JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)
11 July 1996 *

In Case T-161/94,

Sinochem Heilongjiang, a company incorporated under Chinese law, established at Harbin (China), represented by Izzet M. Sinan, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Council of the European Union, represented by Erik H. Stein and Ramon Torrent, Legal Advisers, acting as Agents, assisted by Hans-Jürgen Rabe, Rechtsanwalt in Hamburg and Brussels, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Eric L. White, of its Legal Service, acting as Agent, assisted by Claus-Michael Happe, a national civil servant seconded to the Commission, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: English.

APPLICATION for the annulment of Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China (OJ 1991 L 326, p. 6),

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

composed of: A. Saggio, President, C. W. Bellamy, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 23 January 1996,

gives the following

Judgment

Facts

1 In 1982 the Council imposed a definitive anti-dumping duty on imports into the Community of oxalic acid originating in the People's Republic of China and definitively collected the amounts secured by way of provisional duty on oxalic

acid originating in the People's Republic of China and Czechoslovakia (Council Regulation (EEC) No 1283/82 of 17 May 1982, OJ 1982 L 148, p. 37).

2 In 1987 the Commission initiated a review of those measures, which it concluded on 12 December 1988 by Commission Decision 88/623/EEC accepting undertakings given in connection with the anti-dumping review concerning imports of oxalic acid originating in China or Czechoslovakia (OJ 1988 L 343, p. 34). The undertaking in the case of imports of oxalic acid originating in the People's Republic of China was given by Sinochem Beijing. The Community institutions viewed that undertaking as covering all exports of oxalic acid from the People's Republic of China.

3 In 1990 the Commission received a complaint from Destilados Agrícolos Vimbodí SA (DAVSA) seeking a review of anti-dumping measures in respect of imports of oxalic acid originating in the People's Republic of China and Czechoslovakia and requesting the initiation of a proceeding concerning imports of oxalic acid originating in India.

4 In response to that complaint, the Commission sent a questionnaire to known exporters in the People's Republic of China, Czechoslovakia and India. Among the documents enclosed with the questionnaire was a letter informing the exporters that, if they did not provide the information requested, the Commission would be able to base its decision on the 'facts available' within the meaning of Article 7(7)(b) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1; hereinafter 'the basic regulation').

5 The only two exporters known to the Commission in the People's Republic of China were the China National Medicine and Health Products Import/Export

Corporation and Sinochem Beijing. The former never replied to the questionnaire. Sinochem Beijing informed the Commission that it had not failed to comply with its 1988 undertaking and that, secondly, following reform of the Chinese foreign trade system, there were many Chinese exporters that had been independent of Sinochem since 1988, some of which might have exported oxalic acid to the Community at prices below the undertaking price.

6 On being requested by the Commission to forward the questionnaire to the other exporters, Sinochem Beijing declined, referring the Commission to the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters. The Commission finally obtained, from the latter, a list of exporters and producers of oxalic acid, to whom it then sent the same questionnaire and covering letter as had been received by Sinochem Beijing.

7 The applicant, which sent a letter on 24 December 1990, was the only Chinese exporter to respond to the questionnaire. By telex of 27 February 1991, the Commission replied as follows: '... Considering that your answer to the ... questionnaire ... is very incomplete and insufficient, notably on the crucial point concerning your sales to the Community during the first eight months of 1990, and the conditions of sale, we would like to inform you that the Commission has the intention of basing its findings on the facts available, in accordance with Article 7(7)(b) of [the basic] regulation ...'. The applicant did not reply.

8 By Commission Regulation (EEC) No 1472/91 of 29 May 1991, the Commission imposed a provisional anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China (OJ 1991 L 138, p. 62). In the 13th recital in the preamble to that regulation, the Commission, referring to Article 2(5) of the basic regulation, states that it had to take account of the fact that the People's Republic of China is not a market economy country. In the 22nd recital, it explains that: 'Since China did not give satisfactory answers to the questionnaire, the

Commission based its provisional calculations on the facts available, i. e. the data given in the complaint; the prices used tally with those supplied by the only importer to cooperate' and that 'thus the Commission established that undercutting averaged 25.05% during the first eight months of 1990.' In the 43rd recital, the Commission adds that it 'took note of the fact that China, despite its undertakings, has continued to dump, contributing to the injury suffered by the Community industry.' Finally, Article 1 of Regulation No 1472/91 sets the amount of the provisional anti-dumping duty for imports of oxalic acid originating in the People's Republic of China at 20.3%. Article 3 provides that: 'Without prejudice to Article 7(4)(b) of [the basic] regulation, the parties concerned may make known their views in writing and request a hearing by the Commission within one month of entry into force of this regulation.' In accordance with Article 4, Regulation No 1472/91 entered into force on 2 June 1991.

