OPINION OF ADVOCATE GENERAL LENZ

delivered on 15 July 1993 *

Mr President,
Members of the Court,

A — Introduction

1. The present action has been brought by a Brazilian producer of ferro-silicon (a product used in steel production) against Council Regulation (EEC) No 1115/91 of 29 April 1991 imposing definitive anti-dumping duties in connection with the review of anti-dumping measures concerning imports of ferro-silicon originating in Brazil ('the contested regulation'). [1]

2. That regulation imposed for the first time an anti-dumping duty on imports into the Community of ferro-silicon produced by the applicant. The anti-dumping duty was equivalent to 12.2% of the net free-at-Community-frontier price. As its title suggests, the regulation was adopted pursuant to a review of existing anti-dumping measures.

3. The essential features of the present dispute may be explained by the history and content of the latter existing measures and by events between their adoption and that of the contested regulation.

4. In September 1986 the Commission, after receiving a complaint from Community producers of ferro-silicon, gave notice of its intention to initiate an anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil. [2] Among other companies, the resultant investigation covered the applicant. The evaluation of the anti-dumping questionnaire to which the applicant replied and on-site investigations, however, showed that the applicant had not been engaged in dumping. Neither the provisional anti-dumping duty of ECU 59 per tonne imposed by Regulation (EEC) No 2409/87 [3] nor the definitive duty in the same amount imposed by Regulation (EEC) No 3650/87 [4] was for that reason imposed on the ferro-silicon produced and exported by the applicant. [5]

5. Following a request by five Brazilian producers under Article 14 of Regulation (EEC) No 2423/88 [6] ('the basic regulation') for a review of the duty applicable to them, on the ground that they were no longer engaged in exporting at dumping prices, the Commission initiated the procedure set out in that provision. However, it did not limit it to the

* Original language: German.

1 — OJ 1991 L 111, p. 1.

2 — OJ 1986 C 231, p. 4.

3 — Commission Regulation No 2409/87 of 6 August 1987 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Brazil and accepting undertakings offered by Italmagnesio SA of Brazil and from Promsyrio-Import of the USSR, OJ 1987 L 219, p. 24.

4 — Council Regulation No 3650/87 of 3 December 1987 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Brazil, OJ 1987 L 343, p. 1.

5 — Article 1(3) of Regulation No 2409/87. The applicant was at that time trading as 'Eletrometalur SA Indústria e Comércio'.

6 — Council Regulation No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ 1988 L 209, p. 1.

applicants but extended it to include all Brazilian producers/exporters. Its reasons for so doing are set out in its notice of 3 May 1990. [7] The parties are in dispute as to whether those reasons satisfy the requirements laid down in the basic regulation with regard to the applicant.

6. The investigation which was carried out covered the period 1 September 1989 to 30 April 1990. [8] Once again, the applicant replied to the relevant questionnaires and allowed the Commission to carry out inspections at its premises. [9]

7. After the Commission had informed the applicant of its initial calculations, which determined a dumping margin of 38.2% in the applicant's case, and the latter had submitted its views, the Council adopted the contested regulation. The general rate of duty which it laid down came to 39%. The lower rate of 12.2% on the applicant's exports, mentioned above, corresponded to the dumping margin determined for it.

8. The action against that measure is based on the following pleas in law:

(1) The Community institutions infringed essential procedural requirements in including the applicant within the scope of the review proceeding and imposing an anti-dumping duty on it;

(2) The dumping determination made by the Community institutions is based on factors outside the scope of the investigation period determined by the Commission and is accordingly void;

(3) The dumping determination made by the Community institutions results from an unfair comparison between the normal value and the export price, contrary to Article 2(9)(a) of the basic regulation;

(4) The applicant was denied its fundamental right to be heard with respect to the anti-dumping measure proposed by the Commission.

9. The applicant claims that the Court should:

— annul Article 1(3) of Regulation No 1115/91 imposing an anti-dumping duty on the applicant;

— order the Council to bear the costs.

10. The Council contends that the Court should:

— dismiss the application;

7 - OJ 1990 C 109, p. 5.

8 - Point 11 in the preamble to the contested regulation

9 - Point 8 in the preamble to the contested regulation

— order the applicant to bear the costs.

11. The Commission has intervened in the proceedings in support of the forms of order sought by the Council.

12. In so far as is necessary, I shall deal with additional details in the course of the following opinion. For the rest, I would refer to the detailed Report for the Hearing.

B — Opinion

The first plea in law: The Community institutions infringed essential procedural requirements in including the applicant within the scope of the review proceeding and imposing an anti-dumping duty on it.

13. I. In accordance with the manner in which the application is set out, this plea may be divided into two parts. The *first part* is *formal* in nature, based as it is on a distinction between two methods of procedure provided for in the basic regulation: the procedure under Article 7 for the introduction of new anti-dumping measures and that under Article 14 for the review of existing measures. The applicant takes the view in this regard that it ought not to have been included in the review procedure under Article 14 on the ground that it had been exempted from the anti-dumping duty imposed in 1987 and that for that reason it does not come within the scope of a regulation (Article 14(1)) or measure (Article 14(3)) capable of being reviewed. In view of the fact that it was exempted from all measures imposed in 1987, the applicant argues that the original anti-dumping proceeding involving it was concluded pursuant to Article 7(9)(b) of the basic regulation. The imposition of the contested duty would, in its view, have required the initiation of a new proceeding under Article 7(1) of that regulation. As this was not done, the contested regulation must be annulled to the extent requested.

14. The *second part* concerns a *substantive* condition governing the course of action in respect of the applicant. This condition, which in the applicant's view was not satisfied in this case, follows from Articles 5 and 7(1) of the basic regulation, which provide that a proceeding is to be initiated if there is sufficient evidence of the existence of dumping and the injury resulting therefrom. The applicant argues that since the investigation into its business amounted to the carrying out of a fresh investigation, such an investigation ought to have been carried out only if the above condition had first been satisfied. In view of the fact, however, that there was no evidence of the type specified, the Commission had exceeded its powers through the manner in which it acted.

15. Furthermore, the applicant argues in its reply that the notice announcing the inclusion of the applicant in the review procedure [10] is illogical and contradictory and therefore lacks a proper statement of reasons as required under Article 190 of the EEC Treaty. The Council has correctly pointed out in its rejoinder that this argument was made out of time as it in fact constitutes a plea in law introduced for the first time in

10 — See footnote 7 above.

the reply, of which no further account can be taken under Article 42(2) of the Rules of Procedure.

16. The applicant's arguments on the first and second parts of the plea with regard to the question whether (as the applicant argues) the proceeding involving it was concluded when it was exempted under Regulation No 3650/87 from the definitive anti-dumping duty has been thoroughly discussed in the pleadings. The Community institutions had expressed the view that this is not the case. The *proceeding*, they argue, covered all exports of ferro-silicon from Brazil (including those of the applicant) and was concluded only on the expiry of the measures adopted in that regulation. It was possible to carry out a review under Article 14 of the basic regulation in the course of that proceeding. The conditions for a review laid down in that provision were satisfied, even with regard to the applicant, since circumstances had changed since the adoption of Regulation No 3650/87.

17. In this connection, the Commission has attached particular importance to the difference drawn in Article 7(9) between the terms 'proceeding' and 'investigation' and has pointed out that a 'proceeding' concerns countries and products and that it is therefore not possible to initiate or conclude a proceeding in respect of one single producer/exporter.

