JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
8 July 1998 *

In Case T-232/95,

Committee of European Copier Manufacturers (Cecom), an association under German law, established in Cologne (Germany), represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Marc Lucius, 6 Rue Michel Welter,

applicant,

v

Council of the European Union, represented by Antonio Tanca, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director General of Legal Affairs at the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for annulment of the second paragraph of Article 3 of Council Regulation (EC) No 2380/95 of 2 October 1995 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1995 L 244, p. 1),

* Language of the case: German.

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

composed of: B. Vesterdorf, President, C. W. Bellamy and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 November 1997,

gives the following

Judgment

Facts

1 Following a complaint lodged in July 1985 by the Committee of European Copier Manufacturers ('Cecom'), the Commission adopted on 21 August 1986 Regulation (EEC) No 2640/86 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1986 L 239, p. 5).

2 On 23 February 1987, the Council adopted Regulation (EEC) No 535/87 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12).

3 Following publication in the *Official Journal of the European Communities* of 27 August 1991 (OJ 1991 C 222, p. 2) of notice of the impending expiry of certain anti-dumping measures on imports of plain paper photocopiers originating in Japan, an application was made to the Commission by Cecom for a review of those measures in accordance with Article 15(3) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the 1988 basic regulation').

4 By a notice published in the *Official Journal of the European Communities* of 11 February 1992 (OJ 1992 C 33, p. 4), the Commission gave notice of its intention to carry out a review of the anti-dumping duties introduced by Regulation No 535/87.

5 On 16 July 1992 Cecom requested that the review be extended to plain paper photocopiers having a reproduction capacity of more than 75 photocopies per minute on A4 paper, since such photocopiers were not subject to the anti-dumping duty introduced by Regulation No 535/87 (Article 1(4), first indent, of that regulation).

6 By a notice published in the *Official Journal of the European Communities* of 14 August 1992 (OJ 1992 C 207, p. 16), the Commission announced the initiation of a review under Articles 14 and 15 of the 1988 basic regulation. In accordance with Article 15(3) of that regulation, the anti-dumping measures remained in force pending the outcome of the review.

7 On the basis of that review, which covered the period from 1 July 1991 to 30 June 1992, and upon a proposal by the Commission submitted after consultation with the Consultative Committee, the Council adopted Regulation (EC) No 2380/95 of 2 October 1995 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1995 L 244, p. 1). The anti-dumping duty

imposed by Regulation No 2380/95 also applies to plain paper photocopiers having a reproduction capacity of more than 75 photocopies per minute on A4 paper.

8 In accordance with the second paragraph of Article 3 thereof, Regulation No 2380/95 'shall expire two years after its entry into force, save that should any review of the measures adopted by this regulation be pending on that date, it shall remain in force until that review is concluded'.

9 In that connection, paragraph 103 of the recitals in the preamble to the regulation states that:

'With respect to the period of operation of the measures, the Council noted that, due to the unusual complexity of a number of aspects of this case, significant delays were incurred in its treatment. First, nearly six months elapsed between the notice of the Commission's intention to carry out a review of the measures and the actual initiation of the review. Then, the review investigation itself, which was initiated on 14 August 1992, took more than three years to complete. In accordance with Article 15(3) of [the 1988 basic regulation], the original anti-dumping duty on PPC imports from Japan remained in force during this entire period. The Council therefore considers it reasonable that, in these exceptional circumstances, the period of operation of the new measures should be limited, to expire two years after their entry into force, subject to the applicable provisions on reviews.'

Procedure and forms of order sought by the parties

10 It was in those circumstances that the applicant brought this action by an application lodged at the Registry of the Court of First instance on 19 December 1995.

11 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

12 The parties were heard and gave replies to the questions posed by the Court at the hearing on 25 November 1997.

13 The hearing took place before the First Chamber, Extended Composition, comprising A. Saggio, President, B. Vesterdorf, C. W. Bellamy, R. M. Moura Ramos and J. Pirrung, Judges. Following the appointment of Mr Saggio on 4 March 1998 as an Advocate General of the Court of Justice, this judgment was deliberated upon by the three judges whose signatures it bears, in accordance with Article 32(1) of the Rules of Procedure.

