REPORT FOR THE HEARING
delivered in Case C-121/86 *

I — Facts and Procedure

A — *Background to the dispute*

In June 1982 the applicants, whose total production at the time constituted the whole of Community production of dead-burned natural magnesite, lodged with the Commission, in accordance with the provisions of Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1), a complaint about the dumping of imports of that product originating in China and North Korea.

Considering that that complaint might contain sufficient evidence as to the existence of dumping and of injury caused thereby, the Commission published in the *Official Journal of the European Communities* of 29.6.1982 a notice of initiation of an anti-dumping procedure concerning imports of dead-burned natural magnesite falling under subheading ex 25.19-51 of the Nimexe code and originating in China and North Korea (Official Journal 1982, C 162, p. 3 and C 192, p. 7) and initiated the necessary investigation in that connection.

The Commission's preliminary investigation covered the period from 1 July 1981 to 31 June 1982 and was confined to dead-burned natural magnesite with an MgO content of between 85 and 92%. It succeeded in establishing the similarity of the Community products with the imported products and in disclosing the existence of dumping whose average margin, that is to say the average difference between the export prices to the Community and the normal value of the product in question amounted to about 114% for products originating in the People's Republic of China and about 85% in the case of products originating in North Korea. Since those countries do not have a market economy, the normal value was calculated on the basis of the price of the product manufactured in Spain and placed on the Spanish market.

As regards the existence of injury occasioned by the dumped imports, the information gathered by the Commission showed in particular a substantial diminution in the market share of Greek producers of dead-burned natural magnesite in the Community and an increase in the corresponding market share of Chinese and North Korean producers, a 47% fall in Community sales and a fall in the average rate of utilization of production capacities from 54% in 1979 to 22% in 1981.

Considering that those findings disclosed evidence of injury, the Commission also examined whether that injury stemmed from other factors, such as a reduction in

* Language of the case: Greek.

consumption within the Community, and it concluded that the dumped imports of dead-burned natural magnesite originating in China and North Korea were to be regarded as causing by themselves significant injury to the Community industry in question.

In order to prevent further injury from being caused during the course of the investigation, the Commission adopted, on 22 December 1982, Regulation No 3542/82 imposing a provisional anti-dumping duty on imports of dead-burned natural magnesite having an MgO content of between 85 and 92% and originating in the People's Republic of China and in North Korea (Official Journal 1982, L 371, p. 25). The amount of the duty, which was to apply for a period of four months as from 1 January 1983, corresponded to the difference between ECU 169 and the price per tonne net, free at Community frontier. That amount was less than the dumping margins which had been provisionally established but was adequate, in the Commission's view, to remove the injury caused to Community producers.

That provisional anti-dumping duty was extended by Council Regulation No 991/83 of 25 April 1983 (Official Journal 1983, L 110, p. 27), for a period of two months with effect from 1 May 1983.

After imposing the provisional duty, the Commission appointed two experts in order to study the comparability of the products in question originating in China, North Korea, Spain and Greece, as well as the claim made by the Chinese producers that they enjoyed an exceptional natural advantage from the point of view of competition in relation to Spanish producers of natural magnesite whose prices had been taken by the Commission as the basis for fixing the normal value. This exceptional procedure was decided upon in view of the major importance of the problem and, in particular, in view of the absolutely conflicting opinions of the parties, the different qualities of the products, the numerous applications and the highly technical nature of the products themselves.

As regards the comparability of the products, the Commission concluded, on the basis of all the information available and in spite of the conflicting opinions of the experts, that dead-burned natural magnesite products having an MgO content of between 85 and 92% originating in China, North Korea, Spain and Greece, could be regarded as 'like products' within the meaning of Article 2(12) of Regulation No 3017/79, since they had characteristics of such close resemblance that they could be used for all existing applications.

As to the alleged major natural advantage which Chinese producers were said to enjoy as a result of the purity of their product, the Commission, accepting the experts' report, concluded that, even if that advantage did actually exist and was not offset by relative disadvantages, it was not possible to see how that advantage should be taken into consideration in determining the normal value if those same factors were taken into consideration in a country with a market economy, namely Spain, in order to calculate the normal value. Consequently, it declined to adjust the dumping margin in order to take account of the alleged exceptional natural advantage from a competitive point of view.

