CVRIA
LUXEMBOURG

ПЪРВОИНСТАНЦИОНЕН СЪД НА ЕВРОПЕЙСКИТЕ ОБЩНОСТИ
TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS
SOUD PRVNÍHO STUPNĚ EVROPSKÝCH SPOLEČENSTVÍ
DE EUROPÆISKE FÆLLESSKABERS RET I FØRSTE INSTANS
GERICHT ERSTER INSTANZ DER EUROPÄISCHEN GEMEINSCHAFTEN
EUROOPA ÜHENDUSTE ESIMESE ASTME KOHUS
ΠΡΩΤΟΔΙΚΕΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES
CÚIRT CHÉADCHÉIME NA GCÓMHPHOBAL EORPACH
TRIBUNALE DI PRIMO GRADO DELLE COMUNITÀ EUROPEE
EIROPAS KOPIENU PIRMĀS INSTANCES TIESA
EUROPOS BENDRIJŲ PIRMOSIOS INSTANCIJOS TEISMAS
EURÓPAI KÖZÖSSÉGEK ELSŐFOKÚ BÍRÓSÁGA
IL-QORTI TAL-PRIMI ISTANZA TAL-KOMUNITAJIET EWROPEJ
GERECHT VAN EERSTE AANLEG VAN DE EUROPESE GEMEENSCHAPPEN
SĄD PIERWSZEJ INSTANCJI WSPÓLNOT EUROPEJSKICH
TRIBUNAL DE PRIMEIRA INSTÂNCIA DAS COMUNIDADES EUROPEIAS
TRIBUNALUL DE PRIMĂ INSTANȚĂ AL COMUNITĂȚILOR EUROPENE
SÚD PRVÉHO STUPŇA EURÓPSKYCH SPOLOČENSTIEV
SODIŠČE PRVE STOPNJE EVROPSKIH SKUPNOSTI
EUROOPAN YHTEISÖJEN ENSIMMÄISEN OIKEUSASTEEN TUOMIOISTUIN
EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

1/39

BY FAX
- 357083 -

Luxembourg, 05/05/2008
T-498/04-123

Mr James Flynn
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD

Case: T-498/04

Zhejiang Xinan Chemical Industrial Group Co. Ltd
Association des Utilisateurs et Distributeurs de l'AgroChimie Européenne (Audace), intervener
v
Council of the European Union
Commission of the European Communities, intervener

The Registrar of the Court of First Instance encloses herewith a copy of the Report for the Hearing (Reg. No **357079**) on **03/06/2008**. This document, drawn up by the Judge Rapporteur, is an objective summary of the case. It does not set out every single detail of the parties' arguments, but is meant to enable the parties to check that their pleas and arguments have been properly understood and to facilitate study of the documents before the Court by the other Members of the bench hearing the case.

If you consider it to be necessary, you may submit observations on that report either orally at the hearing or, preferably, in writing in due time before the hearing. Your attention is however drawn to the fact that any written observations must reach the Registry one week before the hearing so that they may be communicated to the judges and to the other parties to the proceedings.

COMMUNITATVM EVROPÆARVM CVRIA

E. COULON
Registrar

RUE DU FORT NIEDERGRÜNEWALD
L-2925 LUXEMBOURG

TÉLÉPHONE: (+352) 4303-1
(EXT.: 3143)

TÉLÉFAX:(+352) 4303-2100
cfi.registry@curia.europa.eu

-119-

CVRIA
LUXEMBOURG

ПЪРВОИНСТАНЦИОНЕН СЪД НА ЕВРОПЕЙСКИТЕ ОБЩНОСТИ
TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS
SOUD PRVNÍHO STUPNĚ EVROPSKÝCH SPOLEČENSTVÍ
DE EUROPÆISKE FÆLLESSKABERS RET I FØRSTE INSTANS
GERICHT ERSTER INSTANZ DER EUROPÄISCHEN GEMEINSCHAFTEN
EUROOPA ÜHENDUSTE ESIMESE ASTME KOHUS
ΠΡΩΤΟΔΙΚΕΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES
CÚIRT CHÉADGHÉIME NA gCOMHPHOBAL EORPACH
TRIBUNALE DI PRIMO GRADO DELLE COMUNITÀ EUROPEE
EIROPAS KOPIENU PIRMĀS INSTANCES TIESA
EUROPOS BENDRIJŲ PIRMOSIOS INSTANCIJOS TEISMAS
AZ EURÓPAI KÖZÖSSÉGEK ELSŐFOKÚ BÍRÓSÁGA
IL-QORTI TAL-PRIMISTANZA TAL-KOMUNITAJIET EWROPEJ
GERECHT VAN EERSTE AANLEG VAN DE EUROPESE GEMEENSCHAPPEN
SĄD PIERWSZEJ INSTANCJI WSPÓLNOT EUROPEJSKICH
TRIBUNAL DE PRIMEIRA INSTÂNCIA DAS COMUNIDADES EUROPEIAS
TRIBUNALUL DE PRIMĂ INSTANȚĂ AL COMUNITĂȚILOR EUROPENE
SÚD PRVÉHO STUPŇA EURÓPSKYCH SPOLOČENSTIEV
SODIŠČE PRVE STOPNJE EVROPSKIH SKUPNOSTI
EUROOPAN YHTEISÖJEN ENSIMMÄISEN OIKEUSASTEEN TUOMIOISTUIN
EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

- 357079 -

REPORT FOR THE HEARING *

(Dumping – Imports of glyphosate originating in China – Status of undertaking operating under market economy conditions – Article 2(7)(b) and (c) of Regulation (EC) No 384/96 – Article 18(4) of Regulation (EC) No 384/96 – Legitimate expectations)

In Case T-498/04,

Zhejiang Xinan Chemical Industrial Group Co. Ltd, established in Jiande City (China), represented initially by D. Horovitz, lawyer, and B. Hartnett, barrister, and then by D. Horovitz,

applicant,

supported by

Association des utilisateurs et distributeurs de l'agrochimie européenne (AUDACE), represented by J. Flynn QC and D. Scannell, barrister,

intervener,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

supported by

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

intervener,

* Language of the case: English.

EN

APPLICATION for the annulment of Article 1 of Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China (OJ 2004 L 303, p. 1), in so far as it concerns the applicant.

Relevant provisions

1. *Community rules*

1 Article 2(1) to (7) 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') lay down, for the purpose of determining the existence of dumping, rules concerning calculation of the amount known as the 'normal value'. Thus, Article 2(1) provides for the main method, according to which '[t]he normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.

2 Article 2(7) of the Basic Regulation lays down a special rule for imports from non-market economy countries. That provision, as amended by Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18), by Council Regulation (EC) No 2238/2000 of 9 October 2000 (OJ 2000 L 257, p. 2) and by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, p. 1), provides as follows:

'(a) 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 ...

(b) In anti-dumping investigations concerning imports from ... the People's Republic of China, the Ukraine, Vietnam and Kazakhstan and any non-market economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, 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 producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under 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,

– firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

– the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

– the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

– exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria 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.'

3 Article 11(5) of the Basic Regulation, as applicable to the present case, provides:

'The relevant provisions of this regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.'

4 Article 18(4) of the Basic Regulation provides:

'If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.'

2. *International rules*

5 Regarding determination of normal value, the applicant also refers to certain World Trade Organisation (WTO) rules. Thus, the second Supplementary

Provision to paragraph 1 of Article VI of the General Agreement On Tariffs And Trade 1994 ('GATT 1994'), in Annex I to GATT 1994, states:

'It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.'

6 Article 2 of the Agreement on Implementation of Article VI of GATT 1994 ('the Anti-Dumping Agreement'), headed 'Determination of dumping', states as follows in paragraph 7:

'This article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.'

7 The Protocol on the Accession of China to the World Trade Organisation, annexed to the decision of the Ministerial Conference of 10 November 2001 (WT/L/432 of 23 November 2001) ('the Accession Protocol'), provides as follows in Article 15:

'Price comparability in determining subsidies and dumping

Article VI of the GATT 1994 [and the Anti-Dumping Agreement] ... shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

...

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices ...

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.'

8 Finally, the applicant also refers to paragraph 6 of Annex II (entitled 'Best Information Available in Terms of Paragraph 8 of Article 6') to the Anti-Dumping Agreement, which provides, in similar terms to Article 18(4) of the Basic Regulation, as follows:

'If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.'

Background to the dispute

9 The applicant is a company incorporated under Chinese law and listed on the Shanghai Stock Exchange. It is a leading Chinese producer of chemical products. Glyphosate is one of the main products produced and sold by the applicant on the Chinese and world markets. It is a herbicide chemical widely used by farmers throughout the world.

10 In February 1998, the Council, by Regulation (EC) No 368/98 (OJ 1998 L 47, p. 1), adopted anti-dumping measures applicable to imports of glyphosate originating in the People's Republic of China ('the PRC'). That regulation was amended by Council Regulation (EC) No 1086/2000 (OJ 2000 L 124, p. 1) and by Council Regulation (EC) No 163/2002 (OJ 2002 L 30, p. 1).

11 On 18 November 2002, following publication of a notice of the impending expiry of anti-dumping measures applicable to imports of glyphosate originating in the PRC (OJ 2002 C 120, p. 3), the Commission received an application for review of those measures under Article 11(2) of the Basic Regulation, submitted by the European Glyphosate Association ('the EGA'). On 15 February 2003, the

Commission published a notice of initiation of an expiry and an interim review of the anti-dumping measures applicable to imports of glyphosate originating in the PRC, under Article 11(2) and (3) of the Basic Regulation (OJ 2003 C 36, p. 18).