14 The applicant claims that the Court should:

— order the Commission and the Council to produce the minutes of the Anti-Dumping Committee and of the Council concerning the adoption of Regulation No 2380/95;

— annul the second paragraph of Article 3 of Regulation No 2380/95;

— in so far as necessary, order the continuation in force of the anti-dumping duty introduced by Article 1 of Regulation No 2380/95 until the adoption by the competent institutions of the measures required for compliance with the judgment of the Court of First Instance;

— order the Council to pay the costs.

15 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The claim for annulment of the second paragraph of Article 3 of Regulation No 2380/95

The plea that the Council does not have power to adopt anti-dumping measures for a period of less than five years

Arguments of the parties

16 This plea may be divided into two limbs.

17 In the first limb the applicant pleads infringement of Article 15(1) of the 1988 basic regulation. The wording of that provision is clear and unconditional: '... anti-dumping ... duties ... shall lapse after five years from the date on which they entered into force or were last modified or confirmed'. It thus determines the period of operation of anti-dumping measures and the commencement of that period, including where anti-dumping duties are confirmed in the context of a review. Consequently, the limitation to two years of the period of operation of the anti-dumping duties provided for in the second paragraph of Article 3 of Regulation No 2380/95 is unlawful because the Council had no power to derogate from

the period of operation of five years applicable on amending or confirming anti-dumping measures under review procedures.

18 Confirmation of that interpretation of Article 15(1) of the 1988 basic regulation is to be found in an analysis of the background to and the objectives pursued by that provision. To the extent to which it is permissible to refer to the historical background in order to interpret that unequivocal provision, the applicant recalls that the earlier agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade ('the earlier anti-dumping code'), approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1), lays down no fixed period for the operation of anti-dumping duties. However, Article 9 thereof provides that 'an anti-dumping duty shall remain in force only as long as, and to the extent, necessary to counteract dumping which is causing injury'. Accordingly, the Community legislature must have deemed five years to be the period necessary to eliminate the harmful effects of dumping and to re-establish normal conditions of competition. That is borne out by the 28th recital in the preamble to the 1988 basic regulation, which states that 'it is necessary to provide that, after a certain period of time, anti-dumping and countervailing measures will lapse unless the need for their continued existence can be shown'.

19 The applicant infers from that that Article 15(1) of the 1988 basic regulation lays down both a minimum and a maximum period of duration for anti-dumping measures. As regards the minimum period, that is intended to afford legal protection to the Community industry which has already, in principle, suffered serious injury even before anti-dumping measures were imposed. The same period of protection of five years is also necessary where it appears, after expiry of the period, that importers have not abandoned their dumping practices and the injury persists.

20 Moreover, the Council always used to fix the duration of anti-dumping measures at five years in accordance with Article 15(1) of the 1988 basic regulation, even

where they were confirmed after a protracted review procedure (see, in particular, the regulation which was the subject of Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381).

21 The provision in Article 15(3) of the 1988 basic regulation that the initial anti-dumping duty is to remain in force pending the outcome of the review creates a risk which, according to the express intention of the Community legislature, must be assumed by the exporters responsible for dumping. The same is true, under Article 15(4) of the 1988 basic regulation, as regards review procedures already in progress on expiry of the initial period of application of anti-dumping measures. Therefore, the period of operation of an anti-dumping measure cannot, contrary to what is stated at paragraph 103 of the recitals in the preamble to Regulation No 2380/95, depend on the duration of the review procedure, because that is dependent on a number of factors which are beyond the control of the Community industry.

22 Finally, the 'exceptional circumstances' relied on by the Council can in no way justify the limitation on the period of operation of anti-dumping measures for photocopiers having a reproduction capacity of more than 75 copies per minute because for those photocopiers the anti-dumping duty was introduced for the first time by Regulation No 2380/95.

23 In the second limb of the plea, the applicant claims that the reduction in the period of operation of the anti-dumping measures violates the legal arrangements introduced by the basic regulations on anti-dumping and, in particular, the distribution of the rights and duties as between the Community industry and undertakings practising dumping. It relies on Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from

countries not members of the European Community (OJ 1994 L 349, p. 1, 'the 1994 basic regulation'), stressing at the same time that earlier basic regulations contained analogous provisions.