9 By telex message of 8 July 1991 addressed to the Commission, the applicant requested a hearing, to be held in September at the latest. In the same message, it asked to be allowed to submit its written observations prior to the hearing and to consult the non-confidential file so as to ascertain on which data the Commission had based its calculation of the provisional dumping margin.

10 With the Commission's consent, the applicant lodged its written observations on 2 September 1991 and on 4 September 1991 a hearing took place. However, the Commission refused to allow access to the information requested by the applicant, on the ground that its request had not been received within the period prescribed by Article 7(4)(c) of the basic regulation. The Commission also stated that it was not under a duty to take the written observations formally into account, on the ground that it had not received them within the period prescribed by Article 3 of Regulation No 1472/91. Nevertheless, at the suggestion of counsel for the applicant, the Commission agreed to treat the written observations as an '*aide mémoire*'.

11 At the hearing and throughout the correspondence exchanged between mid-September 1991 and the end of November 1991, the applicant and the Commission maintained their respective positions. The applicant claimed that it had provided all the information that could reasonably be regarded as covered by the questionnaire, including all the invoices for its exports to the Community during the investigation period (1 April 1989 to 31 August 1990). The Commission, on the other hand, contended that the applicant's reply to the questionnaire was incomplete and that it had therefore failed to cooperate.

12 By Regulation (EEC) No 2833/91 of 23 September 1991, the Council extended the validity of the provisional anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China for a period of no more than two months (OJ 1991 L 272, p. 2).

13 On 5 November 1991 the Commission proposed that the Council should impose a definitive anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China (COM (91) 437 final).

14 On 25 November 1991 the Council adopted the contested act imposing a definitive anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China, confirming in full the findings set out by the Commission in Regulation No 1472/91 with regard to imports of oxalic acid originating in the People's Republic of China.

Procedure

15 In those circumstances the applicant instituted proceedings by application received at the Registry of the Court of Justice on 27 February 1992. The action was registered as Case C-61/92.

16 By order of 30 September 1992, the President of the Court of Justice granted the Commission leave to intervene in Case C-61/92 in support of the form of order sought by the Council.

17 By letter of 20 January 1994, the applicant forwarded an expert's opinion, provided by a Chinese university, on its legal status. It sought the Court's permission to lodge that opinion.

18 Council Decision 94/149/ECSC, EC of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1994 L 66, p. 29) provides that, with effect from 15 March 1994, the Court of First Instance has jurisdiction to hear and determine actions brought by natural or legal persons pursuant to Articles 173, 175 or 178 of the EC Treaty relating to measures taken in the case of dumping and subsidies. By order of 18 April 1994, the Court of Justice therefore referred Case C-61/92 to the Court of First Instance. The action was registered at the Registry of the Court of First Instance as Case T-161/94.

19 The Court of First Instance gave the applicant permission to lodge the expert's opinion on its legal status.

20 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry but, as a measure of organization of procedure, it requested the parties to reply in writing to certain questions before the hearing.

21 At the hearing on 23 January 1996, the parties presented oral argument and replied to oral questions from the Court. At the end of the hearing, the Court asked the applicant to lodge with the Registry the business licence which it held at the time

of making the application. On receiving that document and the observations of the Council and Commission relating thereto, the Court brought the procedure to a close.

Forms of order sought by the parties

22 In its application, the applicant claims that the Court should:

— annul Council Regulation (EEC) No 3434/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China (OJ 1991 L 326, p. 6; hereinafter 'the contested regulation');

— order the Council to pay the costs.

23 The Council claims that the Court should:

— declare the application inadmissible;

— dismiss the application;

— order the applicant to pay the costs.

24 In its reply, the applicant claims that the Court should:

— declare the application admissible;

— annul Regulation No 3434/91 in whole or as regards the applicant;

— order the Council to pay the costs.

25 The intervener claims that the Court should:

— dismiss the application as inadmissible or alternatively as unfounded.

Admissibility

26 The Council and the Commission put forward, essentially, two pleas of inadmissibility. The first plea in law concerns the applicant's status as a legal person. The second alleges that the applicant is not individually concerned.

The first plea of inadmissibility

Arguments of the parties

27 The Council and the Commission consider the application to be inadmissible, first of all on the ground that the applicant is not a legal person within the meaning of the second paragraph of Article 173 of the EEC Treaty. The applicant's lack of legal personality is apparent from the fact that it is only a local branch of Sinochem. It thus forms part of Sinochem Beijing and is therefore not a distinct legal entity.