18. With regard to the first part of the plea, the Community institutions on this basis reached the conclusion that the pursuance of the investigation in respect of the applicant within the framework of the still current proceeding was proper and did not require the initiation of a fresh proceeding. Their reasoning with regard to the second part of the plea is as follows: a review does not require the evidence necessary under Articles 5 and 7(1) of the basic regulation, but instead requires simply evidence of changed circumstances under Article 14, the applicant's submission that there is no evidence as required under Articles 5 and 7(1) is unsound.

19. At the hearing, the applicant departed to some extent from its original position, claiming that it was 'not really material' whether the adoption of Regulation No 3650/87 concluded the proceeding involving it. Rather, the significant fact, in its view, was that the Commission initiated a new *investigation* in respect of the applicant. However, under Article 5(1) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade [11] (the Anti-Dumping Code), which underlies the basic regulation, this can be done only if sufficient evidence has been provided of the existence of dumping and resultant injury. That condition, the applicant argues, has not been satisfied.

20. II. In view of this development in the argument, one may ask whether the applicant has not abandoned the first part of the plea through this oral submission, given that in its application it based this part essentially, and in its reply completely, on the finding that the original proceeding was concluded, so far as the applicant was concerned, by the adoption of Regulation No 3650/87 (with

11 - OJ 1980 L 71, p. 90.

the result that measures could be taken against it only within the context of a fresh proceeding).

21. I, however, do not consider it essential to examine any further this issue of the interpretation of the applicant's submission. The arguments of the parties and the provisions of the basic regulation make it clear that both parts of the first plea are very closely interrelated. More precisely, it must also be determined when examining the second part of the present plea whether the original proceeding involving the applicant was concluded by the adoption of Regulation No 3650/87. If this were the case, measures could have been taken against the applicant only subject to compliance with the requirements concerning evidence under Article 7(1) of the basic regulation (requirements which the applicant argues were not complied with): in view of the conclusion of the original proceeding, it would then have been necessary to open a fresh proceeding.

22. In those circumstances I do not consider it appropriate to look into the fate of the individual parts of the present plea. Rather, we ought to examine the arguments in the first part of the plea within the wider context covered by its second part. In my opinion, this most closely corresponds to the intention of the applicant as set out during the oral procedure.

23. III. For the purposes of the first plea, as thus defined, I shall begin by considering which criteria had to be satisfied by a proceeding involving the applicant in the present case [12] and whether they were in fact here satisfied. [13] I shall then examine the arguments of the Community institutions regarding the question of the extent to which it was necessary on other grounds, in particular grounds of equal treatment, to include the applicant in the investigation. [14] I shall conclude by examining briefly whether the breach alleged by the applicant results in the annulment of the contested regulation. [15]

24. 1. Let us first of all consider the question whether the proceeding initiated in 1986 was concluded with regard to the applicant through the adoption of Regulation No 3650/87.

25. What light do the relevant provisions of the basic regulation cast on this question, particularly with regard to the distinction between the terms 'proceeding' and 'investigation'?

26. The 14th recital in the preamble to the basic regulation (corresponding to the 29th recital in the preamble to Regulation No 2176/84, which preceded it) makes it clear that the Community legislature intended to distinguish between those two terms. However, no indication, whether general or specifically addressing the present problem, is given regarding the meaning and scope of this distinction, which must therefore be inferred from the relevant provisions.

27. Let us for that reason begin with Article 7(9), since this sets out a general rule for distinguishing between the two terms in the

12 — See point 24 et seq. below.
13 — See point 46 et seq. below.
14 — See point 53 et seq. below.
15 — See point 60 et seq. below.

context of the phase relevant to the present context, namely that in which the Community institutions have decided on their course of action after completing the steps described in Article 7(1) to (7). Article 7(9) provides as follows:

'(a) An investigation shall be concluded either by its termination or by definitive action. Conclusion should normally take place within one year of the initiation of the proceeding.

(b) A proceeding shall be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings or by the expiry or repeal of such duties or by the termination of undertakings in accordance with Articles 14 or 15.'

28. It follows in general from this provision that a proceeding and an investigation can conclude simultaneously only if the investigation is terminated without the imposition of duties and without the acceptance of undertakings. Otherwise, the rule applies that an *investigation* is concluded by the *introduction* of protective measures (particularly the imposition of definitive duties and termination of the investigation on acceptance of undertakings). A proceeding, on the other hand, is concluded only when the *effects* of those measures come to an end; prior to this, further investigations may be carried out within the same proceeding, such as, in particular, those pursuant to Article 14(2).

29. So far as concerns the question here of interest regarding the selective application of a proceeding to certain companies, such a possibility would appear to be excluded by the following words of Article 7(9)(b): 'A proceeding shall be concluded ... by the termination of the investigation without the imposition of duties and without the acceptance of undertakings ...'. Consistent with this, Article 9(1) provides that:

'If it becomes apparent after consultation that *protective measures are unnecessary*, then, where no objection is raised within the Advisory Committee referred to in Article 6(1), the proceeding shall be terminated.' [16]

30. These formulations would suggest that a proceeding can be terminated pursuant to completion of the investigation only if there is *no company* involved in the proceeding which is subject to a duty or an undertaking accepted by the Community. Viewed from this perspective, a proceeding cannot be applied selectively to individual companies, at least not in the stage following completion of the initial investigation. It is consistent with this reasoning that Article 14 should provide that 'regulations imposing anti-dumping or countervailing duties and decisions to accept undertakings' (Article 14(1)) should be subject to 'review' (Article 14(2)) (in so far as such a review does not appear superfluous on the ground that the anticipated amendment is minimal or the factual situation is straightforward). [17] Article 14 takes account of the differences which may have arisen in the position of individual companies, depending on the result of the initial investigation, through the possibility of confining the review to individual companies or categories of companies. Thus, Article 14(1) does not preclude the Commission,

16 - My emphasis

17 - Beseler and Williams, *Anti Dumping and Anti Subsidy Law The European Communities*, 1986, No 9.7

in the case of a regulation imposing anti-dumping duties and a decision (adopted at the same time) to accept undertakings, from reviewing only one of those measures and accordingly defining the scope of the investigation pursuant to Article 14(2) if this is justified by differences in the position of categories of companies. Even a uniform measure (such as a regulation on a [definitive] duty) can, according to Article 14(2), be reviewed 'in part', that is to say, depending on the case, can be confined to certain of the producers concerned. [18] There is, on the other hand, no provision for such a selective application with regard to a proceeding, which, according to Article 7(1)(a) of the basic regulation and in view of the position generally obtaining prior to the initial investigation, [19] relates to products and countries.

31. An overall examination of these systematic considerations will show that the conclusion of an initial investigation by way of a measure such as Regulation No 3650/87 does not terminate the 'proceeding' in respect of any producer/exporter of the country in question. Measures taken against some or all of the companies involved in the proceeding after conclusion of the initial investigation can, if necessary, provide the subject-matter for further investigations which, together with the initial investigation, will form part of a single proceeding.

32. The above considerations would suggest that the course of action taken against the applicant did not constitute a new proceeding, but simply a new investigation. From this, one might agree with the Community institutions in their conclusion that the requirement of 'sufficient evidence' in the first sentence of Article 7(1) of the basic regulation was not applicable to the present case.