24 The applicant then sets out in detail the procedural channels through which the Community industry may exercise its rights by lodging a complaint (Article 5 of the 1994 basic regulation) or by applying for a review (Article 11 of the 1994 basic regulation). The complaint and/or the application for review must contain evidence sufficient to justify the initiation of proceedings; the initiative and the burden of proof thus fall on the Community industry. However, Article 11(2) of the 1994 basic regulation makes it clear that once definitive anti-dumping duties have been imposed the Community industry is protected against dumping for five years, unless a review is initiated.

25 During the five years from the date of entry into force of the definitive anti-dumping measures, the initiative and the burden of proof fall, under Article 11(3) of the 1994 basic regulation, on the undertakings carrying out the dumping.

26 The applicant considers that by reducing the period of operation of the anti-dumping measures to two years the Council upset the balance established by the basic regulation between the rights and obligations of the Community industry and the undertakings practising dumping: since the Community industry is obliged to seek a fresh review after a year or so, reducing the period of operation of the anti-dumping measures undermines the legal protection of the European industry and unfairly reverses the burden of seeking review and the burden of proof, to the detriment of that industry.

27 The Council challenges the applicant's interpretation of Article 15(1) of the 1988 basic regulation. Since the provision clearly states that the anti-dumping duties are to lapse not later than five years afterwards, it cannot be interpreted as laying down a minimum period of application of anti-dumping duties.

28 That interpretation is confirmed by the background to the provision. Before the adoption of Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1, 'the 1984 basic regulation'), the basic regulations contained no specific provisions concerning the duration of anti-dumping measures, which meant that the Council was entitled to fix such period as it deemed fit. Under that earlier system, the Council did not as a rule limit the duration of anti-dumping measures, which therefore remained in force until exporters sought a review. None the less, certain exporters omitted to seek a review, or had no interest in doing so, for example because they no longer exported to the Community. For that reason Article 15(1) of the 1984 basic regulation introduced for the first time a provision corresponding to Article 15(1) of the 1988 basic regulation. According to the 34th recital in the preamble to the 1984 basic regulation, which corresponds to the 28th recital in the preamble to the 1988 basic regulation, it was inspired by the aim 'to provide that, after a certain period of time, anti-dumping and countervailing measures will lapse unless the need for their continued existence can be shown'.

29 The Council considers that for reasons of legal certainty, and in order to secure a minimum level of protection for the Community industry, it is necessary to provide systematically for anti-dumping measures adopted for the first time to operate for five years, so that the Community industry is protected for a period of at least that duration, normally extended by the period of operation of the provisional anti-dumping measures. The same considerations do not apply on the initiation of a review since in that case the Community industry has already been protected for a certain period of time. Moreover, since the initial anti-dumping measures remain in force during the review procedure, the Community industry is also protected during the whole of that procedure. In the present case, owing to the introduction

of anti-dumping duties by Regulation No 2380/95, the anti-dumping duties introduced by Regulation No 535/87 were in fact extended by five years and eight months.

30 The earlier practice followed by the Community institutions in fixing the period of application of the anti-dumping measures adopted following a review cannot, contrary to the applicant's assertions, be deemed binding on the Council.

31 Finally, the fact that Regulation No 2380/95 imposed an anti-dumping duty for the first time on plain paper photocopiers having a reproduction capacity of more than 75 copies per minute on A4 paper likewise does not preclude a period of operation of less than five years (see the 15th recital in the preamble to the regulation).

32 As regards the second limb of the plea, the Council contends that fixing the period of operation of the anti-dumping duty imposed by Regulation No 2380/95 at two years does not, contrary to the applicant's assertions, create a situation in which the Japanese exporters and the Community industry are not competing on a level playing-field.

33 In fact, as regards the situation of the Community industry, the latter has enjoyed additional protection by virtue of the fact that the anti-dumping duty remained in force for the whole of the review period.

34 For the Japanese exporters, on the other hand, the maintenance in force during the review period of the anti-dumping duty imposed by Regulation No 535/87 constituted an appreciable drawback because they first had to await the outcome of the review and then allow an additional year to elapse before themselves being able to apply for a review.