28 The Council and the Commission also argue that, at the time of making its application, the applicant failed to produce the business licence establishing its legal personality for the purposes of Chinese law. Furthermore, the licence which the applicant lodged at the Court's request and which it apparently possessed at the time of making the application is not proof of legal personality. It was issued before the adoption of a new Chinese statute concerning the registration of undertakings as legal persons.

29 The applicant contests the argument, put forward by the Council and the Commission, that it does not make its business decisions independently. It points out that the economy of the People's Republic of China has undergone profound changes which have led to the removal of State controls on the business transactions of companies. As regards the Sinochem group, the applicant explains that it has been reorganized as a series of independent companies operating at the provincial level; one of those companies is the applicant, which independently exports products manufactured in the factories of Heilongjiang Province to its own customers, at prices which it fixes itself and in competition with other companies. Moreover, it is clear from the administrative proceeding which gave rise to the present case that the Commission itself regarded the applicant as an individual trader.

30 Furthermore, according to the applicant, its status as an independent legal entity is evident from its constitution and from the business licence which was lodged at the Court's request and which is dated 15 April 1988, that is, well before the time of making the application.

Findings of the Court

31 The Court notes that the admissibility of an action for annulment brought by an entity under Article 173 of the EEC Treaty depends primarily on the legal personality of the applicant. It is settled law that, under the Community judicial system, an applicant is a legal person if, at the latest by the expiry of the period prescribed for proceedings to be instituted, it has acquired legal personality in accordance with the law governing its constitution (Case 50/84 *Bensider and Others* v *Commission* [1984] ECR 3991, paragraphs 7 and 8) or if it has been treated as an independent legal entity by the Community institutions (Case 175/73 *Union Syndicale, Massa and Kortner* v *Council* [1974] ECR 917, paragraphs 11 to 13, and Case 18/74 *Syndicat Général du Personnel* v *Commission* [1974] ECR 933, paragraphs 7 to 9).

32 Secondly, Article 38(5)(a) of the Rules of Procedure of the Court of Justice and Article 44(5)(a) of the Rules of Procedure of the Court of First Instance provide that, where the applicant is a legal person governed by private law, its application must be accompanied by the instrument or instruments constituting or regulating that legal person or a recent extract from the register of companies, firms or associations or any other proof of its existence in law.

33 In the present case, the applicant submitted at the Court's request a licence dated 15 April 1988 attesting to its registration by the authorities of Heilongjiang Province as an undertaking with its own capital and an independent accounting

system. In the Court's view, that document constitutes an extract proving the applicant's existence in law for the purposes of the above provisions.

34 Even on the assumption that, as the Council and the Commission have contended, only undertakings registered under the new Chinese statute (which was promulgated on 3 June 1988 and took effect on 1 July 1988) have legal personality, it is nevertheless clear that the applicant is a legal person within the meaning of Article 173 of the EEC Treaty since it has been treated as an independent legal entity by the Community institutions during the administrative proceeding. Thus, the Commission corresponded with the applicant extensively and accepted it as an interlocutor at the hearing. That being so, the Council and the Commission cannot maintain that, in the judicial proceedings following the administrative procedure, the applicant is not an independent legal person.

35 In the light of all the above considerations, it is clear that, at the time of making the application, the applicant was a legal person within the meaning of Article 173 of the EEC Treaty.

The second plea of inadmissibility

Arguments of the parties

36 The Council and the Commission contend that the contested regulation was not of individual concern to the applicant within the meaning of the second paragraph of Article 173 of the EEC Treaty.

37 In support of that contention, they point out that, in countries which do not have a market economy, exporters' business decisions are subject to State control and that, as a consequence, anti-dumping proceedings and regulations are directed, in such cases, against the State concerned and not against the various exporters. The establishment and calculation of anti-dumping duties on products originating in non-market economy countries are based, not on the circumstances of each individual exporter, but solely on the circumstances of the countries concerned. If an individual anti-dumping duty were separately determined for each exporter, the State in question would immediately begin to channel its exports exclusively through the exporter subject to the lowest anti-dumping duty. In the absence of a system based on individual duties, the Council and the Commission consider that only the State, or the State bodies or undertakings responsible for exporting the product in question, may be regarded as individually concerned by the imposition of the anti-dumping duty.