33. This conclusion, however, fails to convince me in view of its result since it is based on a purely abstract logic and is at variance with the objective pursued by the above requirement concerning evidence.

34. That objective is readily identifiable, being designed to prevent exporters in non-member countries being faced with anti-dumping investigations lacking objective justification. [20]

35. This matter appears all the more justified when, as here, there has been a departure from the rule in Article 5 of the Anti-Dumping Code providing for investigations into alleged dumping practices at the request of the industry affected.

18 — See notices in OJ 1991 C 173 (compact disc players originating in Japan and the Republic of Korea) and in OJ 1991 C 18 (small screen colour television receivers originating in the Republic of Korea).

19 — Even if there is sufficient evidence of dumping emanating from a specific country, there should in that case in general be no information on the exact role of individual companies in such practices. It is the task of the investigation to uncover that information (see Wenig in Dauses, *Handbuch des EG-Wirtschaftsrechts*, Munich, 1993, K II, note 165). The applicant has, admittedly, alluded to an example tending in the opposite direction: see Commission Regulation (EEC) No 2684/88 of 26 August 1988 imposing a provisional anti-dumping duty on certain imports of video cassette recorders originating in Japan and the Republic of Korea, OJ 1988 L 240, p. 5 (particularly at points 6 to 12 in the preamble) and Council Regulation (EEC) No 501/89 of 27 February 1989 imposing a definitive anti-dumping duty on imports of certain video cassette recorders originating in Japan and the Republic of Korea and definitively collecting the provisional duty, OJ 1989 L 57, p. 55 (particularly at point 4 in the preamble).

20 — See Beseler and Williams (cited in footnote 17), No 8.2.3.

36. I am unconvinced by the Commission's argument during the oral procedure that the protection specified should apply to the overall industry in non-member countries rather than to individual companies. Logically, that protection should apply to the companies affected in accordance with the scope and objective of the investigation chosen by the Commission itself.

37. With regard to the distinction between 'proceeding' and 'investigation', it is still necessary to stress that the real reason for the above protection is evidently connected with the consequences of an *investigation* carried out in order to help decide whether or not to introduce anti-dumping measures. This follows from an examination of the position at the outset of the proceeding. The steps under Article 7(1)(a) and (b) of the basic regulation, which characterize the initiation of the proceeding in contrast to that of the initial investigation, certainly do not constitute the reason for the requirement here in issue. Rather, it is the investigative stages described in the subsequent paragraphs of Article 7 and in particular their possible consequence (the adoption of protective measures) which justify that requirement. Reference must also be made to the Anti-Dumping Code, which the Court has now held to be the criterion by which to examine the validity of the basic regulation [21] and which should therefore *a fortiori* be used for the interpretation of that regulation, as the Commission acknowledged during the oral procedure. [22] Article 5 of the Code uses the term 'investigation' in the sense of an initial investigation pursuant to Article 7(1) to (7) of the basic regulation. In this connection, Article 5(1) of the Code provides as follows:

'*An investigation* to determine the existence, degree and effect of any alleged dumping *shall normally be initiated upon a* written *request* by or on behalf of the industry ... affected. *The request shall include sufficient evidence* of the existence of:

(a) dumping;

(b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code;

and

(c) a causal link between the dumped imports and the alleged injury.' [23]

38. A comparison between the objective of the contested requirement, as defined, and the system of the basic regulation in the light of the concepts of 'proceeding' and 'investigation' in the various stages of the Community procedure makes it clear where the weak point in the system lies. The system is based on the premiss that the objective underlying the requirement of evidence under Articles 5 and 7(1) can play a role only in the initial investigation within a proceeding but cannot do so in subsequent investigations. Indeed: Article 9 of the Code makes it clear that the review procedure provided for in Article 14 of the basic regulation primarily

21 - Case C 69/89 *Nakajima* v *Council* [1991] ECR I 2069 (at paragraphs 26 to 32); Case C 188/88 *NMB (Deutschland) and Others* v *Commission* [1992] ECR I 1689 (at paragraph 23)

22 See also the Opinion delivered by Advocate General Van Gerven on 29 April 1993 in Case C 104/92 *Matsushita Electric Industrial* v *Council* [1993] ECR I 4981, at point 19

23 My emphasis

(if not necessarily) [24] represents an instrument for the annulment or mitigation of measures imposed, particularly at the request of the companies concerned. In that case, of course, there is no need for evidence of dumping and injury, but rather grounds are necessary for the opposite assumption in order to justify a review in the above sense. Such an objective of the review also has an effect on those covered by it. The possibility of annulling or mitigating measures can be envisaged only in respect of companies affected by those measures.

39. That premiss, however, fails by reason of its general nature to take account of the fact that the purpose and scope of investigations subsequent to the initial investigation may vary extensively depending on the situation facing the company involved at the conclusion of the initial investigation. That point is made particularly clear in the present case. While the removal or reduction of the duty could be examined with regard to the five companies which requested the review and the other companies on which the duty was imposed, only the introduction of a (new) duty could be examined with regard to the applicant.

40. In those circumstances, my view is that an investigation in the context of Article 14 of the basic regulation presupposes the existence of sufficient evidence within the meaning of Articles 5 and 7(1) of that regulation in so far as that investigation (in respect of one or more companies) is identical in scope to an initial investigation carried out pursuant to Article 7(1) to (7) of the basic regulation.

41. This conclusion is not affected by the arguments of the Council and Commission concerning the detailed arrangements for the provision of evidence under Article 14 of the basic regulation.

42. With regard to this point, the two Community institutions submit that 'evidence of changed circumstances' (second subparagraph of Article 14(1)) suffices for the purposes of a review. This argument amounts to a submission that in the case of a review generally the grounds justifying action by the Community institutions are to be subject to less stringent requirements.

43. That view cannot be accepted. The criteria in Article 14 which guide the Commission's decision on the principle and scope of the investigation are, in view of the multiple possibilities, phrased in very broad terms (see Article 14(1) and (2), under which reviews and investigations are provided for where 'warranted'). The same applies to the criterion put forward by the Community institutions, to the effect that an interested party must, in support of its request for a review, submit 'evidence of changed circumstances sufficient to justify the need for such review'. In my opinion, this formula should not weaken the requirements of the probative value of evidence adduced in respect of Article 7(1) of the regulation. [25] Rather, it

24 — There have in practice been a large number of instances in which complainants have argued that there had been an increase in instances of dumping (see, for example, the Notice of 24 June 1988 of initiation of a review of anti-dumping measures concerning imports of Fibre Building Board (Hardboard) originating in Czechoslovakia, Poland, USSR, Romania, Sweden and Brazil, OJ 1988 C 165, p. 2).

25 — Such a rule would also be totally illogical. The assertion that dumping has ceased must logically be supported by evidence of the same probative value as the evidence required to initiate a proceeding by providing a basis for the suspicion of dumping and injury (see Wenig (cited above at footnote 19), note 179).

merely indicates that the *subject-matter* of the evidence to be adduced regularly does not correspond to that at the outset of the proceeding inasmuch as the matter at issue is the suspension or mitigation of the measures imposed (rather than the introduction of new measures).