Findings of the Court

35 As a preliminary matter, although Regulation No 2380/95 was adopted after the entry into force on 1 January 1995 of the 1994 basic regulation it is clear from Article 24 of the latter regulation that the 1988 basic regulation continues to apply in regard to reviews which were initiated before 1 September 1994. Since Regulation No 2380/95 was adopted following a review initiated in August 1992, its lawfulness must be assessed in the light of the provisions of the 1988 basic regulation.

36 Article 15(1) of the 1988 basic regulation provides that '... anti-dumping ... duties shall lapse after five years from the date on which they entered into force or were last modified or confirmed'.

37 On a literal construction of that provision it is clear that, by providing that the anti-dumping duties are to 'lapse' after five years, it is fixing the time after which those duties are to expire automatically and not a mandatory minimum period during which they are to apply.

38 The literal interpretation of that provision is not put into question by an analysis of its historical origin, contrary to the arguments put forward in that connection by the applicant.

39 A provision equivalent to Article 15(1) of the 1988 basic regulation was incorporated for the first time in the anti-dumping rules by Article 15(1) of the 1984 basic regulation. The 34th recital in the preamble to the latter regulation, which is identical to the 28th recital in the preamble to the 1988 basic regulation, in stating that 'it is necessary to provide that, after a certain period of time, anti-dumping and countervailing measures will lapse unless the need for their continued existence can be shown', in fact does no more than confirm that that provision fixes the time after which anti-dumping duties are to expire automatically.

40 Moreover, the earlier anti-dumping code, which was in force at the time of the adoption of the 1984 basic regulation, provided in Article 9 that 'an anti-dumping duty shall remain in force only as long as, and to the extent, necessary to counteract dumping which is causing injury'. However, according to its wording that provision refers only to the maximum period of application of the anti-dumping duties.

41 It is now necessary to consider whether, as the applicant maintains, it may be inferred from the structure and purpose of the 1988 basic regulation that Article 15(1) thereof must be interpreted as meaning that it imposes a mandatory minimum period for which anti-dumping duties are to apply.

42 In that connection it should be noted, first, that Article 15(2) to (4) of the 1988 basic regulation refers by implication to the five-year period provided for in Article 15(1). Article 15(4), for instance, provides:

'Where a review of a measure under Article 14 is in progress at the end of the relevant five-year period, the measure shall remain in force pending the outcome of such review. A notice to this effect shall be published in the *Official Journal of the European Communities* before the end of the relevant five-year period.'

43 However, even though, as those references show, Article 15(2) to (4) of the 1998 basic regulation is based on the assumption that the five-year period constitutes the normal period of operation for definitive anti-dumping duties, it cannot be interpreted as meaning that that period is to be regarded as a minimum mandatory period for which the definitive anti-dumping duties are to apply, as that would run counter to the literal construction of Article 15(1) of the regulation.

44 As regards the relationship established in the basic regulation between the rights and obligations of the undertakings practising dumping, on the one hand, and the Community industry, on the other, it should be borne in mind that the Council itself maintained that it was necessary to provide systematically for definitive anti-dumping duties imposed for the first time to operate for five years, in order to ensure that the Community industry was adequately protected.

45 There is no reason to believe, however, as the applicant maintains in the second limb of the plea, that the rules laid down by the basic regulation preclude the Council from fixing, in specific cases and on objective grounds, a period of application of less than five years for a regulation imposing definitive anti-dumping duties, at least where those duties were adopted following a procedure for the review of the measures initially adopted. In fact, the Council's power under the basic regulation to adopt anti-dumping measures must be deemed to include the implied power to restrict the period of application of those measures if such a restriction is compatible with the aims of the regulation and the balancing of the rights and obligations of the parties concerned under the regulation.

46 In light of those considerations, Article 15(1) of the 1988 basic regulation must be construed as allowing the Council a discretionary power to fix at less than five

years the period of application of definitive anti-dumping duties adopted following a procedure for the review of the measures initially adopted if, owing to special circumstances, such a limitation best serves to protect the differing interests of the parties to the procedure and maintain the equilibrium between those interests which the basic regulation seeks to establish.