12 On 4 April 2003, following the initiation of the investigation, the applicant submitted to the Commission the completed claim form for market economy status ('MES') and/or individual treatment, asking the Commission to recognise that it had the status of an undertaking operating under market economy conditions in accordance with Article 2(7) of the Basic Regulation ('the MES claim'). Also, on 30 April 2003, the applicant submitted the completed questionnaire intended for exporting producers of glyphosate in the PRC.

13 Subsequently, the applicant responded to several requests for additional information from the Commission and reacted to the observations of the EGA, in which the latter opposed the grant of MES to the applicant. Furthermore, on 2 to 4 September 2003, the Commission carried out a verification visit at the applicant's premises.

14 On 5 December 2003, the Commission informed the applicant of its intention to reject the MES claim ('the MES disclosure'). On 16 and 23 December 2003, the applicant submitted its observations on the MES disclosure. In addition, on 28 January 2004 the applicant submitted a request for individual treatment.

15 By letter of 6 April 2004, the Commission informed the applicant of its formal decision to reject the MES claim.

16 On 7 April 2004, the Commission informed the applicant, under Article 20(4) of the Basic Regulation, of the essential facts and considerations on the basis of which it intended to propose the imposition of definitive anti-dumping measures. The applicant submitted its observations on that communication on 19 April 2004.

17 On 24 September 2004, on a proposal from the Commission, the Council adopted Regulation (EC) No 1683/2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China (OJ 2004 L 303, p. 1, 'the contested regulation').

With regard to the applicant's MES claim, recitals 13 to 15 to the contested regulation state:

'(13) Although the majority of the shares of the company were owned by private persons, due to the wide dispersion of the non State-owned shares, together with that fact that the State owned by far the biggest block of shares, the company was found to be under State control. Moreover, the board of directors was in fact appointed by the State shareholders and the majority of the directors of the board were either State officials or officials of State-owned enterprises. Therefore, it was determined that the company was under a significant State control and influence.

(14) Moreover, it was established that the government of the PRC had entrusted the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters (CCCMC) with the right of contract stamping and verifying export prices for customs clearance. This system included the setting of a minimum price for glyphosate exports and it allowed the CCCMC to veto exports that did not respect these prices.

(15) Consequently, after consulting the Advisory Committee, it was decided not to grant [market economy treatment] to [the applicant] Xinanchem on the basis that the company did not meet all the criteria set in Article 2(7)(c) of the Basic Regulation.'

18 Consequently, the normal value was determined, in accordance with Article 2(7) of the Basic Regulation, on the basis of data obtained from producers in a market economy third country, namely Brazil (recitals 23 to 30 to the contested regulation). Moreover, the Council considered that the applicant did not meet the necessary conditions to benefit from individual treatment as provided for in Article 9(5) of the Basic Regulation (recitals 16 and 17 to the contested regulation).

19 Article 1 of the contested regulation provides:

'1. A definitive anti-dumping duty is hereby imposed on imports of glyphosate falling within CN codes ex 2931 00 95 (TARIC code 2931 00 95 82) and ex 3808 30 27 (TARIC code 3808 30 27 19) originating in the People's Republic of China.

...

4. The rate of duty applicable to the net free-at-Community-frontier price, before duty, of the products described in paragraphs 1 to 3, shall be 29.9%.'

Procedure and forms of order sought

20 By application lodged at the Registry of the Court of First Instance on 23 December 2004, the applicant brought the present action.

21 By a document lodged at the Registry of the Court of First Instance on 5 April 2005, the Commission sought leave to intervene in support of the Council. By order of 13 June 2005, the President of the First Chamber of the Court of First Instance granted leave to intervene. By letter received at the Registry of the Court of First Instance on 28 June 2005, the Commission informed the Court of First Instance that it would not submit a statement in intervention but would take part in the hearing.

22 By a document lodged at the Registry of the Court of First Instance on 25 April 2005, the Association des utilisateurs et distributeurs de l'agrochimie européenne

(AUDACE) sought leave to intervene in support of the applicant. By order of 8 July 2005, the President of the First Chamber granted leave to intervene. He reserved a decision on the merits of the applications for confidential treatment lodged by the applicant and the Council. The non-confidential versions of the documents submitted by the parties were disclosed to AUDACE.

23 AUDACE lodged its statement in intervention on 15 September 2005 and the Council submitted its observations on that statement on 6 December 2005.

24 By letters of 15 December 2005 and 2 December 2005 respectively, the applicant and the Council indicated that they withdrew their applications for confidential treatment vis-à-vis AUDACE. Consequently, a copy of the confidential documents was sent to AUDACE.

25 The composition of the Chambers of the Court of First Instance having been changed with effect from 25 September 2007, the Judge-Rapporteur was assigned to the Fourth Chamber, and therefore the present case was allocated to that Chamber.

26 The *applicant* claims that the Court of First Instance should:

- annul Article 1 of the contested regulation in so far as it concerns the applicant;
- order the Council to pay the costs.

27 The *Council* contends that the Court of First Instance should:

- dismiss the application;
- order the applicant to pay the costs.

28 *AUDACE* claims that the Court of First Instance should:

- annul Article 1 of the contested regulation in so far as it concerns the applicant;
- order the Council to pay the costs of its intervention.

29 The *Commission* supports the Council in seeking dismissal of the application.

Arguments of the parties

30 The *applicant* puts forward, essentially, three pleas in law in support of its application. The first plea alleges manifest error of assessment in the interpretation and application of Article 2(7)(c) of the Basic Regulation. The second plea alleges infringement of paragraph 6 of Annex II to the Anti-Dumping Agreement and

Article 18(4) of the Basic Regulation, and also breach of the applicant's fundamental rights. The third plea alleges breach of the principle of the protection of legitimate expectations.

1. *The first plea: manifest error of assessment in interpreting and applying Article 2(7) of the Basic Regulation*

31 After stating that MES was withheld from it solely because it did not meet the condition laid down in the first indent of Article 2(7)(c) of the Basic Regulation ('the first MES condition' or 'the provision at issue'), the *applicant* submits that that decision was vitiated by several manifest errors of assessment.

32 Thus, first, that conclusion is based on a misinterpretation of the provision at issue (first part of the plea). Second, it does not take account of the Community's international obligations (second part of the plea). Third, it is based on incorrect factual premises, in so far as the applicant provided sufficient information during the investigation to establish that it met the first MES condition (third part of the plea). Fourth, the applicant claims that the reasons set out in recitals 13 to 15 to the contested regulation do not in themselves constitute grounds justifying the withholding of MES and, moreover, those findings are contradicted by evidence submitted during the investigation (fourth part of the plea). Finally, the applicant claims that the institutions did not take appropriate account of the parallel anti-dumping investigations opened against the applicant in other jurisdictions (fifth part of the plea).

33 In support of the applicant, *AUDACE* contends that the approach adopted by the Community institutions in this case was very formal and very perfunctory and prompted them to make errors of law in interpreting and applying Article 2(7)(c) of the Basic Regulation and manifest errors of assessment by not actually taking account of the evidence produced by the applicant in the course of the investigation.

Preliminary remarks on the grounds for refusal of MES

34 The *applicant* observes that, according to the recital 15 to the contested regulation, the Council refused to grant MES to it 'on the basis that the company did not meet all the criteria set in Article 2(7)(c) of the Basic Regulation'. However, the only issue here, as the Council accepted in its defence, is whether its commercial decisions were adopted without significant State interference.

35 It claims in that connection that, in its MES disclosure, the Commission concluded that the conditions laid down in the second, third, fourth and fifth indents of Article 2(7)(c) were satisfied and that the costs of major inputs substantially reflected market values (first indent).

36 In the applicant's view, the Council's statement in recital 15 to the contested regulation, implying that the applicant failed to satisfy several of the criteria, casts

doubt on the objectivity and impartiality of the institutions, contrary to standards of fairness and sound administration. According to the case-law, problems associated with a lack of objectivity on the part of the institutions should be examined 'in the context of the review [by the Court of First Instance] of the assessment [by the institutions] of the evidence or of the statement of reasons for the decision' (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, 'the *TACA* judgment', paragraph 464; see also Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 72).

37 The *Council* states that MES was not granted to the applicant because the institutions found that the applicant had not shown that its decisions were free from significant State interference and therefore that it had not met the burden of proving that it satisfied the first MES condition. That conclusion was based on the following four factors:

- the State was able to control the shareholders' meeting;
- the members of the board of directors were effectively appointed by the State shareholders;
- the majority of the directors on the board were either State officials or officials of State-owned companies;
- the government of the PRC controlled export prices through the China Chamber of Commerce of Metals, Minerals & Chemical Importers and Exporters ('the CCCMC').

38 As regards the applicant's allegations concerning the objectivity and impartiality of the institutions, the Council states that, in recitals 13 and 14 to the contested regulation, and during the investigation, the institutions explained in what way the applicant did not fulfil all the criteria of Article 2(7)(c) of the Basic Regulation.

The first part of the plea: misinterpretation of the provision at issue

39 The *applicant* submits that the Council does not state anywhere in the contested regulation that there was significant State interference in its business decisions. The applicant considers that the Council's assessment that 'the company was under a significant State control and influence' (recital 13 to the contested regulation) does not reach the threshold set out in the provision at issue.

40 In fact, the wording of that provision requires the Community institutions to assess whether the evidence produced by the producer-exporter is sufficient to show that its business decisions respond to market signals without significant State interference. Contrary to the Council's assertions, that provision requires an objective and specific attempt, based on evidence, to establish significant interference by the State regarding each business decision.

41 In that regard, the applicant relies on the definition of the word 'interfere' in the Concise Oxford Dictionary: 'prevent from continuing or being carried out properly; intervene without invitation or necessity'. In view of that meaning, a situation in which the State is not involved in business decisions or is involved but does not prevent them from responding to market signals reflecting supply and demand does not constitute 'interference' within the meaning of the provision at issue. Moreover, that provision accepts a situation of State interference unless that interference is 'significant'.