As regards injury, the Commission altered its provisional conclusions, after noting that there had been a 15% increase in imports between 1979 and 1980, a 3% reduction in 1981 and a fresh increase of 17% in 1982, together with an increase in the market share of products imported from China and North Korea from 26% in 1979 to 37% in 1982, whereas at the same time the market share of the Community industry fell from 48% in 1978 to 25% in 1982.

On the basis of all those considerations and having regard to the seriousness of the injury and the Community interest the Commission on 9 June 1983 proposed to the Council the adoption of a regulation imposing a definitive anti-dumping duty on imports of natural dead-burned magnesite originating in China and North Korea, the amount of such duty to be equal to the difference between the price per tonne net, free at Community frontier, of the product before duty and ECU 152 for the products in question having an MgO content of between 85 and 90%, and ECU 163 for products having an MgO content of between 90 and 92%.

However, the Council, after examining in greater detail the question of the comparability of the products in question, decided not to adopt the regulation proposed by the Commission imposing a definitive anti-dumping duty and, consequently, the provisional duties expired on 30 June 1983.

On 19 April 1985, the complainant undertakings transmitted to the Commission fresh evidence of dumping and of injury occasioned by Chinese imports of dead-burned natural magnesite. On the basis of that information, the Commission published in the Official Journal of 19 June 1985 a notice relating to the continuation of the investigation into Chinese and North Korean imports (Official Journal 1985, C 149, p. 2), this time based on Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984, L 201, p. 1), which had replaced Council Regulation No 3017/79.

At that stage, the Greek producers were complaining only about Chinese imports, since in their opinion the market share controlled by the North Koreans had decreased and their prices had increased. However, the Commission pointed out that it had received no information of an apparent total alteration of the marketing strategy of North Korean importers and, since the investigation into North Korean imports was still under way, it considered that it was appropriate to pursue that investigation as well.

The Chinese producers had stated that they were prepared to adhere to a minimum price in order to achieve a solution to the dispute, but the Commission was unable to accept the undertakings offered by the Chinese exporters in view of objections raised by the Member States. Moreover, it considered that it was not opportune, at that stage, to submit to the Council a proposal to accept the undertakings and terminate the anti-dumping procedure.

The Commission therefore continued its investigations and, following an inquiry carried out during the summer of 1985 after comparing statistical information in its possession for the years 1981-84, it found in

particular that imports into the Community from the countries in question had diminished from 82 500 tonnes in 1981 to 61 000 tonnes in 1984; that Community production had increased by 110% during the same period and that the market share held by Community producers had gone up from 15.4% in 1981 to 19.4% in 1984, whereas the market share held by products originating in the People's Republic of China and North Korea had gone down from 30.4% in 1981 to 19.7% in 1984.

Those findings led the Commission to take the view that the Community industry was no longer suffering serious injury and, consequently, it considered it would serve no purpose to continue the investigation into product comparability or the allegation of dumping, and submitted to the Council a proposal for terminating the anti-dumping procedure relating to imports into the Community of dead-burned natural magnesite originating in the People's Republic of China and North Korea.

The Council adopted that proposal and, on 6 March 1986, adopted under Article 9 of the abovementioned Regulation No 2176/84 Decision 86/59 terminating the anti-dumping proceeding concerning those imports, and it is that decision which is attacked in this action.

B — *Procedure before the Court*

1. This application was lodged at the Court Registry on 23 May 1986. It was originally directed against the Council and the Commission.

2. By an application lodged at the Court Registry on 23 May 1986, the applicants applied under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure for interim relief in the form of an order that the defendants should produce all the documents relating to Council Decision 86/59 and that their agents should declare under oath that they have no other documents. By an order of the President of the Court dated 27 June 1986, that application was dismissed, and the applicants were ordered to pay the costs.