44. It follows from all these considerations that the requirement of sufficient evidence (within the meaning of Articles 5 and 7(1) of the basic regulation) needed to be satisfied in the present case if the review had the same scope for the applicant as an initial investigation (thus at the initiation of a proceeding). [26]

45. There is no doubt that the applicant's position corresponds exactly to this scenario. At the start of the review procedure its exports were not subject to any anti-dumping duty since prior to that date it had not been found to be individually guilty of dumping. Rather, the investigation which led to the adoption of Regulation No 3650/87 had concluded that the applicant was not engaged in exporting at dumping prices and had for that reason expressly exempted it from the duty imposed. The fact that its exports were none the less made subject under that regulation to a duty in so far as those exports were effected via other producers/exporters [27] is to that extent irrelevant. That rule was designed simply to prevent circumvention and does not imply that the suspicion that the applicant was engaged in dumping was justified. Likewise, it does not alter the fact that the disputed investigation prepared the way for the introduction of a measure depriving the applicant of the significant advantages represented by the abovementioned exemption. [28]

46. 2. In the light of those findings, it is necessary to examine whether sufficient evidence, within the meaning of Articles 5 and 7(1) of the basic regulation, existed at the beginning of the investigation.

47. On this point, the Commission admitted during the oral procedure that it had no evidence of dumping which related specifically to the applicant.

48. We must for that reason examine the general information on which the Commission based its findings. That information is set out in the notice of 3 May 1990. [29]

26 The Commission evidently also proceeded on this basis when it included the Nakajima company in a review (Article 15) concerning imports of electronic typewriters originating in Japan: see OJ 1990 C 315 (initiation of the review) and OJ 1991 C 283, p. 13 (inclusion of the Nakajima company). In the same context, see the initiation of a review (for the purpose of extending existing measures) concerning imports of certain ball bearings originating in Japan and Singapore (OJ 1983 C 188, p. 8).

27 See the wording of Article 1(3) of Regulation No 3650/87, 'The duty shall not apply to products *manufactured and exported* by ... [the applicant] ...' (my emphasis).

28 It should be noted incidentally that, when it included the applicant in the review, the Commission apparently considered the conditions concerning evidence in Article 7(1)(a) of the basic regulation to be applicable: the relevant notice (cited in footnote 7 above) is expressly based on Article 7(1)(a) (third paragraph, second column), which concerns the initiation of the 'review' and thus the case in which those conditions indubitably apply.

29 See footnote 7 above.

I would like to quote the relevant passage *verbatim* since it contains all the matters of importance and is therefore at the centre of the dispute between the parties:

'Grounds for the request for a review

The request for a review made by the Brazilian producers and/or exporters asserts that their exports of this product in 1989 were no longer dumped and that the Community industry is therefore no longer suffering material injury connected with the dumping of Brazilian products. The measures adopted in 1987 should therefore be repealed or amended.

Procedure

Having decided, after consultation, that there is sufficient evidence to justify a review, the Commission has begun an investigation in accordance with Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988. [30] As the Commission has, moreover, reason to believe that the circumstances cited by certain Brazilian exporters are equally applicable to other Brazilian producer-exporters and that the ferro-silicon market has changed, overcapacity at world level having brought about a substantial fall in prices on the Community market, the review has been extended to all Brazilian producer-exporters.'

30 — OJ 1988 L 209, p. 1.

49. During the oral procedure, the Council explained what was meant by the remark that there was reason to believe 'that the circumstances cited by certain Brazilian exporters are equally applicable to other Brazilian producer-exporters'. According to the Council's information, this referred to companies which were subject to a duty but had not requested a review: the circumstances cited by the companies requesting the review as proof of discontinuance of dumping could also apply to the former.

50. The only remaining factor of relevance in the present context is the change in market conditions referred to in the notice, that is to say, the fall in prices on the Community market resulting from overcapacity at world level.

51. As the applicant correctly points out, this does not satisfy the requirements regarding evidence under Articles 5 and 7(1) of the basic regulation. It is necessary in this regard to bear in mind the meaning of the term 'dumping'. According to Article 2(2) to (9) of the basic regulation it implies that a price is applied to exports intended for the Community market which is lower than the actual or constructed price (value) on another market [31] (which in Community practice is generally the market of the country of export or origin, except in cases of countries engaged in State trade). Thus, in order to provide sufficient substantiation of the suspicion that the applicant's prices for exports to the Community represent dumping prices when compared with its actual or constructed prices on the Brazilian market,

31 — It would appear to be established since the Court's judgment in *Nakajima* (footnote 21 above) that the basic regulation operates exclusively on the basis of this consideration.

there would have to be at least some indication of differences in price developments on the two markets. However, the fact of overcapacity at world level is not a valid indication in that regard since prima facie it affects the price level not only in the Community but also on all other markets (including that of Brazil). The Commission's reaction to the evidence submitted by the five companies requesting the review, in support of their claim that they were no longer engaged in dumping, also argues against such a (general) divergence of prices on the two markets concerned. According to the information contained in the notice of 3 May 1990, that evidence was sufficient to justify a review (within the terms of the request submitted by the five companies).

52. Since therefore there were no general circumstances relating to the two determinant markets, and certainly no circumstances of any kind relating specifically to the applicant which would have suggested dumping on its part, the conditions regarding evidence in Articles 5 and 7(1) of the basic regulation were not satisfied. The contested regulation therefore breaches Community law through its failure to comply with procedural requirements.

53. 3. Outside the context discussed hitherto, the Community institutions submitted a number of arguments which would suggest that the applicant's inclusion in the review was justified.

54. We can exclude at the outset two arguments which clearly do not provide any justification for such an inclusion.

55. In the first place, and contrary to the view expressed by the Council, it is irrelevant that anti-dumping measures are, in view of their nature and scope of application, legislative measures applicable to all traders generally (see Article 13(1) of the basic regulation). This particular feature ensures the proper and full imposition of duties on importers, but does not affect the procedural guarantees here in question or the right of producers/exporters covered by the investigation to make a complaint [32] through which they can secure judicial supervision of compliance with those guarantees. Secondly, the power, proposed by the Council, in the case of assessment of injury to aggregate the contributions to that injury of several companies found to be guilty of dumping irrespective of their individual share in the dumping which led to the injury [33] is irrelevant so far as the procedural guarantee here in issue is concerned.

56. Albeit expressed in a variety of ways, the remaining arguments raise the question whether the applicant's inclusion in the

32 - Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, at paragraphs 11 to 14; Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, at paragraphs 4 to 7.

33 See in particular the judgment in Case 255/84 *Nachi Fujikoshi Corporation* v *Council* [1987] ECR 1861, at paragraphs 45 to 49

review was appropriate on grounds of equal treatment. Thus, the Council submits that the protection against dumping organized under the basic regulation relates, according to Article 1 of that regulation, to imports from third countries and not to individual exporters. Article 14, it argues, entitles and obliges the Commission to take account of all relevant facts for the purpose of reviewing an anti-dumping regulation. Finally (and this seems to me to be the crux of this group of arguments), a failure to include the applicant in the review could have been regarded as discriminatory.

57. It must be held in this regard that the general prohibition of discrimination in Community law also applies with regard to anti-dumping rules. The case-law in this area has consistently examined the issue with great care in so far as problems of equal treatment have arisen. [34] In this regard, Article 13(5) on equal treatment of the various countries from which dumped goods emanate represents no more than a special version of the above principle.

