutions' initiative, which would have ensured that the procedural safeguards of the basic regulation were respected.

30 The Council, supported by the Commission, contests the validity of this part.

— Second part, alleging infringement of Article 6(1) of the basic regulation

31 The applicant submits that, by basing itself on facts subsequent to the investigation period to revoke the applicant's market economy treatment and to increase significantly the anti-dumping duties on imports of ferro molybdenum produced by the applicant, the Council disregarded Article 6(1) of the basic regulation.

32 The judgments in Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695 and Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757 show that

the word 'normally' in Article 6(1) of the basic regulation concerns only cases where it is decided not to impose, or not to retain, anti-dumping duties.

33 The applicant adds that it follows from those judgments that the Court of First Instance attaches great importance, for the imposition or retention of anti-dumping duties, to the relevant facts being established by an investigation, which did not, however, take place in this case.

34 The Council, supported by the Commission, contests the validity of this part.

The second plea in law, alleging that the Council exceeded its powers

35 The applicant submits that, by revoking, in the course of the investigation, the market economy treatment granted to the applicant, the Council exceeded its powers, since the basic regulation does not provide for such revocation in the course of an investigation but, on the contrary, in Article 2(7)(c), expressly prohibits such revocation.

36 The Council, supported by the Commission, contests the validity of this plea in law.

Findings of the Court

Preliminary observations

37 The first part of the first plea in law alleges that, by revoking the treatment granted to the applicant, the Council infringed Article 2(7)(c) of the basic regulation, and the second plea in law alleges that, by so doing, the Council exceeded its powers.

38 Were it to be concluded that, by revoking the treatment granted to the applicant, the Council infringed Article 2(7)(c) of the basic regulation, it would also have to be concluded that, by so doing, it exceeded its powers. Conversely, were it to be decided that the Council did not infringe that provision, it would follow that it did not exceed its powers in this case.

39 Consequently, as the Council points out, since the second plea in law adds nothing to the first part of the first plea in law, they should be examined together.

The complaints made under the first part of the first plea in law and under the second plea in law, alleging infringement of Article 2(7)(c) and misuse of powers respectively

40 First of all, it follows from Article 2(7)(b) of the basic regulation that the method of determining normal value differs depending on whether or not the producers concerned establish that they satisfy the criteria set out in Article 2(7)(c) of that

regulation and that, therefore, market economy conditions prevail in respect of them. If it is decided that a producer operates under market economy conditions, the normal value of its products is to be determined in accordance with the rules applicable to countries with a market economy referred to in Article 2(1) to (6) of the regulation. On the other hand, if it is not accepted that the producer operates under market economy conditions, normal value is to be determined in accordance with Article 2(7)(a) of the regulation.

41 In that regard, it must be noted that the method of determining the normal value of a product set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down for that purpose in Article 2(7)(a), which is, in principle, applicable to imports from non-market economy countries (Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 50).

42 The original wording of Article 2(7) of the basic regulation was amended by Regulation No 905/98, and then by Regulation No 2238/2000, because the Council took the view that the process of reform in certain countries, including China, had fundamentally altered their economies and led to the emergence of undertakings for which market economy conditions prevail. Thus, the fifth recital in the preamble to Regulation No 905/98 stresses the importance of revising the anti-dumping practice followed with regard to those countries and states that the normal value of a product may be determined in accordance with the rules applicable to countries with a market economy in cases where it has been shown that market conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned. According to the sixth recital in the preamble to that regulation, 'an examination of whether market conditions prevail will be carried out on the basis of properly substantiated claims by one or more producers subject to

investigation who wish to avail themselves of the possibility to have [the] normal value [of the relevant product] determined on the basis of rules applicable to market economy countries' (*Shanghai Teraoka Electronic* v *Council*, paragraph 51).