47 It should be noted that the fact that in other cases prior to the adoption of Regulation No 2380/95 the Council did not exercise its discretion to fix at less than five years the period of application of definitive anti-dumping duties adopted following a procedure for the review of the measures initially adopted is irrelevant, especially as, in the Council's own words, it is a discretionary power which can be exercised only in special circumstances.

48 Inasmuch as the applicant's arguments seek to show that the Council was not entitled *in concreto* to limit to two years the period during which the anti-dumping duties imposed by Regulation No 2380/95 would apply, they fall to be examined in connection with its other pleas. Since this plea concerns the Council's lack of power in principle to fix the period during which anti-dumping duties are to apply at less than five years, those arguments must be regarded as irrelevant in this context.

49 In the light of those considerations the plea must be rejected.

Pleas alleging a manifest error of assessment and infringement of Article 190 of the Treaty

Arguments of the parties

50 The applicant argues that even if — *quod non* — the Council enjoyed a discretionary power to determine the period during which anti-dumping measures are to apply, it made a manifest error of assessment in limiting the period during which Regulation No 2380/95 was to apply.

51 The review could not constitute an 'exceptional circumstance' justifying a reduction in the period of operation of the anti-dumping measure. In view of the complexity of the procedure concerning anti-dumping duties on photocopiers and the investigations which the Commission needed to carry out, a review lasting three years cannot be regarded as exceptional. Moreover, it is of no significance. Whether an investigation lasting for over three years is unusual or not is irrelevant in any event, because what matters is that the duration of the review is ultimately determined by the Community institutions.

52 In claiming that the Community producers are protected throughout the review procedure, the Council is disregarding the legal nature of that procedure. When Article 15(3) of the 1988 basic regulation provides that pending the outcome of the review measures are to remain in force, their continuance will depend in fact on the outcome of the review: if, for example, it leads to a finding that the exporters are no longer engaged in dumping, the measures will be repealed and the exporters as a matter of principle reimbursed upon request the anti-dumping duties paid by them during the period of the investigation.

53 The applicant also challenges the Council's assertion that the period of investigation and the maintenance in force during that period of the anti-dumping duties imposed by Regulation No 535/87 involved appreciable disadvantages for the exporters. It maintains that the exporters did everything they could, by their interventions, to prolong the review because expediting it would merely have been disadvantageous to them. They were aware that the anti-dumping duties would probably be extended to plain paper photocopiers with a reproduction capacity of more than 75 copies per minute and that the outcome of the procedure would be an increase in the anti-dumping duty. Conversely, the Community industry of photocopier manufacturers had a particular interest in a speedy conclusion of the review and the adoption of fresh anti-dumping measures.

54 Since elimination of dumping should enable a return to open and fair market conditions and the removal of distortion of competition arising from illegal trade practices, the only question that ought to have had a decisive influence on the exercise by the Council of its discretionary power is whether, in the light of the results of the review, (fresh) anti-dumping measures were necessary to counteract dumping occasioning injury. Consequently, the Council ought to have decided whether the objectives pursued by the anti-dumping measures could be achieved if the period of operation were reduced to two years.

55 All the relevant assessment criteria ought to have led the Council to fix a fresh five-year period of operation as from the date of the entry into force of Regulation No 2380/95. The applicant puts forward three sets of arguments in that respect.

56 In the first set, it argues that on the basis of the review the Community authorities concluded that the Japanese exporters had intensified their dumping practices, that the injury occasioned to the Community industry had increased, and that the interest in preserving the Community industry had also been thereby strengthened.

57 The findings of the Community authorities show clearly that dumping margins were appreciably higher for each exporter concerned than the anti-dumping rate initially applicable because the average weighted dumping margin was 41% (paragraphs 76 and 78 of the recitals in the preamble to Regulation No 2380/95). The applicant concludes that the Japanese exporters had intensified their dumping practices and that the Council ought therefore to have taken account of those new findings when fixing the anti-dumping duties.