58. So far as the present case is concerned, however, a failure to include the applicant in the review would not have amounted to a breach of that principle. While it is not permissible, particularly at the outset of a proceeding, to adopt different courses of action against producers and exporters who are essentially in identical positions in the light of the evidence of dumping and injury, [35] the applicant, as a company exempted from the original duty and in the light of the purpose of the request submitted by the five producers/exporters and the available evidence, was in a fundamentally different position to that of those companies and the other producers/exporters on whom a duty had been imposed. The exclusion of the applicant from the review would therefore not have been contrary to the prohibition of discrimination, just as it is not contrary to that principle to draw a distinction, at the conclusion of an investigation, between undertakings on the basis of the principle and degree of dumping found to have occurred (see Article 13(2) and (3) of the basic regulation). [36]

59. The finding that the contested action taken by the Commission breached Community law therefore stands.

60. 4. So far as the *legal consequences* of a failure to comply with the requirements regarding evidence under Articles 5 and 7(1) of the basic regulation are concerned, the Council and Commission quite correctly conceded during the oral procedure that this would lead to the annulment of the measure in question in the proceedings before the Court.

61. The fact that the applicant took part in the disputed investigation by replying to the questionnaire and allowing checks to be

34 — Joined Cases 273/85 and 107/86 *Silver Seiko and Others* v *Council* [1988] ECR 5927, at paragraph 18; Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraph 10; Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, at paragraphs 65, 123 and 124; see also my opinion in *Nakajima*, at points 85 and 93.

35 — See Wenig, cited above at footnote 19.

36 — See also the views of the Court on the interpretation of Article 2(3)(b)(ii) of the basic regulation (Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, at paragraphs 35 to 37).

carried out on its premises has no bearing on the result in this case, [37] in view of the fact that such conduct cannot be interpreted as a waiver of the protection attracting the above annulment. Suffice it to point out in this regard that the applicant cannot be said to have waived (in order to preserve its rights under the present plea) the opportunity to prove during the investigation that it had not been engaged in exporting at dumping prices during the investigation period. [38] The price would in fact have been considerable: under Article 7(7)(b) of the basic regulation the Commission is empowered to make findings 'on the basis of the facts available' in respect of companies which refuse to cooperate. According to the practice of the Community institutions, this generally means that the dumping margins of other companies (in this context the highest determined margin) are used. [39] That would, incidentally, have very probably imposed on the applicant a considerably higher rate of duty than 12% (compare the general rate of 39% provided for in the contested regulation).

62. 5. The *result* of the examination of the applicant's first plea in law is that it must be upheld and for that reason results in the contested regulation being declared void to the extent requested.

The second plea in law: The dumping determination made by the Community institutions is based on factors outside the scope of the investigation period determined by the Commission (1 September 1989 to 30 April 1990).

63. I. This plea concerns the rules set out in the basic regulation governing the investigation period. The thirteenth recital in the preamble to the basic regulation explains those rules as follows:

'... it is desirable to state explicitly that the investigation of dumping or subsidization should normally cover a period of not less than six months immediately prior to the initiation of the proceeding and that final determinations must be based on the facts established in respect of the investigation period.'

64. On that basis, Article 7(1)(c) provides as follows:

'[the Commission shall] commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidization and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; *the investigation of dumping or subsidization shall normally cover a period of not less than six months*

37 See the Council's reference to this fact: p. 6 of its defence.

38 The applicant is now also arguing this latter point in its second plea before the Court.

39 This was how the Commission proceeded in, *inter alia*, the investigation which led to the adoption of Regulation No 3650/87 (see footnote 5 above); see also point 9 in the preamble to Regulation No 2409/87 (footnote 3 above).
Further examples include: Regulation No 4062/88 (OJ 1988 L 356, p. 47), points 40 to 42 in the preamble; Regulation No 2357/87 (OJ 1987 L 213, p. 32), point 12 in the preamble, Regulation No 2640/86 (OJ 1986 L 239, p. 5), point 31 in the preamble; Regulation No 2516/86 (OJ 1986 L 221, p. 16), points 36 and 37 in the preamble.
This practice is analogous to the construction of the normal value, for which in certain cases selling, general and administrative expenses and/or profit are calculated on the basis of figures relating to other companies in the country of exportation (Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraphs 7 to 10; Joined Cases 260/85 and 106/86 *Tokyo Electric (TEC) and Others* v *Council* [1988] ECR 5855, at paragraph 15, and Case C 69/89 *Nakajima* v *Council*, cited above, at paragraph 59 et seq., in particular paragraph 67).

immediately prior to the initiation of the proceeding.' [40]

65. Article 12(1) states that:

'Where the facts as finally established show that there is dumping or subsidization *during the period under investigation* and injury caused thereby, and the interests of the Community call for Community intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council ...' [41]

66. It follows from those provisions that at a given date (which in any event is prior to the Council's adoption of the decision) an investigation period must have been laid down to which the definitive determination of dumping relates. Since this determination forms the basis under Article 12(1) of the basic regulation for the Council's adoption of a decision, the latter must necessarily take account of data determined in respect of the investigation period.

67. Consideration of all those factors would also suggest that the same investigation period must apply in respect of all companies involved in an investigation. [42] Likewise, it must be forbidden to use data from outside that period in respect of a company. This represents a specific example of the principle of equal treatment which, it has already been mentioned, also applies in the sphere of the anti-dumping rules. [43]

68. By its submission that the determination of dumping in its case is based on factors relating to normal value and export prices which lie outside the investigation period, the applicant is arguing that there has been a breach of the rules governing the investigation period in so far as those rules are designed to ensure that all companies involved are treated equally. [44] If this submission is correct, it would imply that the applicant has been the victim of clearly discriminatory treatment. In the view of the applicant, all the data used relate to the time *prior to* the investigation period. However, it is not disputed that the applicant did not export any further ferro-silicon to the Community following the export transactions taken into account by the Commission. Considered from this perspective, the discrimination lies in the fact that the applicant

40 — My emphasis.

41 — My emphasis.

42 — See also the citation on p. 30 of the applicant's reply from point 12(iii) in the preamble to Commission Regulation No 2623/88 (OJ 1988 L 235, p. 5).

43 — According to the 27th recital in the preamble to Commission Regulation No 595/85 of 7 March 1985 imposing a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan (OJ 1985 L 68, p. 13), adopted pursuant to Council Regulation No 2176/84, which first provided for a fixed investigation period, it is in conformity with 'the Commission's general practice' to limit the scope of the investiga-tion to producers who actually exported to the Community during the investigation period. In contrast, see Commission Regulation No 2017/81 of 15 July 1981 imposing a provisional anti-dumping duty on phenol originating in the United States of America (OJ 1981 L 195, p. 22), particularly the second paragraph in the left column on p. 23, adopted pursuant to Regulation No 2017/81, the basic regulation (OJ 1981 L 195, p. 22).
In the present case, the Commission appears to have departed from this practice with regard to those exporters who had expressed their intention to export to the Community, had cooperated in the investigation and had given undertakings with regard to prices. In their case, however, only the normal value was calculated with a view to possible acceptance of the undertakings (see points 15, 23 and 43 in the preamble to the contested regulation).

44 — See footnote 42.

would unjustifiably be deprived of its advantage as a company exempted from the duty: the absence of exports during the investigation period should have resulted in its case in its retaining that advantage, just as the absence of exports in the case of a company whose exports were subject to a duty should have resulted in the retention of that duty. [45] Furthermore, the conduct of the Community institutions towards the applicant would (if the submission is correct) have the result that commercial transactions dating further back in time than those of other Brazilian producers were taken into account in the applicant's case in order to justify protective measures. The value of such practices as justification for the duty (fixed at the level of the dumping margin) on *future* imports, however, is less than that of more recent breaches of the anti-dumping rules.