3. By a pleading lodged at the Court Registry on 15 September 1986, the Commission raised a preliminary objection of inadmissibility under Article 91(1) of the Rules of Procedure claiming that the application should be declared inadmissible in so far as it was directed against it, on the ground that the contested decision emanated from the Council.

By an order of 11 March 1987 the Court decided to dismiss the application as inadmissible in so far as it was directed against the Commission and ordered the applicants to pay the costs relating to the objection of inadmissibility.

4. By an application lodged at the Court Registry on 30 January 1987, the applicants made an application under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure for interim relief in which they sought principally an interim injunction requiring the Commission to complete the non-confidential file on the investigation by 31 December 1986. Failing that, the applicants sought in their application an order that:

(i) they should be permitted to consult the file and to refute any new and hitherto unknown item which may be produced;

(ii) no account should be taken of the fresh evidence which the Commission had stated to be contained in the non-confidential file and that, consequently, the only evidence to be taken into consideration would be the non-confidential parts of the file which had been available to the applicants prior to 31 December 1986 and are annexed to their reply.

By an order of the President of the Court dated 20 February 1987, the application for interim relief was dismissed.

5. Upon hearing the report of the Judge-Rappporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It did however ask the parties certain questions which were answered within the prescribed periods.

II — Conclusions of the parties

The applicants claim that the Court should declare the contested decision void and order the Council to pay the costs.

The Council claims that the Court should dismiss the application as unfounded and order the applicants to pay the costs.

III — Submissions and arguments of the parties

The applicants argue, first of all, that they are legally entitled to bring this action, since the decision in question is of direct and individual concern to them. The Council does not challenge the admissibility of the application in so far as it is brought against it.

On the substance of the case, the submissions made by the applicants in support of their application, whose merits are contested by the Council, are set out below.

A — *Failure to provide a statement of reasons*

The applicants consider that the contested decision does not contain a statement of the reasons on which it is based since, on the one hand, it ignores the existence of dumping and, on the other, it bases its recitals solely on comparative factors which do not prove the absence of injury but only that the situation had improved in relation to the situation which the Commission had previously found to prevail. That improvement is entirely refuted, in the applicant's view, by developments during 1985 and by the even more unfavourable trend in 1986. Moreover, the applicants assert that the information used by the Commission is inaccurate and runs counter both to official statistics (those of the Federal Republic of Germany for March 1986 are cited by way of example) and to the Commission's earlier decisions, proposals and findings. In that connection, they also consider that, by declining to accept the undertakings offered by the Chinese exporters in view of objections raised by the Member States, the Commission manifestly acknowledged the existence of injury until 1984, and that it related to a significant quantity.

The Council considers that the reasons contained in the decision in question which amount to not less than 12 recitals, satisfy the requirements laid down by the Court of Justice as regards statements of reasons for instruments adopted by the institutions (see the judgment of 17 September 1985 in Joined Cases 25 and 26/84 *Ford* v *Commission* [1985] ECR 2725). In the Council's view, the three conditions laid down in Article 12 of Regulation No 2176/84 (hereinafter referred to as the 'basic regulation'), namely a definitive finding of dumping, the existence of injury and the need to act in the Community interest are cumulative and must therefore all be fulfilled in order to enable anti-dumping duties to be imposed. The main reason for the termination of the anti-dumping proceeding in this case is constituted by the fact that the Commission, following the inquiry which it conducted, arrived at the conclusion that imports of dead-burned natural magnesite originating in China and North Korea were no longer causing serious injury to Community production. In addition to that is the fact that, should there be a current threat of injury attributable to dumped imports, a fresh complaint could be made to the Commission in accordance with Article 5 of the basic regulation.

B — *Infringement of essential requirements*

The applicants consider that the essential procedural requirements imposed by the basic regulation were infringed, in particular on the ground that the decision in question was not the subject of discussion and was not referred to the Anti-dumping Advisory Committee provided for in Article 6(1) of the aforementioned regulation. They add that, even though consultation in writing did take place, the essential formal requirements were infringed since, according to Article 6(3) of the basic regulation consultation may be in writing only in case of need.