38 According to the Commission, if that principle is not to apply to the applicant, the latter must show that its business decisions are made wholly independently. However, the documents which it has lodged with its application suggest the contrary. In particular, Article 2 of the applicant's constitution discloses that its main object is to procure foreign currency for the People's Republic of China. Thus it carries out its tasks in the context of a socialist society, instead of operating in response to market requirements.

39 The Commission adds that the applicant's participation in the anti-dumping investigation is not sufficient to confer a right of action before the Community judicature. In support of that contention, the Commission refers to the order in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109, paragraph 19, in which the Court of Justice held that the applicant's argument that its participation in the successive stages of the investigation conducted by the Commission should render its application admissible could not be upheld, since the distinction between a regulation and a decision can be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption.

40 The Council observes that, even if the applicant were a State organization, it still would not be individually concerned since, by its own admission, it is only a trading company which exports products manufactured by other companies. As such, the applicant is independent in the sense that it is not linked to any particular producer. It would be pointless, however, to impose individual anti-dumping duties on undertakings which are not genuine producer-exporters on account of the potential for circumvention. Producers would immediately turn to the trader subject to the lowest duty.

41 Lastly, the Council submits that the application is inadmissible also because the applicant claimed that Regulation No 3434/91 should be annulled in its entirety, whereas that regulation imposes different anti-dumping duties, not only on imports of oxalic acid originating in the People's Republic of China but also on imports of oxalic acid originating in India. In those circumstances, the Council points out that, according to the case-law, a regulation imposing different anti-dumping duties on a series of traders is of individual concern to any one of them only in respect of those provisions which impose on that trader a specific anti-dumping duty and determine the amount thereof (see the judgment in Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335). However, the applicant has not, even by way of an alternative claim, sought annulment of the regulation only in so far as it, the applicant company, is affected by the anti-dumping duty imposed on imports of oxalic acid originating in the People's Republic of China.

42 The applicant maintains that it is directly and individually concerned by Regulation No 3434/91. It cites paragraph 12 of the judgment in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, in which the Court of Justice found that measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations. The applicant acknowledges that, in contrast with the present case, the information provided by the applicant company in *Allied Corporation* had been used by the Commission and the Council in order to determine the amount of anti-dumping duty. However, the applicant emphasizes, first, that it was always treated as a party to the proceeding by the Commission agents conducting the investigation and,

secondly, that the refusal by the Commission and the Council to use the information provided by the applicant is central to the present dispute. It would be unjust if the institutions were able to rely on that refusal in order to prevent the definitive measure, in respect of which the decisive factor was that refusal, from being reviewed by the Community judicature.

43 As regards the Council's argument that independent traders are not individually concerned by anti-dumping regulations, the applicant observes that, if that were so, in a system where there is no link between producers and exporters, no trader could bring an action before the Community judicature unless that trader were specifically named by the regulation in question or had provided information which had been used by the Community institutions. In its view, there is no such rule, as shown moreover by the fact that the Council did not refer to any precedent in support of its argument.

44 As regards the Council's contention that the applicant seeks annulment of Regulation No 3434/91 in its entirety, the applicant points out that the *Ricoh* case to which the Council refers concerned Japanese companies on each of which the Council had imposed separately calculated anti-dumping duties. While the Court's argument that a company may only seek the annulment of measures which impose an individual anti-dumping duty makes sense and is acceptable in the context of that case, it makes no sense where an anti-dumping duty concerns companies from a country such as the People's Republic of China, which has a non-market economy. In almost every case where the relevant products originate in a country with that type of economy, anti-dumping duties will not have been calculated and imposed on an individual basis. Accordingly, if the reasoning employed by the Court in *Ricoh* were applied to companies from non-market economy countries, it would lead to the unacceptable result that none of those companies would be entitled to bring a direct action before the Community judicature. Lastly, the applicant claims that it seeks the amendment of Regulation No 3434/91 only in so far as it is concerned by that regulation.

Findings of the Court

45 The Court points out *in limine* that although, in the light of the criteria set out in the second paragraph of Article 173 of the EEC Treaty, regulations imposing anti-dumping duties are indeed, as regards their nature and their scope, of a legislative character in that they apply to all the traders concerned taken as a whole, their provisions may none the less be of individual concern to certain traders (see Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13).

46 Thus it has been recognized that measures imposing anti-dumping duties may be of direct and individual concern to producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations (see *Allied Corporation and Others*, cited above, paragraph 12, Case 53/83 *Allied Corporation and Others* v *Council* [1985] ECR 1621, paragraph 4, and *Extramet Industrie*, cited above, paragraph 15), and, more generally, to any trader who can establish the existence of certain attributes which are peculiar to him and which, as regards the measure in question, differentiate him from all other traders (see *Extramet Industrie*, cited above, paragraphs 16 and 17).