69. None of these arguments derived from the contrast between the applicant's position and that of the other producers is called in question by the fact that at least some of the companies used for the comparison had applied for suspension or modification of the measures originally imposed, since an application of this kind does not prejudice the result of the investigation. If the investigation reveals dumping on the part of the parties making the application, the Community authorities will be able to adopt the appropriate measures. [46]

70. II. It is necessary on this basis to examine whether the applicant is correct in its assertion that the data used related to a time prior to the investigation period.

71. In this connection, particular importance attaches to the submission that the *export* operations used fell outside the investigation period, since, if it should prove to be correct, it would undermine in advance the claim by the Community institutions that there was dumping.

72. There is essentially no dispute regarding the facts to which this submission and the Council's counter-arguments relate.

73. The commercial transactions in question relate to two consignments of 1 000 tonnes and 1 995 tonnes of ferro-silicon which the applicant released for export to the Community. Both were included in the dumping calculation, although the Community institutions reached the conclusion that they could determine dumping only in respect of the consignment of 1 995 tonnes. The consignment of 1 000 tonnes was shipped ex-plant on 13 March 1989 and the consignment of 1 995 tonnes on 25 July 1989; both were

45 — See Wenig (footnote 19), note 179.
The position differs to that extent from that of the initial investigation. Here the companies which did not export during the investigation period are made subject to the residual duty but can request a review under Article 14 of the basic regulation if they resume exports or comply with the one-year period requirement set out in that article (see point 43 in the preamble to Council Regulation No 1768/89 of 19 June 1989 imposing a definitive anti-dumping duty on imports of video cassettes originating in the Republic of Korea and Hong Kong, collecting definitively the provisional duty and terminating the anti-dumping proceeding with regard to the imports of video tape reels originating in the Republic of Korea (OJ 1989 L 174, p. 1)

46 — In the view of Wenig (cited above at footnote 19) (note 181), even a *reformatio in peius* should be possible.

loaded and stowed in the same ship on 31 August 1989, the date on which the bills of lading were issued and the applicant entered the purchase price on the invoice. [47]

74. The parties are in dispute as to the date of the ship's departure from Rio de Janeiro. According to the applicant, it left before the investigation period, probably on 31 August 1989, while the defendant takes the view that the ship departed some days after this date and thus during the investigation period.

75. Finally, so far as importation into the Community is concerned, a distinction must be drawn between the two consignments. The consignment of 1 995 tonnes was imported into the Community in several parts between 30 November 1989 and 31 March 1990 (thus during the investigation period). [48] Moreover, the applicant has not disputed that the consignment in question was (in successive stages) released for free circulation within the Community during the investigation period.

76. According to the defendant, the consignment of 1 000 tonnes was also brought into free circulation within the Community during the investigation period. In contrast, the applicant submits in its reply [49] that the date on which that consignment was released for free circulation is still unknown.

77. This is the basis on which the parties are in dispute as to the date which governs the disputed export transaction and thereby determines whether or not it falls within the investigation period.

78. The applicant has in principle taken 31 August 1989 as its basis, on the ground that the goods were invoiced and shipped on that date. [50] In developing this argument it has at some points focused on the aspect of 'export' prior to the beginning of the investigation period [51] and at others on that of the 'date of sale'. In the new draft GATT Anti-Dumping Code submitted by former Chairman Dunkel the date of sale is normally to be the date of contract, purchase order, order confirmation or invoice, whichever establishes the material terms of sale. [52] The applicant has also pointed out that the negotiations relating to the two transactions took place prior to the investigation period. [53]

79. The Council and the Commission rely on the submission that the goods were released for free circulation during the investigation period. [54] Such a point in time could be applied as being determinant on the ground that Article 2(1) of the basic regulation provides that an anti-dumping duty may be applied to any dumped product 'whose release for free circulation in the Community causes injury'. Importation into the Community during the investigation

47 — The Council admitted in its rejoinder that the contested regulation, unlike the initial investigation results, is not based on the presumption that there was a compensation agreement between the applicant and Considar USA. Likewise, the Commission admitted at the hearing that the determinant invoice (to Considar) dates from 31 August 1989.

48 — See Annex II to the defence.

49 — Page 26, footnote 16.

50 — Pages 24 and 31 of the reply.

51 — Second paragraph of p. 25 and first paragraph of p. 26 of the reply.

52 — Page 28 of the reply.

53 — Pages 24 and 31 of the reply.

54 — See in particular points 75 and 76 above.

period, according to what the Commission said at the hearing, creates a sufficient connection between the transactions in question and the investigation period.

80. In the alternative, the Council relies on its submission regarding the departure of the vessel from Rio de Janeiro [55] and argues that the investigation period is still respected even if that event is treated as the relevant one, since the goods left Brazil after 1 September 1989.

81. With regard to this problem, it must be borne in mind that under Article 2(2) of the basic regulation a product is to be considered to have been dumped if its *export price* to the Community is less than the normal value of the like product.

82. This allows a twofold conclusion to be drawn. First, the determining factor for the purposes of dumping is the application of a (disproportionately low) *price*, rather than the physical transport of the goods in question. The latter instead, is the decisive factor for the *injury*, since Article 2(1) describes the 'release for free circulation in the Community' as being the cause of injury. Secondly, the price, the dumping characteristics of which require to be examined in the light of the basic regulation, is an *export* price and *not an import* price. [56] On this point, Article 2(8)(a) provides unequivocally that:

'The export price shall be the price actually paid or payable *for the product sold for export to the Community* ...'. [57]

83. The import price, on the other hand, can be considered (only) in the context of an examination of injury pursuant to Article 4(2)(b). [58]

84. Article 2(8)(a) defines the export price in another respect, namely with regard to payment. This does not need to have been made, since the export price can also be the 'price ... payable'. While payment provides complete certainty with regard to the amount of the export price, it is not itself a precondition of dumping. It is also not the cause of any injury which may occur. That cause lies in the agreement regarding the (abnormally low) price. It is this agreement (and not the payment of the price) which may result in Community products being displaced by the imported product.

85. With regard to the question of the *point in time* at which the 'export price' factor becomes a precondition for dumping, it follows from the foregoing that the relevant date in the context of the contractual relations between the exporter and the purchaser is that on which the purchaser's obligation to pay, the essential arrangements for payment and the price level are finally fixed.

55 — See in particular point 74 above.

56 — Beseler and Williams, No 4 4.3.1., Landsittel, *Dumping im Außenhandels und Wett-bewerbsrecht*, 1987, p. 27.

57 — My emphasis.

58 — See, for example, point 75 et seq. in the preamble to Commission Regulation No 1418/88 of 17 May 1988 imposing a provisional anti dumping duty on imports of serial-impact dot matrix printers originating in Japan (OJ 1988 L 130, p. 12).

86. This interpretation finds support not only in the above arguments derived from the export-price rules but also in considerations of symmetry with respect to the normal value, with which the export price must be compared under Article 2(2) and (9). In the standard case set out in Article 2(3)(a), the normal value is:

'the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin'.