42 That interpretation is also supported by the term 'in this regard' which establishes a specific link between the 'State intervention' and the relevant 'decisions'. Thus, significant State interference must be measured 'in regard to' each aspect of the business decisions envisaged by the provision.

43 Thus, the applicant considers that the refusal of MES on the basis of potential State interference in the company's business decisions, without any concrete realisation of that potential, is not compatible with the provision at issue. Such an interpretation is, moreover, contrary to the principles of legal certainty and respect for the rights of the defence, since it would require the exporter to provide evidence not available to it (see Case T-80/97 *Starway* v *Council* [2000] ECR II-3099, paragraph 112). The applicant therefore submits that criteria such as 'significant influence', 'significant control' and 'weight' in decision-making used by the institutions in this case are not compatible with the above-mentioned provision. In any event, it considers that all those other criteria were also fulfilled in this case.

44 In its reply the applicant maintains, in response to the Council's argument that the evidence for examining whether the applicant's 'transactions' are carried out in response to market signals is irrelevant with respect to the issue of State influence (paragraph 20 of the defence), that it is clear both from the *Shanghai Teraoka* judgment and from the practice of the institutions themselves that each indent of Article 2(7)(c) constitutes 'a condition' concerning a single set of factual circumstances which must be examined together. That approach is also confirmed by the wording of the MES disclosure in this case.

45 The applicant also states that Article 2(7)(c) was adopted in order to 'take account of the changed economic conditions in ... the People's Republic of China' and that it is meant to allow the institutions to consider whether the exporting companies are 'firms for which market economy conditions prevail' (fourth recital to Regulation No 905/98). It considers that the five indents of that article concern five main aspects of the essential characteristics necessarily possessed by firms operating in a market economy system. The first indent relates to the manner in which the entity concerned adopts its business decisions, appraised from three parallel angles (sub-criteria) designed to assess whether those decisions are taken 'by the business and for the business' or whether they are tainted by other considerations prevailing in non-market economy systems.

46 Consequently, in the applicant's opinion, whilst in this case the institutions recognise that its business decisions 'are made in response to market signals reflecting supply and demand' and that the 'costs of major inputs substantially reflect market values', there is then a presumption that those decisions are also taken 'without significant State interference in this regard', above all where there is nothing on the record to show the contrary and the conditions in the four remaining indents of Article 2(7)(c) of the Basic Regulation are entirely fulfilled. The applicant thus maintains that the institutions should have kept that presumption in mind when making their assessment.

47 As regards the statement made by the Council in its defence to the effect that it is not necessary to consider whether the State interfered with particular business decisions, because 'the PRC is still a non-market economy country in which only a few companies operate according to market economy conditions', the applicant observes that China long ago abandoned the system in which the State held an almost total monopoly over the country's trade and determined domestic prices and costs and that, over more than two decades now, the Chinese economy has moved towards an entirely market based system. In 1998, the Council itself formally recognised that those substantial developments justified amending Article 2(7) of the Basic Regulation. Moreover, it is clear from the institutions' decision-making practice that the grant of MES to firms established in China is far from being so exceptional. The applicant considers that, in those circumstances, the Council's above-mentioned statement is a significant indication of lack of objectivity and impartiality.

48 On this point *AUDACE* adds that the aim of Article 2(7)(b) of the Basic Regulation is to enable qualified Chinese exporters, however few they may be, to show case by case that they are subject to market economy forces, China being a member of the WTO. The approach taken by the Council would appear to subvert that process and prejudge the answer to be given.

49 Finally, contrary to the assertion made by the Council in its defence, the *applicant* contends that Article 2(7)(b) and (c) of the Basic Regulation must not be interpreted strictly but, on the contrary, that the institutions' approach should be flexible in each individual case and open to the possibility that more and more companies are meeting the MES criteria. It observes that this mechanism constitutes an 'exception to the exception', namely an exception to the 'analogue country' principle which, under the Basic Regulation and the Anti-Dumping Agreement, is itself an exception to the general principles for determination of normal value. Moreover, it is a provisional and transitional solution.

50 *AUDACE* claims that the Council's approach to the interpretation of Article 2(7)(c) of the Basic Regulation, as set out in paragraphs 17 to 22 of the defence and as is apparent from recital 14 to the contested regulation, is misconceived. It maintains that the concept of 'interference' clearly refers to an element of meddling, tampering or actual contamination. It states that it is a transitive concept

and that the State must interfere 'with' a particular decision or action, which must fall within one of the categories mentioned in the provision at issue. The wording of this provision in the other official languages confirms that interpretation ('intervention significative' in the French version and 'Staatsgriffe' in the German version). According to *AUDACE*, that concept cannot be validly assimilated to the concepts of 'control' or 'influence' which are intransitive concepts, the State being able to exercise a degree of influence without actually tampering with decisions or actions. Moreover, use of the term 'in this regard' ties such interference to decisions on prices, costs and inputs.

51 AUDACE also contends that the Council's interpretation is not consistent with the objective of Article 2(7)(c) of the Basic Regulation which is to establish criteria to determine whether the undertakings concerned must be treated in the same way as market economy companies with a view to determining the normal value of products. What is of essential importance to that appraisal is the question whether companies' decisions are market-driven. Thus, according to AUDACE, the Community institutions must verify whether State influence has the *effect* of contaminating the relevant decisions so that they are not market-driven.

52 Moreover, the institutions' perfunctory approach in this case is highlighted by the fact that there was no attempt to grapple with the term 'significant' and to question the limits which it imposes on the freedom of Community institutions to deny MES.

53 The *Council* submits that the interpretation of the provision at issue contended for by the applicant and AUDACE is wrong and that the institutions applied the correct test.

54 First, by way of preliminary, the Council describes the context and evolution of Article 2(7) of the Basic Regulation. It contends, in particular, that that provision has already been interpreted by the Court of First Instance in the *Shanghai Teraoka* judgment (Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663) and the *Changzhou* judgment (Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council* [2003] ECR II-4741) and its conclusions were as follows:

- It follows from the recitals to Regulation No 905/98, which inserted Article 2(7)(b) and (c) into the Basic Regulation, that the PRC is still a non-market economy country and that the institutions must undertake a case-by-case assessment whether exporters claiming MES operate under market economy conditions (*Changzhou*, cited above, paragraph 40, and *Shanghai Teraoka*, cited above, paragraph 52);

- the method for determining normal value set out in Article 2(7)(b) of the Basic Regulation is an exception to the specific rule laid down in Article

2(7)(a) and consequently must be interpreted strictly (*Changzhou*, paragraph 39, and *Shanghai Teraoka*, paragraph 51);

– the criteria set out in Article 2(7)(c) of the Basic Regulation are cumulative (*Shanghai Teraoka*, paragraph 54);

– the burden of proving that all those criteria are fulfilled lies with the producer concerned (*Shanghai Teraoka*, paragraph 53);

– the institutions enjoy wide discretion with respect to MES determination (*Shanghai Teraoka*, paragraphs 48 and 49)

55 Next, specifically with regard to the interpretation of the provision at issue, the Council considers that 'significant State interference' within the meaning of that provision does not require the institutions to assess whether the State interfered in individual business decisions if the State itself takes individual business decisions or prevents them from being taken. It is sufficient to establish that the State exercises significant control over the exporter in the PRC.

56 In that regard, the Council states that the PRC is still a non-market economy country in which only a few companies operate according to market economy conditions. It therefore considers that, in order to establish that the State participates in business decisions, it is sufficient to establish that the State participates with a significant weight in the overall decision-making of the company. That may occur in a variety of ways, including participation in shareholder and board meetings. Such participation constitutes actual and not potential interference.

57 The Council emphasises that if the State controls a company, it also interferes with its decisions, even if it does not 'meddle' or 'tamper' with individual decisions or 'contaminate' them, as AUDACE requires. In that case, the decisions of the company are State decisions taken by virtue of the general control it exercises and that will necessarily apply to the categories of decisions covered by the provision at issue. Thus, according to the Council, if the holding of shares by the State gives rise to State control, it also leads to State interference which is, by definition, significant.

58 Under the provision at issue, State interference and arm's length prices are two different issues and the MES determination is not concerned solely with verification that prices and costs reflect market values. The Council emphasises in that regard that, as is apparent from use of the conjunction 'and' in the wording of the provision at issue, an exporter must demonstrate two separate facts: first, that its decisions are made in response to market signals and, second, that its decisions are taken without significant State interference. It follows that evidence on the prices of particular transactions is irrelevant to the question of State influence.

59 The Council also submits that if it were true that evidence as to individual business decisions is required, that would make it virtually impossible for the exporter to show that the first criterion is met. Consequently, it is normally sufficient for the exporter to show that, generally, it is not controlled by the State and operates without significant State influence, because that indicates that its business decisions are also free of State interference.

60 Consequently, in this case, given that the applicant does not operate without significant State interference, the Council considers that it was not necessary to assess whether its business decisions were made in response to market signals.

61 The Council adds that it depends on the circumstances of each case whether the State participation in overall decision making is of sufficient weight to constitute State interference. In the present case, the institutions concluded that the four grounds of refusal set out in the contested regulation, taken together, were sufficient to conclude that the applicant had not shown that it operated free of State interference.

62 Finally, the Council submits that Article 2(7)(b) of the Basic Regulation does not represent an 'exception to the exception' because Article 2(7)(a) lays down the general rule applicable to investigations concerning non-market economy countries and is not, contrary to the applicant's contention, an exception. Moreover, as regards the flexible and open analysis advocated by the applicant, the Council points out that MES may be granted only if the exporter has established that it fulfils all the criteria of Article 2(7)(c).