58 The injury caused to the Community industry had also increased. For all the photocopiers regarded as like products, it was established that the key indicators of economic performance for the Community industry deteriorated significantly between 1988 and the end of the investigation period; these included production (down 16%), market share (down from 15.4% to 12.4%), and PPC hardware profitability (from 11.1% to 2.7%) (paragraphs 33 to 35 of the recitals in the preamble to Regulation No 2380/95). Notwithstanding a reduction in the volume of exports from Japan, the Commission also found high undercutting margins (paragraphs 42 and 43 of the recitals in the preamble to the regulation). On the basis of those findings, the Council came to the conclusion that expiry of the anti-dumping duty in force would lead to a recurrence of serious injury (see, in particular, paragraphs 81 and 87 of the recitals in the preamble to the regulation).

59 Finally, the Council found that the Community's interest in retaining European production of photocopiers had increased and that if the duties were to lapse there would be an incentive for the Japanese exporters to cut production in the Community in order to reduce the significant stocks in Japan and improve capacity utilisation there (paragraph 88 et seq. of the recitals).

60 The applicant concludes that the findings made by the Community authorities themselves under the review procedure clearly preclude any limitation on the period during which anti-dumping measures are to apply. The link between those findings and the period during which the anti-dumping measures are to apply results not merely from Article 15(1) of the 1988 basic regulation but, *a fortiori*,

from the fact that the dumping and the injury caused to the Community industry, far from being eliminated, increased considerably during the period of operation of Regulation No 535/87.

61 In the second set of arguments, the applicant maintains that the Council misunderstood the particular features proper to photocopiers having a reproduction capacity of more than 75 copies per minute, which are protected for the first time against dumped imports by Regulation No 2380/95. Photocopiers belonging to this upper segment were marketed particularly aggressively by the Japanese exporters and the fact that an anti-dumping duty is imposed on this group of photocopiers for only two years should, in the circumstances, be regarded as running counter to the findings made by the Community authorities themselves.

62 The sector of plain paper photocopiers having a reproduction capacity of more than 75 copies per minute is of particular importance to Community producers. In Regulation No 2380/95 (paragraphs 42 and 46 of the recitals), the Council and the Commission established however that in that sector there was both a substantial rise in imports and an increased incidence of undercutting.

63 The applicant does not seek 'special rules' for these machines but simply the application of the normal rule in Article 15(1) of the 1988 basic regulation. The Council itself acknowledges that for reasons of legal certainty, and to provide a minimum level of protection, it is necessary for measures adopted for the first time to apply for five years.

64 The absence of a statement of the reasons which led the Council to limit to two years the period of operation of anti-dumping measures for those photocopiers, too, likewise constitutes an infringement of Article 190 of the Treaty.

65 Finally, the applicant alleges that prior to the entry into force of Regulation No 2380/95 some Japanese producers built up considerable stocks of those photocopiers in an attempt to defeat the anti-dumping measures.

66 In a third set of arguments the applicant maintains that limiting the period of application of Regulation No 2380/95 to two years sets a dangerous precedent which could greatly reduce the value of anti-dumping measures as an instrument of policy, particularly when the Community institutions reduce the period of operation of anti-dumping measures notwithstanding increased dumping, greater injury and a powerful interest on the part of the Community in the maintenance of a major industrial sector. Contrary to the Council's assertions, those arguments are not based on purely political considerations.

67 The Council notes at the outset that paragraph 103 of the recitals in the preamble to Regulation No 2380/95 clearly shows that the matters which led it, exceptionally, to fix at two years the period of application of the regulation were the unusual length of the review procedure and the fact that the anti-dumping duty had remained in force during that procedure. Regulation No 2380/95 therefore actually extended the period of application of the anti-dumping duty by five years and eight months, so that the applicant's current situation is more favourable than it would have been if the Council had immediately extended the initial anti-dumping duty by five years.

68 As regards the duration of the review, it was indeed unusually long, as confirmed by the fact that the procedure leading to the adoption by Regulation No 535/87 of the initial anti-dumping duty lasted only some 18 months.

69 The factors other than the length of the review relied on by the applicant in support of its argument that the period of application of Regulation No 2380/95 ought not to have been limited are not such as to invalidate the assessment made by the Council.

70 First, the applicant's arguments concerning the alleged increase in dumping and in the injury caused to the Community industry and the strengthening of the Community interest are said to be based essentially on the findings set out in Regulation No 2380/95 itself. However, there is no link at all between those factors and the fixing of the period of operation of the anti-dumping duty introduced by that regulation.