47 In the present case, it cannot be denied that the applicant was deeply involved in the preliminary investigation. In particular, it answered the Commission's questionnaire and submitted written observations. Furthermore, its representatives travelled abroad in order to defend the company at a hearing organized for that purpose by the Commission. Lastly, it corresponded with the Commission on a regular basis. All the information which it provided, together with its arguments, were received and evaluated by the Commission. That makes it clear that, from the point of view of both the applicant and the Commission, the applicant participated in the preliminary investigation and that its position was examined by the Commission in the course of the proceeding which led to the imposition of the anti-dumping duty. Contrary to the Council's contention at the hearing, that finding is not affected by the fact that the Commission ultimately decided not to accept the information provided by the applicant with regard to the central points at issue.

48 It follows from the above circumstances that the applicant was concerned by the preliminary investigations within the meaning of the case-law cited. Furthermore, the applicant is the only Chinese undertaking to have participated in the investigation, which constitutes a factor of a kind which differentiates it, as regards the measure in which the investigation culminated, from all other traders.

49 It is clear from the foregoing that the applicant is directly and individually concerned by Regulation No 3434/91. That finding cannot be invalidated by the fact that, in its application, the applicant did not expressly confine its action to the part of Regulation No 3434/91 concerning imports originating in the People's Republic of China. In this respect, it should be noted that none of the pleas in law or arguments put forward by the applicant can have any bearing on the part of Regulation No 3434/91 which concerns imports originating in India. In these circumstances, the subject-matter of the application is clearly, albeit implicitly, solely the annulment of Regulation No 3434/91 in so far as the applicant is affected by the anti-dumping duty imposed on imports of oxalic acid originating in the People's Republic of China.

50 It follows from all the foregoing considerations that the application is admissible.

Substance

51 The applicant essentially puts forward three pleas in law: (1) the Commission and the Council infringed Article 2(8)(a) and Article 7(7)(b) of the basic regulation; (2) Article (7)(4)(c) of the basic regulation and the applicant's right to a fair hearing were infringed; and (3) the Commission and the Council infringed Article 4(1) of the basic regulation.

The first plea in law: infringement of Article 2(8)(a) and Article 7(7)(b) of the basic regulation

Arguments of the parties

52 Article 2(8)(a) of the basic regulation provides that 'the export price shall be the price actually paid or payable for the product sold for export to the Community...'. Article 7(7)(b) of the basic regulation provides that: 'In cases in which any interested party ... refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. Where the Commission finds that any interested party ... has supplied it with false or misleading information, it may disregard any such information and disallow any claim to which this refers'.

53 The applicant points out that its reply to the Commission's questionnaire contained all the necessary information, including its sales invoices for that part of 1989 covered by the investigation period, as well as the information that there had been no sales in 1990. The Commission and the Council should therefore have determined the export price on the basis of Article 2(8)(a) of the basic regulation and not of Article 7(7)(b) thereof, which is only applicable where the interested party does not sufficiently cooperate in the investigation.

54 The applicant maintains that each exporter who participated in the investigation is entitled to an individual determination, based on its own export sales. According to the applicant, the fact that the People's Republic of China does not have a market economy in no way affects that entitlement. The Commission has never been authorized by a decision of the Council, based on Article 113 of the Treaty, to pursue a different policy in relation to countries whose economies are State-controlled, except as regards the calculation of the normal value, for which Article 2(5) of the basic regulation prescribes different treatment. The Commission's collective calculations produce for certain exporters effects which are

incompatible with Article 13(3) of the basic regulation, which provides that the amount of the definitive anti-dumping duty may not exceed the dumping margin established.

55 The applicant further states that the 'available facts' on which the Commission and the Council relied, that is to say, the data provided in the complaint, are inaccurate and partisan. It explains that, even if its own data are discounted, several sources containing more accurate and impartial information than the data given in the complaint were available to the institutions, namely the Eurostat statistics, the data provided by Hunan Bremen, one of the importers, which answered a questionnaire for importers, and the data provided by Metallurgie Hoboken Overpelt, a customer, which answered the same questionnaire.

56 The Council submits that the question of whether or not the applicant was cooperative is irrelevant, since in any case the institutions could not have determined the export price on the basis of the information provided by it.