63 The Council submits therefore that the applicant has not shown that in reaching that interpretation of the first criterion under Article 2(7)(c) the institutions violated their margin of discretion, in particular taking into account that, pursuant to the case-law, the conditions under which MES is granted must be interpreted strictly.

The second part of the plea: application of Article 2(7) of the Basic Regulation in a manner contrary to the Community's international obligations

64 Responding to the Council's arguments concerning the interpretation of Article 2(7) of the Basic Regulation (above), the *applicant* submits that the manner in which the institutions apply that provision must take account of the WTO rules concerning determination of normal value, as set out in Article VI of GATT 1994 and the Anti-Dumping Agreement. It states that it is the responsibility of the Court of First Instance to review the legality of measures such as the contested regulation in the light of its international obligations (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31, and Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraph 54).

65 It maintains, in that regard, that the Community institutions may apply Article 2(7) of the Basic Regulation to imports from China, provided that that country is

viewed as having 'a complete or substantially complete monopoly of its trade and ... all domestic prices are fixed by the State', as required by the second Supplementary Provision to paragraph 1 of Article VI, in Annex I to GATT 1994 (to which Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement refer). That is in fact the only definition, as a matter of WTO law, of a situation in which normal value can be determined for a Chinese importer otherwise than by a comparison with prices and costs on the Chinese domestic market. In particular, Article 15 of the Accession Protocol does not define what 'non-market economy' really means, and does not leave it to WTO members' domestic laws to define that term, in contrast with the right that is given to WTO members to recognise China as a market economy country (see Article 15(d) of the Protocol).

66 As the Council expressly recognised when adopting Regulation No 905/98, that description has ceased to apply to the Chinese economy. Therefore, by basing their findings on Article 2(7)(a) of the Basic Regulation, which concerns imports from non-market economy countries, the institutions applied Article 2(7) of the Basic Regulation in a manner that is inconsistent with their international obligations as well and as a result committed a manifest error of assessment.

67 The *Council* contends, first, that WTO law is not relevant to the interpretation of Article 2(7)(c) of the Basic Regulation. According to settled case-law, WTO law is not directly applicable in cases brought before the Community judicature and applicants cannot contest the legality of a Community measure on the ground that it infringes WTO law (Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395). In its opinion, the applicant likewise cannot rely on the *Nakajima* and *Petrotub* judgments, cited above, because Article 2(7)(c) of the Basic Regulation, which was introduced well before the accession of China to the WTO, was not intended to implement the obligations resulting from Article 15 of the Accession Protocol. The Council also observes that Regulation No 905/98 did not refer to the Community's obligations as a member of the WTO.

68 Second, the Council considers that, in any event, there is no conflict between Article 15 of the Accession Protocol, on the one hand, and Article 2(7)(c) of the Basic Regulation and the contested regulation, on the other. In the Council's opinion, the Community went well beyond its obligations under Article 15 of the Accession Protocol by providing that individual producers may obtain the benefit of MES, regardless of whether the whole industry producing the like products operates under market economy conditions.

69 Moreover, the Council observes that, in its application, the applicant did not challenge the validity of the contested regulation on the ground that it infringed Article 15(d) of the Accession Protocol or any provision of Community law by treating China as a non-market economy country. Consequently, a new plea in law to that effect is inadmissible under Article 48 of the Rules of Procedure of the Court of First Instance.

70 Finally, the Council states that, under Article 15(d) of the Accession Protocol, it is for the 'importing member' to decide whether it is appropriate to treat China as a market economy and to decide on the date from which to do so. However, it is clear from Regulation No 905/98 that the institutions consider China still to be a non-market economy country (*Shanghai Teraoka*, cited above, paragraph 52). Moreover, that remains the case (see point 14 of the Joint Statement of the Eighth China-EU Summit held in Peking on 5 September 2005, Annex 1 to the rejoinder)

The third part of the plea: failure to take due account of the evidence produced by the applicant to show that its actual business decisions were free of State interference

71 The *applicant* claims that it fully discharged its burden of proof by producing, at the start of the investigation, sufficient evidence to establish that it operated under market economy conditions. It considers that it was for the Community institutions to assess whether the evidence submitted showed that the company's actual business decisions were made in response to market signals reflecting supply and demand and without significant State interference in that regard, and that it is for the Court of First Instance to verify whether the institutions' response was vitiated by a manifest error (see *Shanghai Teraoka*, cited above, paragraph 53). There is nothing in the investigation record to show that the institutions made any substantive assessment of that evidence.

72 Thus, with regard to prices, the applicant responded to the Commission's questionnaire addressed to glyphosate exporters, provided a complete list of its export sales and presented detailed information and documentation to show how the company takes decisions in that regard. It clearly established that it negotiates prices at arm's length, seeking to ensure that they are sufficient to cover the company's full cost of production and also provide a reasonable profit.

73 With regard to costs, the applicant demonstrated – as was explicitly recognised in the MES disclosure – that its costs are recorded in accordance with Chinese Generally Accepted Accounting Principles, which reflect international standards. Moreover, the applicant demonstrated that its costing system reasonably reflects the company's costs.

74 With regard to inputs, the Commission found in its MES disclosure that the prices of domestically supplied and imported raw materials were almost the same, thus demonstrating that the applicant sourced raw materials in the domestic market at market prices reflecting market values. The applicant also observes that, as there are no import restrictions or conditions for raw materials in China, it also purchased raw materials from foreign suppliers which are in no way subject to influence or interference by the State or State agencies.

75 The applicant observes that the Commission examined its documents relating to prices, costs and purchases of inputs in its on-the-spot verification and did not

raise any concern regarding their accuracy and that those matters were not contested or rebutted by the Community institutions' conclusions. Moreover, the investigation record contains no evidence to show that the applicant's actual decisions concerning export prices, costs and inputs did not respond to market signals reflecting supply and demand without significant State interference in those decisions.

76 Responding to the Council's arguments that the burden of proof lies on the exporter concerned and regarding the institutions' margin of discretion, the applicant refers to the procedural principle, which is also applicable to this case, according to which the burden of proof shifts from one party to another (see, for example, Case T-48/96 *Acme* v *Council* [1999] ECR II-3089, paragraph 40). It considers that the evidence produced by it was sufficient to transfer the burden of proof to the institutions and that the latter did not discharge their own burden of proof and, consequently, exceeded their margin of discretion.

77 The applicant adds, in that regard, that the limits on the Council's powers have been clearly defined by the case-law and that it must in particular respect the requirements of fairness and sound administration. It states, in particular, that the guarantees provided by the Community legal order in administrative proceedings include, in particular, the obligation on the relevant institution carefully and impartially to examine all the relevant aspects of the individual case, the right of the person concerned to make his views known and his right to have an adequately reasoned decision (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; see also Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86, and the *TACA* judgment, cited above, paragraph 404). The applicant considers that in this case the Community institutions clearly failed to meet those fundamental standards and thus equally failed to conduct a proper assessment of the facts.

78 Finally, referring in particular to the *Mukand* judgment (Case T-58/99 *Mukand and Others* v *Council* [2001] ECR II-2521, paragraphs 38 to 55) and the *Shanghai Teraoka* judgment, cited above (paragraphs 55 to 57), the applicant contends that the Court of First Instance should in this case examine whether the evidence produced by it was sufficient to satisfy the first criterion laid down in Article 2(7)(c) of the Basic Regulation. It submits that, in accordance with the case-law, that examination should also extend to those facts that the institutions ought to have 'accepted' but failed to do so. In fact the Court verifies whether or not the institutions have failed to take account of all the decisive factors relevant to their assessment.

79 In its defence, the *Council* does not deal with the applicant's arguments concerning the evidence produced by it in the investigation. As stated earlier, it considers that evidence on prices of individual transactions is irrelevant with respect to the issue of State influence.

80 In its rejoinder, the Council adds that the fact that the institutions considered the evidence irrelevant and for that reason did not address the issue likewise does not show that the institutions were biased. It also observes that the institutions clearly indicated to the applicant, both in the contested regulation and in the disclosure documents, the reasons for which it considered the evidence produced by it to be insufficient.

81 Finally, the Council rejects the applicant's arguments regarding the alleged shifting of the burden of proof. It states that, under Article 2(7)(c) of the Basic Regulation, the applicant was required to prove, to the requisite standard, that it met the criteria laid down in that provision. Since the institutions considered that the applicant had not produced such evidence, the relevant question now is whether they committed a manifest error of appraisal in that respect, as the applicant moreover appears to recognise. Thus, the present dispute relates not to the question whether the applicant provided sufficient evidence that its decisions were consistent with the provision at issue but to the question whether the Community institutions committed a manifest error of assessment when they decided that the applicant had failed to do so.

The fourth part of the plea: irrelevance of the grounds of refusal set out in the contested regulation and manifest error in assessing the information in the file

Preliminary arguments

82 The *applicant* states that no actual case of interference was found and that the Council never concluded that the State interfered with the company's business decisions. As regards the grounds on which the institutions relied in asserting that the applicant had not demonstrated that its business decisions were free of significant State interference, the applicant considers, first, that they are contradicted by the evidence produced during the investigation. Second, the Council's findings were based on factors from which it could not be inferred that the first MES criterion was not fulfilled. Before dealing with each of the grounds of refusal, the applicant makes a number of 'common points' concerning all those grounds.

83 First, it contends that the institutions gave weight and credence to information received from the complainant, whose identity moreover was not disclosed, and neglected evidence from the applicant and thus failed in their duty to make a correct judgment on the basis of evidence available to them and in the duty of sound administration. Second, the institutions displayed total indifference to the counter-arguments and counter-evidence produced by the applicant, confining themselves, in the contested regulation, to reiterating their earlier findings without challenging such evidence or arguments or even examining them.