87. In this case also, therefore, the emphasis is placed on the agreement on price as the subject of the purchaser's obligation, rather than on delivery or payment. This convergence of chronological criteria is again reflected in Article 2(9)(a), which provides that the normal price and the export price, 'shall be compared as nearly as possible at the same time'. If release into free circulation were taken as the criterion for determining the relevant time for the export price, the uniform basis for comparison with the normal value would be placed in question.

88. Finally, the interpretation here suggested is also consistent with Article 2(13), which provides that, where prices vary, export prices are normally to be compared with the normal value 'on a *transaction-by-transaction* basis'. [59] More generally, Article 2(6) of the Anti-Dumping Code provides that the two prices are to be compared in respect of 'sales made at as nearly as possible the same time'.

89. If those considerations are transposed to the present case, it will be found that the determinant transactions took place prior to the investigation period. The export prices used by the Community institutions in their calculation were invoiced on 31 August 1989 and were thus fixed in respect of their level. Furthermore, it may be assumed that when it came to the invoicing the applicant had done everything on which the payability of the purchase price depended. [60]

90. In those circumstances, the 'price ... payable' was established prior to the investigation period. If it is true that the applicant engaged in dumping with regard to the consignment of 1 995 tonnes through the application of the price in question, this did not in any event take place during the investigation period.

91. The fact that the goods may have been released during the investigation period for free circulation in the Community does not, contrary to the view expressed by the Commission, establish a sufficient connection between the export price and that period. As has already been pointed out, that fact is not a constituent feature of dumping. Moreover, it is clear from Article 7(1)(c) of the basic

59 — Second indent of Article 2(13); my emphasis.

60 — In this regard, the Community institutions have not submitted any contrary arguments. In addition, the Commission (according to the undisputed submission of the applicant) asked the applicant in its questionnaire about transactions invoiced during the investigation period.

regulation that the investigation period, as the time-frame for the examination which ensures equal treatment for all the companies involved, is of special importance precisely for the determination of dumping. In that provision dumping is expressly stated to be the subject of the examinations during the investigation period — in contrast to injury. [61]

92. The conclusion that account could not, as a matter of law, be taken of the disputed export transactions is not affected by the wide discretion vested in the Community institutions when appraising complex economic facts (particularly in the area of anti-dumping law). [62] The provisions on the basis of which the present breach of the law on the part of the Community was determined and from which the mandatory nature of the investigation period and the nature and significance of the 'export price' factor emerge are intended to define the framework for action by the Community and for the economic assessments which may prove to be necessary in that regard. So far as the present problems are concerned, the application of those provisions cannot therefore be made subordinate to the discretion of the Community authorities.

61 — With regard to injury, the Court has in fact accepted that account may be taken of data relating to the period prior to the investiga-tion period (Case C-121/86 *Epicheirseon Metalleftikon Viomich-anikon Kai Naftiliakon and Others* v *Council* [1989] ECR 3919, at paragraph 20; see also the judgment in *Nakajima*, cited above.
Advocate General Tesauro, however, has correctly pointed out that the investigation period must cover the examination of injury (opinion in Case C-121/86 *Epicheirseon*, cited above, at p. 3939 et seq.) See also my Opinion in *Nakajima*, which supports that view (point 234).

62 — Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, paragraph 21

93. In the result, the second plea in law must therefore also be upheld.

Third plea in law: the dumping determination made by the Community institutions results from an unfair comparison between the normal value and the export price, contrary to Article 2(9)(a) of Regulation No 2423/88.

94. A number of aspects of the construction of the normal value are discussed under this plea. In fact, however, the applicant accuses the Council merely of a failure to compare the normal value and the export price at the same time. [63] The Community institutions, it is stated in the application, compared a constructed normal value, based on production costs from May to July 1989, with an export price from the month of August. By so doing, the applicant argues, the Council failed to comply with the requirement under Article 2(9)(a) of the basic regulation that the normal value and the export price should be compared 'as nearly as possible at the same time'. If the production costs for August (alone) had been taken into consideration and converted into US $, there would have been no finding of dumping (normal value: US $ 571; export price: US $ 671). Furthermore, the normal value in the case of the other exporters was calculated on a monthly basis.

63 — See the express restriction of this third plea at pp 33 and 35 of the reply

95. In its defence, the Council (like the Commission) made it clear that in addition to the months of May to July, the month of August 1989 had also been taken into consideration for the purposes of production costs.

96. The applicant insisted in its reply that the Council should have applied solely the production costs for August, the month in which the disputed transactions took place. This discrepancy between the export transactions and the normal value had serious consequences in view of the sudden devaluation of the Brazilian cruzeiro during the period in question. Had the Commission applied the cruzeiro/US $ exchange rate in force on 31 August 1989, there would have been no finding of dumping.

97. The Council subsequently explained in its rejoinder that the quantity of ferro-silicon produced by the applicant in August covered only 8% 'of the quantity shipped to the EEC during the reference period', not to mention the domestic sales. It would therefore have been absurd to use the cost of production for the month of August 1989 alone. Moreover, the cost of production for that month was lower than that for the three preceding months, thereby raising questions about its reliability. Notwithstanding this, the Commission included the August production and its cost in the constructed normal value.

98. So far as the question of the exchange rate is concerned, the Council has pointed out that the documents appended to the questionnaire and the documents examined during the on-site inspection were expressed in both the Brazilian and American currencies. As in the case of the other companies which were the subject of an investigation, the applicant drew up its accounts in both currencies in order to avoid the confusion arising from the discrepancies between the exchange rates and the economic reality during that period. The Commission was thus following established accounting practice and avoided the distortions caused by the instability of the cruzeiro's exchange rate.

99. The applicant again referred at the hearing to the chronological discrepancy between the date determining the normal value and that of the export transaction; however, it failed to address the argument advanced by the Council in its rejoinder.

100. With regard to the problem as thus outlined, I need only express my views in the alternative, since in my opinion the first two pleas must be upheld. In addition, it emerges from my consideration of the second plea that all the export transactions considered took place prior to the investigation period and therefore must from the outset be excluded as the subject of a comparison, irrespective of whether the normal value and export price in question were compared 'as nearly as possible at the same time'.

101. Subject to that reservation, the action of the Community institutions in taking account of production costs for the months of May to July 1989, in view of the minimal production in August 1989, and in applying the exchange rates used by the applicant itself does not strike me as unlawful. The phrase 'as nearly as possible at the same time' confers on the Community a degree of discretion which allows it to take account of all relevant economic data. In the light of the

reasons put forward by the Council I am unable to discern any manifest error of assessment which could render unlawful the method applied in this case. In particular, it has not been specifically demonstrated that the use of the exchange rates applied by the applicant itself, having regard to the time that had elapsed and to the devaluation of the cruzeiro, resulted in a distortion of the comparison.

The fourth plea in law: The plaintiff was denied its fundamental right to be heard with respect to the anti-dumping measure proposed by the Commission.

102. In order to understand this plea it should be recalled that the Commission had first submitted to the applicant a provisional calculation (Annex III to the defence) resulting in a dumping margin of 38.2%. After the applicant had submitted its comments, the Council adopted the contested regulation which — following the Commission's proposal — proceeded on the basis of a dumping margin of 12.2% and fixed the duty on the applicant's goods at the same percentage.