57 Eurostat statistics show that in 1990 oxalic acid had been exported from the People's Republic of China to the Community in considerable quantities and at prices significantly lower than those of 1989. In view of the applicant's claim to have made no such exports in 1990 and since no other Chinese exporter answered the questionnaire, the institutions simply had no choice but to determine the export price on the basis of a non-Chinese source of information. Moreover, the Council suspects that many exporters decided not to answer the questionnaire because they hoped that the institutions would base their findings solely on the applicant's response. The Council also expresses doubts as to the accuracy of the information provided by the applicant.

58 As regards the determination of a reliable source of information, the Council points out that the institutions have a broad discretion in deciding which data may be regarded as the 'available facts'. Furthermore, none of the sources mentioned by the applicant is reliable. According to evidence before the Commission, the prices quoted in the Eurostat statistics do not match the actual prices. Nor are the figures provided by Hunan Bremen representative, since that company has only one Chinese supplier, with which it has formed a joint venture. As for the prices mentioned by Metallurgie Hoboken Overpelt, these cannot be regarded as export prices, since that company does not purchase directly from Chinese exporters but from other Community importers.

59 The Commission submits, first, that the applicant's reply to the questionnaire is unreliable in view of the many inconsistencies it contains, and refers to its letter of 8 November 1991, in which that point is more fully explained.

60 Secondly, the Commission provides further figures to substantiate the Council's argument that the information supplied by the applicant was unrepresentative. During the investigation period, 3 505 tonnes of oxalic acid were exported to the Community by the Chinese. According to its own data, the applicant only exported 500 tonnes. It would be impossible to base any calculations on such a small quantity.

61 Lastly, as regards the determination of a reliable source of information, the Commission adds, in support of the Council's contentions, that the figures quoted in the Eurostat statistics as representing the value of the oxalic acid were not reliable, because they also cover other products.

Findings of the Court

62 The Court notes, first of all, that the Commission sent a questionnaire to all the Chinese exporters of oxalic acid who were on the list that it had obtained from the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, but received in return only the questionnaire completed by the applicant.

63 Secondly, the applicant's exports during the investigation period, which it recorded in its answer to the questionnaire, constitute only a small proportion of the total quantity of exports by Chinese undertakings during that period. The applicant stated that it exported 500 tonnes to the Community during that part of the investigation period which falls within 1989 and denied making any exports in 1990. In view of the fact that the total volume of Chinese exports during the investigation period amounted to some several thousand tonnes, the Court considers that the information supplied by the applicant was not sufficiently representative to enable the Community institutions to make reliable assessments.

64 Bearing in mind that, with the exception of the applicant, all the Chinese exporters refused to cooperate in the investigation, and that the information provided by the applicant was not representative, the Court considers that the Community institutions were entitled to decide to apply Article 7(7)(b) of the basic regulation and to found their assessments solely on data that were truly reliable. By the same token, the institutions were not in a position to calculate and impose an individual anti-dumping duty for each Chinese exporter. Even on the assumption that an individual anti-dumping duty could have been imposed in relation to the applicant, the possibility of making dual provision in the contested regulation — one anti-dumping duty for the applicant and another, higher, anti-dumping duty for all other Chinese exporters — could not have been contemplated owing to the risk of circumvention.

65 Thirdly, as regards non-Chinese sources of information, the Court considers that the Community institutions did not commit a manifest error of assessment by concluding that they were unable to make reliable findings on the basis of the Eurostat statistics or the figures provided by Hunan Bremen and Metallurgie Hoboken Overpelt. On studying those statistics and figures, the institutions found, on the one hand, that the statistics do not quote figures relating exclusively to the product in question, nor do they indicate the purchase price charged by the Chinese exporters, but only the resale prices in the Community; the figures supplied by Hunan Bremen and Metallurgie Hoboken Overpelt, on the other hand, do not relate to transactions entered into directly with Chinese exporters. In those circumstances, the institutions were entitled to conclude that the data given in the complaint represented the only 'available facts' for the purposes of Article 7(7)(b) of the basic regulation.

66 Consequently, by basing their calculations on the information provided by the complainant undertaking and not on the applicant's reply to the questionnaire or the related invoices, the Community institutions did not infringe either Article 2(8)(a) or Article 7(7)(b) of the basic regulation.

67 It follows from the foregoing that the first plea in law must be rejected.

The second plea in law: infringement of Article 7(4)(c) of the basic regulation and of the right to a fair hearing

Arguments of the parties

68 Article 7(4)(b) of the basic regulation provides that 'exporters ... of the product subject to investigation ... may request to be informed of the essential facts and

considerations on the basis of which it is intended to recommend the imposition of definitive duties'. Article 7(4)(c)(i)(aa) requires requests for information to be addressed to the Commission in writing. Pursuant to Article(7)(4)(c)(i)(cc), such requests must be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty. Lastly, Article 7(4)(c)(ii) and (iii) prescribe the manner in which the Commission may provide the information requested and the period within which it must do so.