43 As the Council points out, since it governs the choice of the method to be used to calculate normal value, the answer to the question whether the producer concerned operates under market economy conditions affects the calculation of the dumping margin and, therefore, the amount of the definitive anti-dumping duty imposed by the Council. Furthermore, the grant of market economy treatment also entails consequences as regards the manner in which the investigation will be conducted, since, if Article 2(1) to (6) of the basic regulation is applied, the Commission is to determine normal value on the basis of the information provided by the exporter in question and may, for that purpose, check its correctness. That is not so, on the other hand, if normal value is to be determined in accordance with Article 2(7)(a) of the basic regulation.

44 That is why the final indent of Article 2(7)(c) of the basic regulation provides that the determination whether the producer concerned operates under market economy conditions must be made within three months of the initiation of the investigation and that the determination is to remain in force throughout it. That provision is intended, in particular, to ensure that the question is not decided on the basis of its effect on the calculation of the dumping margin. Thus, the last sentence of Article 2(7)(c) of the basic regulation prohibits the institutions from re-evaluating information which was already available to them at the time of the initial determination as to market economy treatment.

45 That being so, the last sentence of Article 2(7)(c) of the basic regulation cannot have the effect that normal value is to be determined according to the rules applicable to countries with a market economy where the party concerned is revealed, in the

course of the investigation and possibly after the imposition of provisional measures, not to be operating under market economy conditions within the meaning of Article 2(7)(c).

46 Article 2(7)(a) of the basic regulation lays down a specific method of determining the normal value for imports from non-market economy countries, precisely because the information on which the determination of normal value is based under Article 2(1) to (6) is not regarded as reliable evidence for the purposes of calculating normal value. While Article 2(7)(b) of the basic regulation lays down, for certain countries, an exception to the method of determining normal value under Article 2(7)(a), that exception must be given a strict interpretation (*Shanghai Teraoka Electronic* v *Council*, paragraph 50) and cannot, consequently, apply where, following changes in the factual situation or the discovery of new evidence of which the Commission could not reasonably have been aware at the time, within three months of the initiation of the investigation, of the determination as to market economy treatment, the producer concerned is found not to fulfil the criteria which an undertaking operating under market economy conditions must satisfy.

47 Having regard to the foregoing, the last sentence of Article 2(7)(c) of the basic regulation is to be interpreted as meaning that it precludes the institutions from re-evaluating evidence they had at the time of the initial determination as to market economy treatment. That provision does not, however, preclude the grant of market economy treatment from being discontinued if a change in the factual situation on the basis of which such treatment was conferred no longer permits the conclusion that the producer concerned operates under market economy conditions.

48 In this case, it should be observed that the contested regulation stated that, shortly after the imposition of provisional anti-dumping duties, the applicant had

participated in a grouping of Chinese ferro molybdenum producers, set up under the auspices of the China Chamber of Commerce and Minmetals, within the framework of which the producers concerned were granted specific export allocations which appeared to have been determined by taking into account the level of their provisional anti-dumping duties.

49 In recital 15 in the preamble to the contested regulation, the Council noted that, although the applicant declared 'that its decisions concerning inter alia prices, output and sales were made in response to market signals ... and without significant State interference', it had nevertheless 'align[ed] its operations and business decisions not only with companies that failed to satisfy the [market economy treatment] criteria but also with State owned firms that did not cooperate in the proceeding' and, '[m]oreover, it appear[ed] willing to agree to export products that it [did] not have the capacity to produce at minimum prices established by the group'. The Council thus found that '[c]learly, this [was] contrary to [the applicant's] prior declarations and incompatible with one of the main criteria for granting [market economy treatment] that inter alia decisions regarding prices, output and sales are made in response to market signals'.

50 The Council added, in recital 16 in the preamble to the contested regulation:

'[T]he [applicant] that appeared to act according to [the] standards [set forth in Article 2(7) of the basic regulation] during the [investigation period] has modified its behaviour since it received its individual dumping margin. Consequently, it is now apparent that this company no longer operates in accordance with market economy principles in accordance with Article 2(7)(c) of the basic regulation, but that it is subject to external interference and party to export constraints in terms of prices and quantities. It also appears that the company does not operate without significant State interference.'