84 Third, and in the alternative, the applicant submits that, even if the phenomena relied on by the institutions as grounds for refusing MES actually occurred and

were to be regarded as State interference, the latter could not be regarded as 'significant interference' within the meaning of the provision at issue. Those phenomena also occur in market economies. It observes, in that regard, that governments constantly interfere both at microeconomic and macroeconomic level in the economy of all market economy countries and the imposition of anti-dumping duties is a classic example of such interference to protect domestic industry. The difference between a market economy system and a non-market economy system consists therefore in the introduction of an element of degree ('significant'). However, the institutions have not looked into that aspect at all in this case, which is indicative, moreover, of their lack of objectivity and impartiality, and thereby their failure to meet the standard of sound administration.

85 The applicant also rejects the Council's assertion (see below) that, in order to succeed with its application in this case, it would have to show that the Council's 'overall conclusion' was vitiated by a manifest error of appraisal and contends that the assertion is incompatible with the Council's approach of not dealing with arguments concerning evidence produced during the investigation.

86 The *Council* states that it was incumbent on the applicant to show during the investigation that it met all the criteria for MES. The institutions found, on the basis of the four factors mentioned in paragraph 37 above, taken as a whole, that the applicant had not fulfilled that obligation because it had not shown that its decisions were free from significant State interference. In the Council's opinion, in order to succeed, the applicant would therefore have to show that the Council's overall conclusion – and not each of the factors, taken in isolation – was vitiated by a manifest error of appraisal.

87 The Council considers that the 'common points' add nothing significant to the argument. It submits, in particular, that the Community institutions examined all the evidence available to them and explained clearly during the investigation and in their defence the reasons for which, in their opinion, the applicant had not proved that it met the criteria laid down in Article 2(7)(c) of the Basic Regulation.

88 The Council also considers that State interference in a market economy in which all companies operate, in principle, in accordance with market criteria, even when they are wholly State-owned, cannot be compared to interference carried out in a country without that type of economy, in which a company controlled by the State does not operate in accordance with market criteria. Moreover, the establishment of a general framework in which companies operate, even if it has an impact on company decisions, including those relating to prices, does not in the Council's opinion constitute State interference within the meaning of the provision at issue.

The ground of refusal concerning the identity of the shareholders

89 The *applicant,* supported by AUDACE, claims that the Council committed a manifest error of assessment in finding that the State's minority shareholding in itself was a factor from which it could be inferred that the company was under State control and that the State's minority shareholding was a factor from which it could be inferred that the first MES criterion was not fulfilled.

90 First, the applicant claims that it established that the State's holding in it was a minority holding. It provided the Commission with evidence proving that it is a limited liability share stock holding company established in 1993 and listed on the Shanghai Stock Exchange in 2001 as a 'public listed joint stock company', 59.02% of whose shares were, during the period of the investigation, held by entities other than the State.

91 It claims that no published decision has ever denied MES to a company by reason of a minority shareholding held by the State or by State-owned companies. It also submits that the Commission must have formed the opinion, during the investigation, that that shareholding was not an obstacle to the grant of MES since otherwise the on-the-spot verification it carried out was meaningless and should be regarded as disproportionate or as constituting a misuse of powers.

92 It also established that the holding of KaiHua (9.72%), which is a corporate entity formed by a local/regional authority, was a normal commercially based investment in the applicant. In its view, the allegation that that transaction enabled the State to take control of the applicant is a manifest error of assessment and is also evidence of a lack of objectivity and impartiality.

93 Second, the applicant states that it provided the Commission with evidence that the State's ownership of minority shares in the company did not confer control over it either in fact or in law. In that respect, the applicant furnished evidence that the relevant provisions of the company law of China, the applicant's articles of association and the listing rules of the Shanghai Stock Exchange provided, first, for the separation of shareholders (as investors) from the board and company executives (as directors and managers) and, second, for separation of the board of directors from the day-to-day management of the company. It thus established that its shareholders are not involved in the management or business decisions of the company regarding prices, domestic and export sales, production volumes, costs or suppliers or customers.

94 The applicant also explained that its articles of association prohibit a 'holding shareholder', defined as a shareholder holding more than 30% of the shares or voting rights, from infringing the company's and other shareholders' legitimate rights and interests, so that the applicant's shareholders cannot be dictated to by any particular shareholder or group of shareholders.

95 The applicant states that none of its observations concerning the safeguards preventing the State from interfering with its business decisions was analysed or challenged by the institutions in their pleadings. That approach conflicts with the institutions' usual practice, before and after the adoption of the contested regulation, according to which they assess in detail 'which measures were taken by the company to prevent [State] interference' in such circumstances. The applicant cites a number of regulations in that regard and emphasises that that practice was followed even where companies were entirely or predominantly State owned. Moreover, the applicant submits that, by asserting that the State had a decisive influence in the company's operations, the Council seems to allege that the company infringed Chinese law and its articles of association, whereas there is no evidence to that effect in the investigation record.

96 Third, the applicant states that control is not the threshold envisaged in the first criterion of the provision at issue. The minority shareholding of two public undertakings cannot of itself be a factor from which it could be inferred that the first criterion of Article 2(7)(c) of the Basic Regulation was not fulfilled, and the investigation record contains nothing to indicate that that holding prevented the company's business decisions from responding to market signals reflecting supply and demand, quite the contrary. AUDACE also emphasises that point, claiming that the only evidence before the Commission was evidence which showed that the undertaking's decisions were taken for transparently commercial reasons, without State interference of any kind, and a fortiori without significant State interference.

97 Finally, the applicant considers that the Council's interpretation means in practice that, by reason of a State minority shareholding, many of China's modern, commercial and well-managed limited liability companies would not be able to demonstrate that 'market economy conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned', which runs counter to the dominant reason for the adoption of Regulation No 905/98. The applicant submits that it is clearly an example of such new and successful Chinese companies, with a public stock exchange listing and operating in full market economy conditions to maximise profits and the value of dividends for shareholders.

98 The *Council* observes that the institutions' conclusion that the State controlled the applicant despite not holding the majority of the shares was based on an assessment of the distribution of the shares. The State shareholding (40.98%) is extremely concentrated whereas the private shareholding (59.02%) is widely dispersed.

99 It states, in that respect, that the public shareholders were Jiande State Assets Administrative Authority (JSAAA) (29.77%), KaiHua Industry State Assets Operating Company ('KaiHua') (9.72%), et Sinochem Shanghai Import & Export Corporation ('Sinochem') (1.49%). The main private shareholder held only 2.2%

of the shares, the remainder being distributed among thousands of individuals. What is also important is the fact that a very large proportion of the private shareholders were the applicant's employees (12.44% of total shares).

100 In that regard, the applicant's claims that KaiHua's holding resulted from an arm's length transaction and that KaiHua belongs to a local State authority rather than a central State authority are irrelevant. The Council also observes that, according to the applicant's articles of association, the State holds 39.49% of its capital, those shares being at present held by JSAAA and KaiHua. Similarly, whether or not the applicant is listed on the stock exchange and whether or not it is successful are also irrelevant.

101 The Council maintains that the fact that the uneven distribution of the State-owned shares and the non-State-owned shares allows the State to control the company is confirmed by the representation of the shares at the annual shareholders' meeting held during the investigation period. Only 43.28% of the total shares were represented, 91% of which were held by the State or State-owned companies.

102 As regards the applicant's arguments that it had established that the State's minority participation did not allow it to interfere with the day-to-day management of the company and its operational decisions and that it is not control that represents the threshold envisaged in the first criterion of Article 2(7)(c) of the Basic Regulation, the Council contends that they are based on a misinterpretation of that first criterion. Moreover, those arguments take no account of the fact that the refusal of MES was not based only on the composition of the shareholding.

103 Finally, the Council disputes the existence of an established practice whereby the institutions examine in detail the measures adopted by the exporter under investigation to prevent State interference. It observes that, of the regulations cited by the applicant in support of that claim, in only two cases did the institutions use the expression 'measures taken by the company to prevent State interference' or similar terms.

104 In any event, the Council considers that the applicant did not show in the investigation that it had in fact taken measures to prevent State influence. It observes that measures that may be relevant in that regard would be, for example, measures concerning the composition of the board of directors (whose members would be neither officials nor persons having links with the State) or relating to voting rules (no minority blocking vote for the public shareholder, which would enable the majority non-State shareholders to control the company). However, the only measure referred to by the applicant is the Chinese Company Law which is thus not a measure adopted by the applicant. In the Council's opinion, if the Chinese Company Law alone could make it possible to preclude State influence, all State controlled companies could, by virtue of such a law, apply for MES, which would make the assessment of MES virtually meaningless.

The ground of refusal concerning the appointment of board members

105 The *applicant*, supported by AUDACE, claims that the Council committed a manifest error of assessment in finding that 'the board of directors was in fact appointed by the State shareholders'. It considers that there is nothing in the investigation record to enable such a conclusion to be drawn.

106 It states, in that regard, that, as it explained in the administrative procedure, the members of its board of directors are not appointed and, in particular, are not appointed by the State, but are elected by the shareholders' meeting. It also explained that the company and its shareholders were protected against such interference by company legislation, its own articles of association and the listing rules of the Shanghai Stock Exchange.

107 It also provided minutes of the 2002 annual shareholders' meeting, showing that the motions of that meeting were adopted unanimously and therefore, despite the fact that the State shareholders were in a majority in the meeting, none of the other 41 non-State shareholders present had a different opinion.

108 Moreover, the applicant also explained that the fact that most of the other shareholders do not take part in the annual meeting does not lead to the conclusion that there is significant State interference in the applicant's business decisions. AUDACE also refers to this point, contending that the institutions adopted a technical approach which is irrelevant in view of the aim of Article 2(7)(b) and (c) of the Basic Regulation.