The Council, without expressing an opinion on whether consultation of the committee constitutes an essential formal requirement within the meaning of Article 173 of the Treaty, confirms that that consultation did take place in writing and claims that the committee is purely consultative in nature. As far as recourse to written procedure for consultation of the committee is concerned, the Council observes that no request was made for an oral consultation as provided for in Article 6(3) of the basic regulation.

At the hearing on 16 May 1989 the applicants withdrew their submissions relating to the consultation of the Anti-dumping Committee.

C — *Infringement of rules of law contained in the basic regulation*

1. The applicants maintain that the Commission failed to fulfil the express obligation imposed on it by Article 7(1)(c) of the basic regulation, according to which the investigation of dumping is to cover a period of not less than six months immediately prior to the initiation of the proceeding, regard being had to the fact that the Commission initiated the proceeding on 19 June 1985 and confined its attention to the results for 1984 and failed to take account of factors relevant to 1985 which are decisive because they prove the existence of very significant injury in that year and the threat of yet greater injury.

In that connection, the Council submits that the applicants are confusing the reference period for the existence of dumping and the

period covered by the investigation of the evaluation of the injury suffered by the Community industry as a result of the dumping. Since the basic regulation in no way requires the period over which injury is assessed to be limited to the reference period relating to dumping, the Commission follows the practice of carrying out its investigation as to injury over a period of several years.

2. In the applicants' view, however, the fact that Article 7(1)(c) of the basic regulation makes no mention of an investigation into injury in no way means that the period of six months prior to the initiation of the proceeding is not applicable to the investigation into injury. That article does not expressly mention injury because the investigation in relation thereto may cover not only the period in question but also, at the same time, a period longer than six months. In any event, regard being had to the Commission's previous practice and the questionnaire addressed to the parties concerned, in which they were requested to give information relating to a period of five years, the decision at issue is unlawful in so far as it took into consideration only factors relating to the period 1981-84, and it infringed the principle that dumping and injury must be examined at the same time, which is a fundamental principle not only of Community law but also of the GATT.

The Council observes in that connection that the requirement that the existence of a dumping practice and of injury caused thereby should be examined at the same time was introduced in the Anti-dumping Code of 1968, and that that provision was aimed principally at the United States because American legislation at the time provided for the possibility of requiring a banker's guarantee on the importation of products which at first sight appeared to be dumped, even prior to establishing the existence of injury, but that possibility does not exist in Community law.

3. The applicants consider, moreover, that, in accordance with Article 7(9)(a) of the basic regulation, the anti-dumping proceeding in question should have been concluded in one manner or another in June 1983, as the Commission had proposed to the Council, and initiated either as a matter of course or at the request of the applicants, or at all events by order of the Council. In the applicant's view, even if the adverb 'normally' appearing in that provision does not mean a precise period of one year, a proceeding which remains open for four and a half years runs counter not only to Article 7(9) of the basic regulation but also to the principles of legal certainty, the protection of legitimate expectations and the expeditious disposal of litigation.

In the Council's view, the fact that the proceeding was not concluded 'in one manner or another' in 1983 cannot be relied on against a subsequent decision concluding the proceeding, such as the contested decision. The Council also observes that the complex nature of the case in fact necessitated a lengthy proceeding, which is not contrary to the basic regulation according to which the duration of one year is merely the normal period for the proceeding.

4. Finally, the applicants challenge the fact that, in spite of their fresh request for the proceeding to be initiated anew in 1985 solely as regards the People's Republic of China, the Commission preferred to continue the pending proceeding regarding China and North Korea together, whilst endeavouring to take account of the situation of the latter country in such a way

as to present the situation of importers in a favourable light and to conclude the proceeding.

The Council recalls, however, that the proceeding initiated in 1982 concerning North Korea had not yet been concluded and it was therefore natural that the imports from that country should be taken into account in order to determine any injury. Moreover, imports originating in China underwent between 1981 and 1984 a greater reduction than imports originating in North Korea.