51 It is thus clear from the contested regulation that the factual basis on which the Commission relied in order to grant the applicant market economy treatment was changed, after the imposition of provisional anti-dumping duties, following the applicant's participation in the grouping of Chinese producers of ferro molybdenum.

52 Although the applicant disputes the correctness of the facts as set out in recitals 11 to 17 of the preamble to the contested regulation, on which the revocation of market economy treatment is based, it has, however, adduced no evidence which could cast any doubt on their truth. That objection must therefore be rejected and reliance placed on the facts as established in the contested regulation.

53 Moreover, it should be observed that revocation of market economy treatment merely draws the consequences, for the future, from an established change in the relevant circumstances. Since revocation of that treatment thus produces only prospective effects, it in no way constitutes an interference with the applicant's vested rights (see, to that effect, Case 56/75 *Elz* v *Commission* [1976] ECR 1097, paragraph 18, and Case T-498/93 *Dornonville de la Cour* v *Commission* [1994] ECR-SC I-A-257 and II-813, paragraph 48).

54 As regards the argument that the revocation of market economy treatment should have been effected within the framework of the procedure under Article 11(3) of the basic regulation, it must be observed, as the Council points out, that that provision covers the review of the definitive measures imposed at the end of an anti-dumping proceeding. The purpose of the review procedure is to adapt the duties imposed to take account of the changes, after the imposition of those duties, in the factors which gave rise to them (Case T-7/99 *Medici Grimm* v *Council* [2000] ECR II-2671,

paragraph 82), and usually involves the use of an investigation period subsequent to the imposition of the definitive measures to be reviewed. On the other hand, the review procedure is not intended for the review of the factors which gave rise to those duties if they are unchanged, such a review consisting, in fact, in a reopening of the original procedure (see, to that effect, *Medici Grimm* v *Council*, paragraph 85).

55 In this case, it is common ground that the Commission became aware of the new factors relating to the setting-up of a grouping of Chinese ferro molybdenum producers before the conclusion of the anti-dumping proceeding which led to the imposition of the definitive duties. The Commission and the Council were therefore entitled, indeed obliged, to draw the consequences from that new factual situation, then and there, at the stage of the initial investigation, since the review procedure under Article 11(3) of the basic regulation is not an appropriate framework in that regard. Moreover, were it to be accepted, the applicant's argument would mean requiring the Council to impose definitive anti-dumping duties determined on the basis of a normal value calculated in breach of Article 2(7)(a) of the basic regulation. Such a consequence is unacceptable.

56 Furthermore, to the extent that the applicant intended to assert infringement of the rights of the defence, it must be observed that, in any event, it is clear from recital 12 in the preamble to the contested regulation and from the documents annexed by the Council to the defence that the applicant was given an opportunity to put forward its observations as regards the consequences which the Commission intended to draw from the new factors which had been brought to its attention. Therefore, the applicant cannot allege an infringement of the rights of the defence, as recognised by the general principles of Community law and implemented by Article 20 of the basic regulation (see, to that effect, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 108; Case T-155/94 *Climax Paper* v *Council* [1996] ECR II-873, paragraph 116; and *Shanghai Teraoka Electronic* v *Council*, paragraphs 288 to 290).

57 It must therefore be concluded that the Council did not infringe Article 2(7)(c) of the basic regulation by revoking, at the stage of the initial investigation, the market economy treatment granted to the applicant and did not therefore exceed the powers conferred on it by the basic regulation.

The second part of the first plea in law, alleging infringement of Article 6(1) of the basic regulation

58 The applicant submits that, by basing itself on facts subsequent to the investigation period to revoke the applicant's market economy treatment and to increase significantly the anti-dumping duties on imports of ferro molybdenum produced by the applicant, the Council disregarded the last sentence of Article 6(1) of the basic regulation.