109 The *Council* claims that the members of the board of directors were formally elected at the shareholders' meeting. Owing to the distribution of the shares, those meetings were controlled by the State shareholders, as the meeting during the investigation period exemplified. The Council states that, at that annual shareholders' meeting, 90% of the shares represented were held by the State or by State-owned companies. Therefore, State shareholders de facto appointed the board of directors. Moreover, the Council emphasises that the applicant does not deny that the shareholders' meetings, which decided on the composition of the board of directors, were controlled by the State or by State-owned companies.

110 In that connection, the fact that the non-State shareholders gave their assent to those appointments is without importance. In any event, their opposition would have been pointless.

The ground of refusal concerning the composition of the board of directors

111 First, the *applicant*, supported by AUDACE, claims that the Council committed a manifest error of assessment in considering that 'the majority of the directors of the board were either State officials or officials of State-owned enterprises'.

112 It observes that the Community institutions have never clarified which members of the board they would consider to be State officials or officials of State-owned enterprises. AUDACE also draws attention to this point.

113 The applicant then submits that, in the MES claim, it indicated that none of the directors or managers were State officials and that Article 58 of the Company Law, echoed by Article 79 of the applicant's articles of association, prohibits State officials from holding posts as directors, supervisors or managers of companies. It emphasises, in that connection, that nothing in the investigation record shows that it infringed the law.

114 It also provided the Commission with evidence proving that, in the investigation period, the board of directors comprised nine members, of whom only two were managers of State-owned companies. However, those two members were, according to the applicant, neither officials nor on the public payroll, nor affiliated with the State.

115 Moreover, no other director was affiliated with the State or employed by the State. The applicant states that, as it made clear to the Commission on several occasions, its directors were elected by reason of their expertise and personal skills and had nothing to do with State influence over business decisions within the meaning of the provision at issue.

116 In that regard, the applicant states that two of its directors cannot be regarded as affiliated to the State because they were employed by the applicant. That reasoning on the part of the institutions is illogical and self-defeating and evidences their partial approach in this case. According to the applicant, the institutions first presumed, erroneously, that it was State owned or controlled and then, on the basis of that mistaken presumption, concluded that those managers were also 'directly employed by State-owned/controlled companies'.

117 Similarly, the applicant rejects the Council's conclusion that two of the other directors are affiliated with (or employed by) the State because both are professors in universities which are State-owned educational institutions. In its view, in the absence of proof to the contrary, university professors may not be viewed as carrying out any function other than teaching or otherwise sharing their knowledge and experience.

118 It claims that the investigation record and the contested regulation contain no examination of the evidence and information which it produced regarding the composition of the board of directors and the professions of its members, or an adequate statement of reasons. It therefore considers that the institutions breached their obligation to examine the evidence and information carefully and impartially and breached their obligation to give a proper statement of reasons.

119 Second, the applicant, supported by AUDACE, claims that the Council committed a manifest error of assessment by considering that the presence of alleged State

officials or officials of State-owned enterprises on the board of directors was a factor from which it could be inferred that the first MES criterion was not satisfied.

120 It observes, in that regard, that the members of the board do not represent any particular shareholder and do not interfere in the company's decisions regarding prices, costs and inputs, and such interference would have been against both the Chinese Company Law and the applicant's articles of association (see Articles 81, 82 and 95 of the articles of association and Article 47 of the Company Law).

121 The applicant rejects the Council's arguments that the references to the Chinese Company Law are irrelevant. It maintains that it is widely accepted, especially in the area of international trade, that a State can reasonably expect that considerable deference be given to its laws. It observes that the Chinese Company Law applies rules similar to those of the main modern economies and considers that the Council's allegations fly in the face of Chinese efforts to establish a market economy and conflict with the reasons for introducing MES in the Basic Regulation.

122 The applicant also observes that significant State holdings in EU companies illustrate the fact that State shareholding does not imply that the State interferes in a company's business decisions or that the employees of such companies are State officials.

123 Finally, the applicant states that the investigation record contains no evidence demonstrating that the composition of the board prevented its decisions from responding to market signals. It observes, in particular, that during the on-the-spot verification the Commission investigators met the applicant's administrative staff members, the secretary of the board, and two directors. Nothing in their testimonies provides a basis for a finding that the State was using them to control, influence or interfere with the business decisions of the company.

124 AUDACE also considers that it is not legally permissible to base the question of a Chinese company's MES on allegations arising from the involvement in that company of people linked to the public sector. Like the applicant, AUDACE observes that people of that kind are involved in many of the most competitive companies in the EU.

125 The *Council* claims that it is clear from the table provided by the applicant in response to a request for information from the Commission that only two of the nine members of the board had no affiliation with the State. All the others were employed by State-owned or controlled companies or institutions. In a non-market economy country, it may be assumed that the State controls all economic activities. Consequently, it is difficult to see how employees of State-controlled or owned entities could be free from the influence or their employer, namely the State, and would not act in the same manner as State officials. Moreover, that is

not inconsistent with the applicant's submission that the directors were chosen because of their professional expertise and personal skills.

126 The Council also points out that the Commission indicated on several occasions to the applicant that it considered the majority of the members of the board to be State officials or affiliated with the State. While disputing that point, the applicant neither complained that the Commission did not identify those members nor did it request such information.

127 As regards the two directors employed by the applicant, the Council states that it did not say that the applicant was State owned but rather that it was a State-controlled company. That statement is correct. It considers that there is no circular reasoning. In any event, the Council maintains that even if those two directors had to be ignored for the purpose of the assessment, the conclusion would remain the same.

128 As regards the two professors from public teaching establishments, the Council maintains that it was right to conclude that they were employed by a State-controlled entity.

129 Finally, the Council considers that the argument to the effect that Chinese law prohibits State officials from being directors of companies is irrelevant. To begin with, what matters is what functions the members of the board actually have. Second, the applicant, whilst making a general reference to Article 58 of the Chinese Company Law, did not explain either in the administrative procedure or before the Court of First Instance how that provision is applied in practice. It appears from the facts of this case that that provision does not prevent officials or persons employed by State-owned or controlled companies or persons affiliated with companies or entities of that kind from serving as board members of companies. At best, the provision prohibits a person from carrying out at the same time both a function in the government and a management function in a company.

130 Second, as regards the applicant's argument that the presence of State officials or officials of State-owned entities on the board of directors does not in itself constitute a factor from which it may be inferred that the first MES criterion is not satisfied, the Council considers that argument to be based on a misinterpretation of the provision at issue and that it does not take account of the fact that the denial of MES was not based on the State affiliation of the members of the board of directors alone.

131 The Council also rejects the comparison of the applicant's situation to that of a company in a market economy country, because it takes no account of the fact that the PRC is still a non-market economy country and that, against that background, State-controlled companies per se do not operate under market economy conditions.

The ground of refusal concerning the procedure for the stamping and verification of export contracts by the CCCMC

132 The *applicant,* supported by AUDACE, claims, first, that the Council committed a manifest error in its assessment of the role played by the CCCMC. Second, in the alternative, it states that because the role attributed by the Council to the CCCMC relates to export prices and not to sales of the relevant product on the domestic market, it cannot be a valid basis for withholding MES.

– The complaint concerning manifest error in the assessment of the facts

133 The *applicant* submits that the Council's statement in recital 14 to the contested regulation is not supported by the administrative record of the investigation. The record contains evidence establishing that the indicative price was not fixed by the CCCMC but by Chinese glyphosate producers themselves and that it was not a binding minimum export price but an indicative, guiding price. Thus, no 'compliance' with that price was required, and the stamping procedure was a mere formality.

134 In that regard, the applicant refers, first, to the evidence and explanations given to the Commission and subsequently verified on the spot, which established that its price decisions were based on purely commercial considerations and were not dictated or controlled by the State. The applicant established, in particular, that no authorisation was necessary to sell the product concerned on the domestic or international market and that no price regulation resulted from the action of State bodies.

135 Second, with regard to the CCCMC, the applicant explained that it is neither directed nor controlled by the State but is a non-governmental body founded by its members. More specifically, with regard to the contract stamping procedure, the applicant explained that Chinese glyphosate producers agreed among themselves on the need for guided export pricing in order to minimise the risks of anti-dumping actions in foreign markets. The role of the CCCMC was to facilitate such coordination and provide secretarial services.

136 Thus, the applicant indicates that the input for a subsequent year's guided price came from the Chinese producers, who made their individual suggestions to the CCCMC. The actual export prices were decided on by each producer on the basis of arm's length negotiations with customers. A copy of the related export contract was then submitted to the CCCMC, whose role was to register the basic contract information in a database and stamp the contract without intervening in the export prices. According to the applicant, the exporter showed the stamped contract to the customs authority, which then cleared the goods for export. It states that the information gathered by the CCCMC was used to report to Chinese glyphosate producers at regular intervals, in aggregate and non-confidential form, about the industry export prices.

137 The applicant states that the above procedure was a formality. It is clear from a CCCMC information brochure provided to the Commission that glyphosate is one of a group of products for which the CCCMC does not even verify the export prices for customs clearance but just carries out contract stamping.

138 The applicant also observes that export formalities are not uncommon, even in the EU. For example, an export licence is a compulsory requirement for the export of foodstuffs under the Common Agricultural Policy.

139 Third, the applicant claims that it established that all its export contracts in the investigation period were stamped by the CCCMC, regardless of price, and therefore that the alleged minimum export price was not binding and certainly was not binding in relation to the applicant. In that respect, it refers to certain information which it provided during the administrative procedure, which was verified by the Commission on the spot, such as copies of export contracts and invoices, and complete lists of its export sales to the EC and other markets in the investigation period, all showing prices, including the average unit price of export sales, which were lower than the guided price. It also provided a certificate from the CCCMC confirming that the latter had stamped all the applicant's glyphosate export contracts in the investigation period.