69 The applicant submits that, by refusing to disclose any information regarding its calculation of the provisional anti-dumping duties, the Commission infringed that provision of the basic regulation. The applicant refers to the judgment of the Court of Justice in Case C-49/88 *Al-Jubail Fertilizer and Saudi Arabian Fertilizer* v *Council* [1991] ECR I-3187, paragraphs 15 to 17, in which it was found that 'it is necessary when interpreting Article 7(4) of the basic regulation to take account in particular of the requirements stemming from the right to a fair hearing, a principle whose fundamental character has been stressed on numerous occasions in the case-law of the Court'.

70 However, the applicant states that, despite its request, it did not receive any information regarding either the export price or the normal value and thus found it virtually impossible to put forward sufficient evidence to provide an effective defence.

71 As regards the prescribed period within which requests for information must be submitted, which runs for one month after publication of the imposition of the provisional anti-dumping duty, the applicant submits that it is too much to expect the Chinese to have had actual knowledge of a Community decision on the date of its publication.

72 The Council points out that the right to a fair hearing must be balanced against the institutions' aim of conducting anti-dumping proceedings effectively and bringing them to a close within a reasonable period of time. The time-limit laid down by

Article 7(4)(c)(i)(cc) of the basic regulation should be regarded as a formal requirement specifically designed to ensure that a proceeding is terminated within a reasonable period of time.

73 It also makes the point that the disclosure of the information requested by the applicant was not possible for reasons of confidentiality.

74 In its reply, the applicant confirms that its request for information was not submitted within the period prescribed by Article 7(4)(c)(i)(cc) of the basic regulation. It submits, however, that the Commission could have released the information sought simply on grounds of fairness, particularly in view of the applicant's geographical remoteness, which makes it difficult to comply with narrow time-limits.

Findings of the Court

75 It is settled case-law that, in order to respect the right to a fair hearing, the undertaking concerned must have been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and its observations on any documents used (see, for example, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 108, Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 59, and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 69).

76 In the present case, it is clear from the documents before the Court that the applicant was afforded an opportunity to make its views known. In particular, Article 3 of the provisional regulation invited the parties concerned to make known their views in writing and request a hearing by the Commission within one month of the entry into force of the regulation on 2 June 1991.

77 As regards the request submitted by the applicant to the Commission for information concerning the calculation of the provisional dumping margin, the Court notes that, after provisional duties were imposed on imports of oxalic acid originating in the People's Republic of China, the applicant did not resume its contacts with the Commission until 8 July 1991, that is, after the expiry of the period laid down in Article 3 of the provisional regulation for submitting observations and in Article 7(4)(c)(i)(cc) of the basic regulation for submitting requests for information. In those circumstances, a company cannot complain that the Commission infringed Article 7(4)(c) of the basic regulation (see *Nakajima*, cited above, paragraph 112).

78 The second plea in law must therefore also be rejected.

The third plea in law: infringement of Article 4(1) of the basic regulation

Arguments of the parties

79 Article 4(1) of the basic regulation provides that 'a determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury, i. e. causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry'.

80 The applicant submits that the Commission and the Council were wrong to conclude that the imports of oxalic acid from the People's Republic of China caused the injury complained of by DAVSA. It observes, first of all, that the institutions extrapolated from the figures in the Eurostat statistics relating to the first eight months of 1990 whereas, at the time when the definitive anti-dumping duties were imposed, Eurostat statistics were available for the whole of 1990, which showed a

sharper decline in Chinese exports. The applicant also points out that the Commission stated in its letter of 20 September 1991 that 'injury is determined only with regard to the complainant Community industry and not with regard to the Community industry as a whole'. According to the applicant, that explanation raises serious doubts as to the accuracy of the determination of a causal link, since the complainant company accounts for only 20.8% of the European industry and has an 8.5% share of the European market, whereas its two major competitors, Hoechst and Rhône Poulenc, made no complaint. In its view, the injury suffered by DAVSA was caused essentially by Hoechst France's massive increase in sales.

81 Those factors lead the applicant to conclude that the Commission abused the discretion it has when determining the existence of a causal link.