59 In that regard, the Court of First Instance has had occasion to point out that the fixing of an investigation period and the prohibition on consideration of factors arising subsequently are intended to ensure that the results of the investigation are representative and reliable (*Euroalliages* v *Commission*, paragraph 74). The investigation period under Article 6(1) of the basic regulation is intended to ensure, in particular, that the factors on which the determination of dumping and injury is based are not influenced by the conduct of the producers concerned following the initiation of the anti-dumping proceeding and therefore that the definitive duty imposed as a result of the proceeding is appropriate to remedy effectively the injury caused by the dumping.

60 It must also be observed that the adoption of anti-dumping duties is not a penalty for earlier behaviour but a protective and preventive measure against unfair

competition resulting from dumping practices. It is therefore necessary, in order to be able to determine the anti-dumping duties appropriate for protecting the Community industry against dumping, to carry out the investigation on the basis of information which is as recent as possible (Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraphs 91 and 92).

61 It follows that by using the term 'normally', Article 6(1) of the basic regulation does allow exceptions to the rule against taking account of information relating to a period subsequent to the investigation period. As regards circumstances favourable to the undertakings concerned by the investigation, it has been held that the Community institutions cannot be required to incorporate in their calculations factors relating to a period subsequent to the investigation period unless such factors disclose new developments which make the proposed anti-dumping duty manifestly inappropriate (see, to that effect, *Sinochem Heilongjiang* v *Council*, paragraph 88, and *Euroalliages* v *Commission*, paragraph 75). If, on the other hand, factors relating to a period subsequent to the investigation period justify, because they reflect the current conduct of the undertakings concerned, the imposition or increase of an anti-dumping duty, it must be held, on the basis of the foregoing, that the institutions are entitled, indeed obliged, to take account of them.

62 In this case, as has been established in paragraphs 48 to 51 above, it is clear from the contested regulation that, following the applicant's participation, after the imposition of the provisional anti-dumping duties, in a grouping of Chinese ferro molybdenum producers, it no longer fulfilled the requirements to be regarded as a market economy undertaking. Those factors, which related to a period subsequent to the investigation period, had, necessarily, to be taken into consideration by the Commission and the Council since the failure to take them into account would have led to the imposition of manifestly inappropriate definitive anti-dumping duties, since they would have been determined on the basis of a normal value calculated in breach of Article 2(7)(a) of the basic regulation.

63 It follows that the Council correctly applied Article 6(1) of the basic regulation by taking account of the applicant's participation in a grouping of Chinese ferro molybdenum producers subsequent to the investigation period and by revoking, as a result, its entitlement to market economy treatment so as to prevent the imposition of manifestly inappropriate definitive measures.

64 As regards the argument, in the context of the complaint of infringement of Article 6(1) of the basic regulation, that no second investigation was carried out within the framework of an interim review under Article 11(3) of the basic regulation, it must be observed, as has already been stated in paragraphs 55 and 56, that, first, the new factors relating to the setting-up of a grouping of Chinese ferro molybdenum producers could be taken into account before the imposition of the definitive measures, since the interim review procedure is not an appropriate framework in that regard, and, second, that the procedural guarantees were respected since the applicant was given an opportunity to submit its observations on those new factors. It is also clear from the documents annexed to the defence that the Commission checked the information with which it had been provided, as is evidenced by the fax of 5 February 2002 from the Commission's Delegation in China. Furthermore, it must be observed, again, that while the applicant disputes, before the Court, the correctness of the facts as set out in the contested regulation, it has adduced no evidence which could cast any doubt on their truth.

65 It follows from the foregoing that the second part of the first plea in law must be rejected.

66 None of the pleas in law relied upon having been successful, the action must be dismissed.

Costs

67 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(4) of those rules, institutions which intervened in the proceedings are to bear their own costs.

68 Since the applicant has been unsuccessful and the Council has applied for an order that it pay the costs, the applicant must be ordered to pay, in addition to its own costs, the costs incurred by the Council. The Commission shall bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. **Orders the applicant to bear its own costs and to pay those incurred by the Council;**

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

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 14 November 2006.

E. Coulon J. Pirrung

Registrar President