140 The applicant adds that the institutions did not take account of the arguments and evidence which it put forward at the various stages of the investigation, retaining an identical statement of reasons regarding the CCCMC's role in their various documents and in the contested regulation. By so doing, they failed to observe standards of fairness, objectivity and impartiality and the obligation to undertake a diligent examination, and they breached the principle of sound administration.

141 Finally, the applicant submits that the Council's argument based on the fact that only two glyphosate producers in the PRC applied for MES is plain speculation and is unacceptable. In any event, it states that in fact several Chinese exporters were overwhelmed by the offensive that has been waged against them by Monsanto in the anti-dumping investigations taking place almost in parallel world wide and chose not to spend additional funds on their defence in the European Union market. AUDACE also dwells specifically on this point, observing that the Council's argument betrays its perfunctory and prejudicial approach to its assessment in this case.

142 The applicant also claims that, should the Council's finding relate to a situation in which the CCCMC could ('it allowed the CCCMC to veto exports') refuse to stamp an export contract because of the price, that possibility could not justify the denial of the applicant's MES claim, in view of the practice demonstrated above and without any actual demonstration of refusal to stamp. A right to veto without any use of the right cannot constitute State interference, let alone significant interference. In any event, it maintains that it has demonstrated that there was not

even any risk of interference since the mechanism concerned was not at all designed to allow interference.

143 The *Council* claims that, in its response to a request from the Commission for additional information, the applicant explained that within the CCCMC there is a glyphosate export coordination group which meets to determine the appropriate price floors for export sales. Most exports are made at prices above those floor prices, which remained unchanged for two years. According to the applicant's explanations, all the export contracts had to be submitted to the CCCMC, which checks the selling prices and stamps the contract if the selling price exceeds the floor price. The government of the PRC has directed the Chinese customs authorities not to permit exports to take place unless the contract bears the verification stamp of the CCCMC.

144 The Council observes that, in a subsequent letter, the applicant indicated that it had misapplied the term 'floor price' and that the task of the CCCMC was merely to verify the contract price. The Council emphasises however that, whilst maintaining that the CCCMC stamped contracts whose price was lower than the floor price, the applicant never stated that the CCCMC was not entitled to refuse to stamp a contract whose price was lower than the floor price. According to the Council, if it did not have that power, the whole stamping system could not achieve the purpose it was set up for, namely to ensure that the pricing of Chinese glyphosate exports does not trigger the initiation of foreign anti-dumping investigations.

145 The Council observes that, because the customs authorities would not permit exports to proceed unless the contract was stamped by the CCCMC, the CCCMC had the power to veto any export which did not respect the floor price. In its view, that effectively forced exporters, including the applicant, to respect the floor price, notwithstanding the fact that sometimes the CCCMC also stamped export transactions for which the export price was below the floor price.

146 The Council therefore considers that there was a very efficient control system in place, that it was run by the State through the CCCMC and the customs authority, and that it therefore constituted interference by the government of the PRC with the setting of the applicant's export prices. In those circumstances, the price actually set by the applicant, and in particular the fact that the CCCMC had stamped contracts in which the price was lower than the floor price, is irrelevant.

147 As regards the applicant's allegation that it is clear from the CCCMC information brochure that the CCCMC confined itself to stamping contracts but did not verify export prices, the Council observes that the allegation is in plain contradiction with the applicant's submission during the investigation.

148 As regards the applicant's argument that the CCCMC was not directed or controlled by the State and that the floor price was not established by the CCCMC

but by the Chinese glyphosate producers themselves, the Council considers that it is contradicted by the wording of an extract from the CCCMC information brochure which reads as follows.

'Sales at low prices make *the government*, industry and enterprises suffer big losses and pull the industry and enterprises concerned into overseas anti-dumping cases. In order to maintain a sound export order and protect the interests of the industry, *the government has issued* measurements [sic] entrusting Chamber of Commerce of Importers and Exporters the right to contract stamping and verifying export prices for customs clearance' (emphasis added by the Council).

149 Moreover, according to the Council, if the price was set by all the glyphosate producers, it was effectively set by the State since the vast majority of producers were State owned or controlled companies. In that regard, the Council observes that of 39 glyphosate producers in the PRC, as identified in the review request, only two requested MES. The Council infers that the other 37 producers themselves concluded that they did not fulfil the criteria for MES, which means that they were owned or controlled by the State. In its observations on AUDACE's statement in intervention, the Council adds that this point is merely an additional argument.

– The complaint concerning misinterpretation of Article 2(7)(b) and (c) of the Basic Regulation

150 In the alternative, the *applicant* claims that the Council's assessment is based on an interpretation of the provision at issue which is incompatible with the general scheme of the Anti-Dumping Agreement, the Accession Protocol and the Basic Regulation.

151 The role that the Council attributes to the CCCMC in fact relates to the export price and not to sales of the product concerned on the domestic market. Consequently, the stamping procedure cannot be a valid basis for refusing MES.

152 In that regard, it states that the main context and the purpose of Article 2(7) of the Basic Regulation are determination of the normal value, which is an entirely different concept from that of export prices and is governed by different rules. Moreover, the basis of Article 15 of the Accession Protocol and Article 2(7) of the Basic Regulation is that the sale of the product concerned on the Chinese domestic market is taken into account. That interpretation is confirmed by the preamble to Regulation No 905/98, by the case-law of the Court of First Instance (*Shanghai Teraoka* judgment, cited above) and by the institutions' own constant practice whereby, to assess 'significant State interference', they always consider decisions relating to domestic prices, not export prices.

153 The *Council* contends that the fact that the CCCMC contract stamping procedure relates to export transactions only is irrelevant. It considers that the applicant is confusing the conditions for granting MES with determination of normal value

and calculation of the export price in the event of MES being granted. However, for MES to be granted, the exporter must provide sufficient evidence that there is no State interference regarding the undertaking's prices and sales. That condition is not met if the State interferes with the company's export prices. Moreover, in the *Shanghai Teraoka* judgment, the Court of First Instance placed particular emphasis on the institutions' conclusions regarding State-controlled export prices (*Shanghai Teraoka*, cited above, paragraphs 94 to 109).

The fifth part of the plea: failure to take appropriate account of anti-dumping proceedings in other jurisdictions

154 The *applicant* claims that the present case must be considered with due regard to other recent anti-dumping investigations against Chinese glyphosate in countries such as Argentina, Australia and Brazil. Those investigations are particularly relevant, since they were triggered by the same glyphosate manufacturer, based in the United States, which was the major force behind the complaint in the present case. Moreover, it was following that chain of global anti-dumping proceedings that the Chinese glyphosate producers established the CCCMC contract stamping procedure.

155 It observes that the Australian customs service found, on the basis of criteria almost identical to those in Article 2(7)(c) of the Basic Regulation, that the applicant was entitled to market economy treatment (in Australian terms, there was no 'price control situation'). Accordingly, they found in particular that 'decisions of [the applicant] relating to prices, costs, inputs, sales and investments are made in response to market signals and without significant State interference'.

156 The applicant admits that each jurisdiction may reach its own conclusions by applying its own laws. It nevertheless points out that the result of the Australian investigation is relevant because the criteria applied were essentially the same, the applicant's corporate status and operations were the same and the timing of the two investigations was not significantly different.

157 It also submits that, under Community and WTO law, institutions must take account of the way in which other WTO members implement their anti-dumping rules. In that regard, it refers, first, to the fourth recital in the preamble to the Basic Regulation and, second, to the fact that, as a member of the WTO Anti-Dumping Committee, the Community constantly follows changes to the anti-dumping rules of other WTO members (see, in particular, Articles 16(1) and 18(5) of the Anti-Dumping Agreement).

158 The applicant also considers that the institutions should not have ignored important world trading countries, such as Australia, New Zealand and Brazil, and that a number of other countries have recognised China as market economy country.

159 The *Council* maintains that the outcome of investigations in third countries is irrelevant. It notes that the Community institutions and the authorities of third countries apply their respective rules and decide on the basis of the evidence on the record in their respective investigations. There is no rule in the applicable Community law requiring the institutions to grant MES to a Chinese exporter because another country has granted MES to it.

160 According to the Council, the fourth recital in the preamble to the Basic Regulation, invoked by the applicant, concerns the drafting of the Basic Regulation itself and does not establish a principle that the Community institutions, when carrying out specific investigations, must take into account the findings of the investigating authorities in third countries. Moreover, the fact that WTO members consult each other in the Anti-Dumping Committee is also irrelevant.

161 The Council also observes that there were differences between the relevant EU legislation and that of Australia regarding the treatment of economies in transition. It notes that, under the Australian system, the task of verifying whether there is a 'price control situation' is the responsibility of the Minister of Justice and Customs.

162 The Council also states that Brazil, which also investigated dumped imports of glyphosate originating in the PRC, concluded that no Chinese glyphosate exporter met the requirements for MES.

163 Finally, the Council considers that the fact that in the meantime Brazil and Australia have granted MES to China as a whole has no impact on the present case. Under Article 15(d) of the Accession Protocol, it is for each WTO member to decide, on the basis of its own national laws, whether and when during the 15 years following China's accession to the WTO to treat China as a market economy.

2. The second plea: infringement of paragraph 6 of Annex II to the Anti-Dumping Agreement and Article 18(4) of the Basic Regulation, and breach of the applicant's fundamental rights

164 The *applicant* states that, from the time of its MES claim of 4 April 2003 submitted immediately following the initiation of the investigation, it provided the Commission with ample evidence and information to show that it fulfilled the conditions for the grant of MES. It observes that it was only on 5 December 2003, the date of the Commission's MES disclosure, that it learned that its MES claim had not been accepted and it was also at that time that it inferred that a substantial amount of the evidence and information given by it to the Commission to support its MES claim had in fact been rejected within the meaning of paragraph 6 of Annex II to the WTO Anti-Dumping Agreement and Article 18(4) of the Basic Regulation, in breach of its rights of defence. It considers that the institutions'

findings could not be based on that evidence and must be based on other information or evidence of which the applicant is unaware and could not comment on and is in clear contrast with the evidence on record.