82 The Council confirms that the volume of imports of oxalic acid originating in the People's Republic of China fell during the investigation period, but stresses that Community consumption of oxalic acid fell even more sharply during the same period. It maintains that, in those circumstances, the institutions were correct in concluding that, during the investigation period, Chinese exporters were able to increase their share of the Community market. The institutions also found that, at the same time, the Chinese exporters were undercutting prices, thereby compelling the Community industry to sell at a loss.

83 Further, the Council acknowledges that the institutions extrapolated the figures for the first eight months of 1990 to cover the whole year. It explains that this was solely in order to render the results comparable with annual figures for other years. In any case, it emphasizes, the figures for the last four months of 1990 could

not be taken into account as those months fell outside the investigation period. The institutions cannot take into account developments arising after the end of the investigation period since, if they did, they would constantly be obliged to revise their findings with regard to dumping, injury and causation. For the same reason, the institutions were unable to base their findings on the Eurostat statistics, which contained figures for the whole of 1990.

84 Lastly, the Council stresses that the institutions carefully examined whether the activities of Hoechst and Rhône-Poulenc had contributed to the injury suffered by DAVSA and set out their findings in the 40th recital in the preamble to the provisional regulation and in the 22nd recital in the preamble to the definitive regulation. The Commission had also explained its findings to the applicant in its letters of 20 September 1991 and 11 October 1991. According to the Council, the applicant misinterpreted Hoechst's sales and production figures which are given in the non-confidential version of Hoechst's reply to the questionnaire. The applicant thought that the figures supplied by Hoechst related to 1990, whereas in fact they related to the 17 months covered by the investigation period. In reality, according to the Council, those figures show a drop in Hoechst's sales and a very slight increase in production.

85 As regards DAVSA's size, the Council observes that during the investigation period its market share amounted to 16%. The Commission indicated, in reply to a written question from the Court, that DAVSA accounted for 35% of the Community industry.

Findings of the Court

86 First of all, in determining injury, the Council and the Commission are obliged under Article 4(1) of the basic regulation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and to

disregard any injury deriving from other factors, in particular from the conduct of Community producers themselves (see Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, paragraphs 15 and 16).

87 In the present case, it is clear from the 40th recital in the preamble to the provisional regulation and the 22nd recital in the preamble to the contested regulation that the Community institutions did at least take into account the activities of the Community producers during the investigation period. Moreover, the reply by Hoechst France to the questionnaire sent by the Commission to Community producers establishes that its sales and production of oxalic acid did not increase to any appreciable extent during the investigation period. As regards Hoechst's sales of its own product within the Community, these sales actually declined, from 160 tonnes for the whole of 1988 to 190 tonnes for the 17 months constituting the investigation period. Those data contradict the applicant's allegation that the injury suffered by the complainant undertaking was brought about essentially by Hoechst France's increase in business.

88 Secondly, as regards the extrapolation described in the 19th, 20th, 25th to 27th, 33rd and 37th recitals in the preamble to the provisional regulation (which were confirmed by the contested regulation), the first point to note is that this method was intended solely to enable figures to be submitted and compared on an annual basis and that it by no means had the effect of distorting the calculations made on the basis of data relating to the investigation period. The Community institutions cannot be criticized in that regard for not using the actual figures for the last four months of 1990: they cannot be required to incorporate in their calculations data which postdate the investigation period unless such data disclose new developments which make the planned imposition of an anti-dumping duty manifestly

inappropriate. In the present case, however, it has not been shown that developments of such significance took place during the four months following the investigation period.

89 Lastly, the applicant cannot criticize the fact that the Community institutions determined the injury in relation solely to the complainant Community industry and not to Community producers as a whole. On that point, it should be observed that the term 'Community industry' in Article 4(1) of the basic regulation is defined in Article 4(5) thereof as referring to 'the Community producers as a whole ... or to those of them whose collective output of the products constitutes a major proportion of the total Community production'. As the parties maintained at the hearing, the expression 'major proportion' should be interpreted not as a proportion of 50% or more, but rather as 25% or more. In the present case, it is clear from the table annexed to the Commission's replies to the Court's written questions on Community production of oxalic acid that, during the investigation period, the complainant undertaking produced 35% of the total Community output of oxalic acid. It was therefore lawful for the Community institutions to have determined the injury and, consequently, to have established the existence of a causal link, in relation to the complainant industry alone.

90 It follows from the foregoing considerations that none of the arguments put forward by the applicant shows that the reasoning applied by the Community institutions in connection with the regulation at issue is vitiated by an error of fact or law.

91 The third plea in law must therefore be rejected.

92 In the light of all the foregoing, the application must be dismissed.

Costs

93 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Saggio Bellamy Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 11 July 1996.

H. Jung A. Saggio

Registrar President