103. The applicant relies on the principles set out in the *Al-Jubail* judgment [64] with respect to the *right to a fair hearing* to which undertakings affected by anti-dumping investigations are entitled. Those principles were in the applicant's view violated by reason of the fact that

— it was never informed of the exact extent to which its comments (on the provisional calculation) were taken into account; [65]

— it was not until the contested regulation was published that the applicant learnt that the Commission had calculated a dumping margin of 12.2% and had proposed that the Council impose a duty at that rate; [66]

— it was never informed of how the dumping margin of 12.2% was determined; [67]

— it was not able to assess whether the dumping margin finally determined by the Commission was still affected by errors. [68]

104. The Community institutions construe this argument to the effect that the applicant is claiming *a right to disclosure of information, within the meaning of Article 7(4)(b) of the basic regulation* which is in the nature of a *second disclosure*, since the applicant had already received a provisional calculation (resulting in a dumping margin of 38.2%) for comment. [69]

64 — Case 49/88 *Al Jubail Fertilizers* v *Council* [1991] ECR I-3187.

65 — Page 14 of the application

66 — See previous footnote.

67 — Page 39, first and last sentences, and p. 40 of the reply.

68 — Page 39 last sentence of the reply.

69 — See point 20 of the Council's rejoinder; to the same effect, see the observations of the Commission in the written procedure (p. 12 of its observations) and at the hearing (p 44 of the transcript of the hearing).

105. And in fact: the *Al-Jubail* judgment on which the applicant relies concerns the interpretation of Article 7(4) of the basic regulation which in the view of this Court is to be undertaken in the light of the requirements stemming from the protection of the right to a fair hearing. [70] In conformity with those requirements and with Article 7(4)(b) and (c)(iii) the information is intended to give exporters *the opportunity in the administrative procedure* to *express their views* on the facts and considerations on which the Commission intends to base its proposal to the Council:

'In any event, the undertakings concerned should have been *placed in a position during the administrative procedure* in which they could *effectively make known their views* on the correctness and relevance of the facts and circumstances alleged and in the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury.' [71]

106. However, the specific complaint of the applicant (it never learnt to what extent its comments were taken into account and how precisely the figure of 12.2% was arrived at) concerns not the right to a fair hearing but the duty to state reasons laid down in Article 190 of the EEC Treaty. It raises the question whether it was possible for the applicant, *when the contested measure was issued*, to become

'aware of the reasons for the measure'

and whether the Court can

'exercise its supervisory jurisdiction'. [72]

107. In other words: the information deficit of which the applicant complains is of importance for the guarantees which Article 190 of the EEC Treaty provides with respect to the conduct of its case *before the Community Court.*

108. On the other hand, it is not directly of importance for the guarantees stemming from the right to a fair hearing with respect to the conduct of its case *in the administrative procedure.* In that regard the applicant would have to be able to allege specifically that the Community authorities included in the contested measure certain facts and considerations on which the applicant could not effectively make known its views. Precisely this, however, is not possible for the applicant, according to its own submissions, since it allegedly never learnt how the Commission came to arrive, after the originally accepted dumping margin (38.2%), to the margin underlying the contested decision (12.2%).

109. In the light of this analysis of the applicant's submission I consider it necessary first to examine the question of an infringement of Article 190 of the EEC Treaty. In so far as the applicant has based the plea now under consideration on an alleged infringement of the right to a fair hearing, this does not stand in the way of such an examination. As may

70 — Paragraph 15 of the judgment.

71 — Paragraph 17 of the judgment in *Al-Jubail*; my emphasis.

72 — The Court has consistently so defined in its case-law the requirement to state reasons: as regards the sphere of anti-dumping, see for example the judgment in Case 256/84 *Koyo Seiko* v *Council* [1987] ECR 1899, at paragraph 29.

be seen from the considerations just set out, the 'right to a fair hearing' in the sense in point here and the duty to state reasons equally serve the objective of ensuring that the party concerned receives the information he needs for his defence. The distinction concerns solely the stage at which these guarantees produce their effects in the administrative procedure, on the one hand, and in the preparation of the proceedings before the Court and in those proceedings, on the other. That being so, it would be unduly formalistic to refuse judicial review under Article 190 of the Treaty merely because the applicant formulated its complaint under the wrong heading. The Court must, however, when assessing the Community institutions' arguments in defence, bear in mind that the applicant's arguments could give rise to misunderstandings.

110. On this basis I should first like to deal with the requirements for the statement of reasons. In this regard it should be stated that the applicant, as an undertaking directly and individually affected by the contested part of the regulation, was entitled to learn of all essential particulars of the calculation of the duty. Only in that way is the objective of the duty to state reasons attained, which is to enable the applicant effectively to exercise its right of action under the second paragraph of Article 173 of the Treaty. From that point of view it would not be acceptable if, as it alleges, the extent to which its objections to the original calculation had been taken into account was concealed from it. In that case it could not determine which objections should be pursued by way of an action. But it must be possible even for any purely technical errors of calculation to be discovered and made the subject of an action.

111. In this case the Council alleged in its defence that the calculation of the dumping margin of 12.2% was communicated to the applicant orally. However, it has supplied no evidence of this. Since the applicant has maintained that the opposite is the case, the Council should have furnished evidence of its assertions, which however it has failed to do. In this respect the same principles must apply as those laid down in the *Al-Jubail* judgment with respect to the burden of proof regarding communications necessary for the protection of the right to a fair hearing. [73]

112. In its rejoinder the Council also — like the Commission at the hearing — contended that the reduction in question of the dumping margin was made 'on the basis of written comments by the applicant'. 'As a matter of fact', the Commission decided to ignore the compensatory agreement between the applicant and Considar and thus based the export price on the sales to Considar. [74] The terms of those sales were of course perfectly well known to the applicant.

113. This argument in defence cannot succeed in regard to Article 190 of the Treaty. In the first place, neither the terms used by the Council as described above nor anything else in the pleadings allows the conclusion that the disputed difference in the dumping

73 See paragraph 20 of the *Al Jubail* judgment.

74 See footnote 47, above, and the text relating to it

margins is based *solely on the compensatory agreement originally presumed. That this is not the case is further suggested by the fact that the original calculation of the normal value still left out of account in the production costs for the month of August 1989* [75] *whereas those costs were taken into account in the final calculation.* [76] *Still less justified, secondly, is the conclusion that the applicant was already informed of the final calculation when the regulation was issued.*

114. Proof of information sufficient to satisfy Article 190 of the Treaty would have been provided, however, had it been established that, had it exercised reasonable diligence, the applicant could have learnt how the 12.2% margin came to be calculated. [77] Such proof could possibly have been provided on the basis of a comparison of the original calculation, the applicant's comments on it and the final calculation. In view of the applicant's rather confused argument in relation to this plea, I consider it appropriate to give the Council, if need be, the opportunity to furnish this proof belatedly and, after the applicant has given its views, to re-open the oral procedure. [78]

115. I say 'if need be' deliberately, for in my opinion the decision in this case does not turn on the plea now under consideration, since the application must already succeed on the basis of the first two pleas in law.

116. In the result, I propose that the Court should

— annul Article 1 of Regulation No 1115/91 in so far as it concerns the applicant;

— order the Council to pay the costs pursuant to Article 69(2) of the Rules of Procedure, save the costs of the Commission which should be borne by the latter pursuant to Article 69(4).

75 — See Annex III to the defence.

76 — See point 95 above.

77 — See, in a similar case concerning Article 15 of the ECSC Treaty, the judgment in Joined Cases 275/80 and 24/81 *Krupp* v *Commission* [1981] ECR 2489, paragraph 13.

78 — See point 109, above.