165 Thus, the Community institutions failed to fulfil their obligations under paragraph 6 of Annex II to the Anti-Dumping Agreement and Article 18(4) of the Basic Regulation in three respects. First, in its MES disclosure, the Commission gave no reason for its refusal to accept the applicant's evidence and information. Second, the Commission did not grant the applicant, either in its MES disclosure or in the accompanying letter, any opportunity to provide further explanations and even excluded that possibility by stating explicitly that 'new information cannot be taken into account at this stage of the investigation'. Third, the Council did not indicate in the contested regulation the reasons for which it rejected the evidence and information provided by the applicant.

166 Finally, the applicant considers that the abovementioned failures also constitute violation of its fundamental rights. It submits, in that connection, that the rights of the defence include the right of parties such as the applicant to be informed of the reasons for rejection of their evidence or information, particularly that which is crucial for the establishment of those parties' case, to be granted an opportunity to respond to such reasons, to receive a reply from the Community institutions to the arguments that they submit and to have their arguments examined by the Community institutions and also taken into account as appropriate (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 15; Case T-155/94 *Climax Paper* v *Council* [1996] ECR II-873, paragraph 117).

167 The *Council* contends that this plea is based on a misinterpretation of Article 18(4) of the Basic Regulation and must be rejected.

168 It submits that Article 18(4) of the Basic Regulation applies if the institutions reject information or evidence pursuant to Article 18(1), that is to say where a party refused to cooperate, significantly impeded the investigation or provided misleading information. Moreover, Annex II to the WTO Anti-Dumping Agreement also concerns the possibility of an investigating authority rejecting information that was not submitted in the proper form.

169 In this case, however, the institutions did not reject any evidence or information submitted by the applicant within the meaning of Article 18(1) of the Basic Regulation. They 'rejected' the interpretation and the conclusions of the applicant drawn from the evidence and they found certain information or evidence irrelevant in the light of other evidence.

170 Furthermore, the Council maintains that the institutions did not rely on evidence or information that the applicant was unaware of and could not comment on. Moreover, the applicant had ample opportunity to provide evidence and

information showing that it fulfilled the criteria of Article 2(7)(c) of the Basic Regulation. Finally, the institutions disclosed all their findings to the applicant.

3. The third plea: breach of the principle of the protection of legitimate expectations

171 The *applicant*, supported by AUDACE, considers that the institutions breached the principle of the protection of legitimate expectations, first because of the length of the investigation with regard to determination of MES and, second, by denying MES on the ground of the State minority shareholding.

172 First, the applicant claims that the Community institutions acted contrary to the principle of the protection of legitimate expectations by not concluding their MES determination expeditiously, that is to say at the beginning of the investigation rather than 14 months later.

173 In that connection, the applicant states first that, under Article 11(4) of the Anti-Dumping Agreement and Article 11(5) of the Basic Regulation, reviews 'shall be carried out expeditiously'. In its opinion, that requirement also applies to determinations, such as the MES determinations, that the institutions must adopt at an early stage of the investigation. It therefore considers that it was not unreasonable for it to expect the Community institutions to take the most expedited action to determine whether or not it met the criteria for MES.

174 Also, in its reply, the applicant adds that the last indent of Article 2(7)(c) of the Basic Regulation sets the time-limit for making that determination in investigations under Article 5(9) of the Basic Regulation as within three months of the initiation of the investigation. The applicant considers that that period of three months, even if not formally applied in review proceedings (see Article 11(5) of the Basic Regulation), nevertheless establishes a general guideline in relation to time-limits for MES determinations, which must not be overstepped excessively. The same rationale for the short time-limit laid down for 'new' investigations also applies to review investigations. The applicant observes in that connection that the MES determination directs the course of the investigation and should allow an exporter to defend its rights in the best possible way in the remaining part of the investigation.

175 It observes that, in this case, the procedure was initiated on 15 February 2003, that on 5 December 2003, after three times the period that is usually foreseen for a formal determination of that nature, the Commission informed the applicant of its informal decision to deny market economy treatment to it and that on 6 April 2004, that is to say after more than four times the 'normal' period, the Commission finally informed the applicant of its formal decision to reject its MES claim. It considers that all those missed deadlines must be viewed as excessive and as a clear violation of its legitimate expectations.

176 Moreover, also in its reply, the applicant observes that, given that the review investigation lasted more than 19 months (it started on 15 February 2003 and was concluded with the adoption of the contested regulation on 30 September 2004), the institutions did not fulfil their obligation to carry out that investigation 'expeditiously' as required by Article 11(5) of the Basic Regulation and also breached the applicant's legitimate expectation in that regard. It considers that it was not unreasonable for it to expect the institutions to conduct the investigation expeditiously, namely within a time frame that would not be excessively longer than 12 or a maximum of 15 months after it was initiated.

177 The applicant also states that, following the 2004 amendment (Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12)), Article 11(5) of the Basic Regulation provides that 'in any event, reviews ... shall in all cases be concluded within 15 months of initiation'. That new rule, although not applicable to the present case, in the applicant's opinion does provide a very strong indication of what the requirement for an 'expeditious' review must mean.

178 As regards the duration of the investigation in this case, AUDACE supports the applicant's arguments and considers that the fact it exceeded by six months the maximum period provided for by Article 11(5) of the Basic Regulation, as amended by Regulation No 461/2004, was clearly such as to undermine legal certainty and cause adverse effects for the applicant. The concern that exceptionally long review investigations may be the source of legal uncertainty and adversely affect the parties concerned prompted the amendment introduced by Regulation No 461/2004 (see recitals 9 and 10). In the alternative, AUDACE claims that the indicative time-limit laid down in Article 11(5) of the Basic Regulation must not be extended beyond a reasonable period, to be assessed according to the particular circumstances of each case (Case T-163/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraphs 119 and 120). In its view, that reasonable period was exceeded in this case.

179 Secondly, the applicant, supported by AUDACE, claims that the Community institutions acted unreasonably, disproportionately, contrary to their own administrative practice and thus in breach of the principle of the protection of legitimate expectations, in so far as the MES claim was rejected by reason of the State minority shareholding and the issues inferred from it. Similarly, it was a departure from their usual practice for the institutions not to take account of its observations concerning the safeguards it put in place to ensure that the State would not be able to interfere with the company's business decisions. It also claims that it was legitimately entitled to expect that the Council would apply the criteria established in Article 2(7(c) of the Basic Regulation and not resort to another threshold.

180 It points out in that connection that, according to Community case-law, the principle of the protection of legitimate expectations can be relied on by persons 'in a situation from which it appears that the Community administration, in

providing them with specific assurances, has fostered legitimate expectations on their part' (Case T-76/98 *Hamptaux* v *Commission* [1999] ECR I-A-59 and II-303, paragraph 47; Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 48) and considers that such specific assurances derive in this case from the long-standing administrative practice of the institutions (Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435) as made public in a score of precedents (the applicant refers in that regard to the list of cases cited in footnote No 123 to the reply).

181 Finally, in response to the Council's allegation that the present plea is based on a wrong interpretation of the concept of the protection of legitimate expectations, the applicant states that the Council is wrongly limiting that principle to the possibility of an action to establish non-contractual liability.

182 The *Council* contends that this plea is based on a wrong understanding of the concept of the protection of legitimate expectations and must be rejected. It states that an applicant invoking the protection of legitimate expectations must show (i) that the institutions had created a precise legitimate expectation on the part of the applicant (Case T-465/93 *Consorzio gruppo di azione locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraph 67); (ii) that the applicant relied on that expectation in its actions; and (iii) that the applicant suffered damage because the institutions frustrated its expectations (Case 181/87 *Agazzi Léonard* v *Commission* [1998] ECR 3823, paragraph 35). Those considerations are not limited to actions to establish non-contractual liability, since both the cases cited were actions for annulment.

183 The Council submits that in this case the applicant has not even attempted to show that those elements are present with respect to the three expectations invoked.

184 First, with respect to the timely determination of MES, the applicant has not stated what action it took on the basis of its expectation or the damage which it suffered as a result of its MES claim being finally determined in April 2004. Moreover, it was informed during the investigation about the timing of the decision and never complained about it. The Council adds in that regard that the investigation coincided with the outbreak of the SARS epidemic in Asia, which resulted in the verification visit being delayed.

185 As regards the allegation that the investigation as a whole infringed Article 11(5) of the Basic Regulation (paragraphs 143 to 145 of the reply), the Council observes that this is a new plea which is inadmissible under Article 48 of the Rules of Procedure of the Court of First Instance. In its application, the applicant merely complained about the allegedly excessive length of the MES determination. Moreover, under Article 116(3) of the Rules of Procedure, AUDACE, as intervener, likewise is not entitled to raise new pleas in law. In any event, the

Council submits that the applicant has not shown that, in the light of the circumstances of this case, the length of the investigation was excessive.

186 Second, with regard to the State minority shareholding, the applicant does not explain on what basis it expected that a company in which the State was a minority shareholder could never be denied MES. In any event, given that MES determinations are to be made on a case-by-case basis (*Shanghai Teraoka*, cited above, paragraph 52), that generally excludes any legitimate expectation on the part of any producers that MES will be granted. Moreover, the applicant does not explain what actions it undertook as a result of its legitimate expectations or claim that it suffered damage because that expectation was frustrated. Furthermore, the Council contests the applicant's allegation that the institutions did not apply the criteria laid down in Article 2(7)(c) of the Basic Regulation.

Ingrida Labucka
Judge-Rapporteur