71 Secondly, the Council points out that in paragraph 15 of the recitals in the preamble to Regulation No 2380/95 it set out the reasons why it was not possible to lay down specific rules for photocopiers having a reproduction capacity of more than 75 copies per minute. Since it was therefore not possible to lay down a different period for those machines during which the anti-dumping duty would apply, it was also unnecessary for Regulation No 2380/95 to provide any particular reasoning in that regard.

Findings of the Court

72 As a preliminary point, it must be stated that the applicant cannot validly maintain that the review was not unduly long in this case. It is sufficient to cite Article 7(9)

of the 1988 basic regulation, which provides that '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.' The Commission announced the initiation of the review procedure only on 14 August 1992, some six months after the publication on 11 February 1992 of the notice of its intention to initiate it. The review then lasted from August 1992 to October 1995, or approximately 38 months.

73 In those circumstances the first point to consider is whether the unusual length of the review was a factor which the Council could legitimately take into account in determining the period of operation of the definitive anti-dumping duties imposed following the review. In order to do so it is necessary to determine the consequences of such a lengthy procedure both for the undertakings subject to the anti-dumping duty and for the Community industry.

74 As regards the undertakings subject to the duty, the anti-dumping measures imposed by Regulation No 535/87 remained in force during the whole of the review procedure, in accordance with Article 15(3) of the 1988 basic regulation. Furthermore, even though the review covered the period from 1 July 1991 to 30 June 1992, the imposition by Regulation No 2380/95 of new definitive measures meant that the undertakings subject to anti-dumping measures were unable to seek a new review before October 1996, since Article 14(1) of the 1988 basic regulation provides that application for review may be made 'provided that at least one year has elapsed since the conclusion of the investigation'.

75 Protection against dumping practices was thus secured for the Community industry, owing to the duration of the review procedure, until at least October 1996.

76 The Council was therefore entitled to take the view that the unusual length of the review affected the legal situation of the parties to the procedure to the detriment of the undertakings subject to the anti-dumping measures.

77 Consequently, the unusual length of the review was capable of justifying limiting the period during which the definitive anti-dumping measures adopted following that procedure were to apply. Furthermore, the Council cannot be said to have exceeded the limits of its discretion in deciding that in view of the length of the review procedure a period of application of two years for Regulation No 2380/95 was reasonable. The introduction by Regulation No 2380/95 of new definitive measures meant that unless there was an application for a review of the measures imposed under that regulation the Community industry would be protected against dumping practices until October 1997, that is to say for five years after the expiry of the initial anti-dumping duty.

78 The next point to consider is whether the other factors relied on by the applicant ought to have dissuaded the Council from limiting the period during which Regulation No 2380/95 was to apply to two years, notwithstanding the unusual length of the review.

79 In that regard it must be noted, first, that the applicant has failed to adduce any evidence whatsoever in support of its assertion that the review was deliberately held up by the undertakings subject to the anti-dumping duty.

80 Secondly, the applicant's argument to the effect that the findings made by the Community authorities in the context of the dumping investigation, the injury caused by the dumping and the Community interest ought to have led the Council to confirm the anti-dumping duty for a fresh period of five years must be rejected.

81 In the first place, the review covered the period from 1 July 1991 to 30 June 1992. Secondly, the anti-dumping measures introduced by Regulation No 535/87 remained in force throughout the review procedure. Finally, it was on the basis of the findings made by the Community authorities in the context of the dumping investigation, the injury caused by the dumping and the Community interest that the Council considered it necessary not to allow the anti-dumping measures introduced by Regulation No 535/87 to lapse and to confirm the rate of anti-dumping duty laid down in that regulation. Since the period of operation of the definitive anti-dumping duty introduced by Regulation No 2380/95 was fixed at two years, the Community industry was protected against dumping practices for more than five and a half years after February 1992, when the anti-dumping duty imposed by Regulation No 535/87 would have lapsed if no review procedure had been initiated.

82 In those circumstances the applicant cannot validly claim that the findings in question ought to have been taken into consideration in determining the period during which the new definitive anti-dumping measures were to apply. It should be emphasised in that regard that, although those findings were relevant for the purposes of determining the rate of the anti-dumping duty laid down in Regulation No 2380/95, the applicant is not seeking to have that rate annulled.