D — *Misuse of powers*

The applicants argue that the adoption of the decision at issue was attended by a misuse of powers in so far as the limits of the Commission's discretionary power were infringed by the use of the provisions of the basic regulation in a manner which was unlawful and contrary to the objective defined by the Community legislature. The Commission allowed the case to remain pending for nearly five years in breach of the letter and the spirit of the regulation in order to find an appropriate pretext for terminating the proceeding. On the other hand, it is clear from the procedure prior to the adoption of the decision that the Commission 'bargained' in this respect with the parties concerned (points 7 to 9 of the application). In their reply, the applicants also allege a misuse of powers by the Council, inasmuch as it intervened in the examination of the substance of the question of the comparability of the products in June 1983, which is contrary to the objectives defined by the Community legislature.

The Council, in its defence, considers that all the arguments in the application on this submission are entirely unsupported by evidence and relate to acts of the Commission. As far as a misuse of powers by the Council is concerned, the Council in its rejoinder relies on Article 42(2) of the Rules of Procedure, pursuant to which no fresh issues may be raised in the course of proceedings, so that that submission must also be rejected.

E — *Arguments developed on the basis of the information contained in the non-confidential files of the Commission and the Commission's answer in its rejoinder in Case C-122/86*

In their reply, the applicants assert that they obtained knowledge, at the end of December 1986, of certain information contained in the Commission's non-confidential files to corroborate the submissions on which their application was based. According to the applicant undertakings, that information enables the following conclusions to be drawn:

(a) first, the applicants observe that there is no data relating to imports of natural magnesite originating in North Korea as from 1982 or relating to imports of magnesite originating in China as from the second quarter of 1983, or at least the Commission's non-confidential files do not contain the relevant questionnaires containing those data. If such data were supplied after the reply had been lodged, the applicants request the Court not to take them into account since that would infringe the principle of equality of arms between the parties;

(b) the applicants also allege that there are considerable differences in the figures quoted in the various documents of the

Community institutions. In that connection, they stress that in Commission Regulation No 3542/82 total imports of magnesite originating in China amounted to 61 949 tonnes for 1981, whereas according to a Commission working document of 13 November 1985 those imports were estimated for the same year at only 54 949 tonnes. Furthermore, a comparison of Commission Regulation No 3542/82 with Council Decision 86/59 reveals a significant difference as to the market share held by Community producers in 1981;

(c) the applicants go on to argue that the finding relating to the profitability of Community producers stated in Decision 86/59 is not supported by a statement of reasons and, in support of their argument, they cite the figures contained in Regulation No 3542/82;

(d) the applicants also allege that the Commission has made an error in its calculation by failing to take account of quantities of magnesite originating in North Korea measuring between 0 and 3 mm;

(e) the applicants also assert that the Commission, in calculating the market share in respect of imports of natural magnesite originating in China and North Korea, used a different method from that adopted in order to evaluate market share held by Community producers. In the latter case, the Commission took account of all quantities of natural dead-burned magnesite produced in the Community, whatever their degree of purity, whereas imports originating in China and North Korea were only of natural dead-burned magnesite whose MgO content did not exceed 92%;

(f) finally, the applicants observe that, whereas the market share held by Community producers, Chinese and North Koreans reached 62% in 1982 according to the proposal for a decision submitted by the Commission to the Council on 9 June 1983, it reached only 39.1% in 1984 according to Council Decision 86/59. This difference of 20 percentage points in respect of the whole of that market in barely two years demonstrates, in the applicants' view, that the Commission has completely altered its method of calculation.

The Council, in its rejoinder, asserts that it is merely replying to the specific arguments of fact and law which relate to it. As to the arguments based on the information contained in the Commission's non-confidential files, the Council observes merely that that part of the reply is reproduced in the reply of the applicant undertakings in Case C-122/86.

It should be observed in that connection that, in its rejoinder in Case C-122/86, the Commission replies to each of the observations relating to the non-confidential files and developed by the applicant undertakings both in their reply in the present case and in their reply in Case C-122/86.

G. C. Rodríguez Iglesias
Judge-Rapporteur