83 Thirdly, the applicant maintains that the period of operation of the new anti-dumping measures should not have been limited because for photocopiers having a reproduction capacity of more than 75 copies per minute on A4 paper an anti-dumping duty was introduced for the first time by Regulation No 2380/95. It is common ground that those photocopiers were not subject to the anti-dumping duty imposed by Regulation No 535/87 because, at the time, those photocopiers were not imported from Japan and photocopiers having a reproduction capacity of more than 75 photocopies per minute were not manufactured by the Community industry.

84 In accordance with the request to that effect made by the applicant, however, the review procedure also covered photocopiers having a reproduction capacity of more than 75 copies per minute on A4 paper. In that connection, the third subparagraph of paragraph 15 of the recitals in the preamble to Regulation No 2380/95 states:

'Conducting two separate proceedings on the same product originating from the same country would be illogical, contrary to the system envisaged by [the 1988 basic regulation], and conducive to incongruous results. In the case of PPCs from Japan, the review of the existing measures pursuant to Article 15 was opened and conducted in accordance with Article 14 as well, based on the view that Article 15 should, and indeed can only, be read in conjunction with Article 14. Reviews of existing measures under these provisions may lead to the amendment of those measures. If, following a review, existing measures could not be amended to include within the scope of those measures new types of the same product, the effectiveness of those measures would be impaired.'

85 Since large-capacity photocopiers were included in the review procedure on the ground that it would be illogical, and would undermine the usefulness of the anti-dumping measures, to have different arrangements for dumping practices concerning like products from the same country, the Council was entitled to take the view that the anti-dumping duty had to be applied for the same period to all the photocopiers covered by the procedure.

86 Furthermore, Regulation No 2380/95 was adopted following a review of the measures initially introduced which was extended to cover large-scale photocopiers only at the applicant's express request. Accordingly, the Council did not exceed the limits of its discretion in taking the view that the inclusion of those photocopiers in the review procedure did not make it necessary for the new definitive measures to apply for more than two years.

87 It should be added that the applicant has adduced no evidence in support of its assertion that before the entry into force of Regulation No 2380/95 certain Japanese exporters had built up considerable stocks of the photocopiers at issue in order to circumvent the anti-dumping duty. It is not necessary therefore for the Court to consider whether sufficient evidence of an attempt to circumvent the anti-dumping duties imposed for the first time in regard to those photocopiers was a factor to be taken into account in determining the period of operation of the new definitive anti-dumping measures laid down in that regulation.

88 In so far as the applicant alleges infringement of Article 190 of the Treaty, the inclusion in the review of photocopiers having a reproduction capacity of more than 75 copies per minute on A4 paper is explained in paragraph 15 of the recitals in the preamble to Regulation No 2380/95 by the fact that this was done at the applicant's express request and that it would be illogical to initiate two distinct procedures for photocopiers from Japan. Accordingly, since the Council set out, in paragraph 103 of the recitals in the preamble to Regulation No 2380/95 (see paragraph 9 above), the reasons for which it decided that the regulation should apply for a period of two years, it was under no obligation to provide specific reasoning concerning the limitation of the period of application of the regulation in regard to large-capacity photocopiers.

89 Fourthly and finally, the applicant's argument that the limitation of the period during which Regulation No 2380/95 was to apply sets a dangerous precedent likely to erode the value of anti-dumping measures as an instrument of policy must be rejected, since it is not founded on breach of a rule of law. In any event, since the Council itself has argued that its discretion to set at less than five years the period of operation of definitive anti-dumping duties adopted following a procedure for the review of the measures initially adopted can only be used in special circumstances, there is no reason to conclude that the limitation of the period during which Regulation No 2380/95 was to apply creates a precedent capable of undermining the effectiveness of anti-dumping measures.

90 In the light of those considerations, the pleas alleging a manifest error of assessment and infringement of Article 190 of the Treaty must be rejected.

Plea alleging infringement of the Community industry's rights of defence and the rights available to it to ensure the effectiveness of anti-dumping measures

Arguments of the parties

91 The applicant begins by explaining that, shortly after the imposition of definitive anti-dumping duties on photocopiers in 1987, the Japanese exporters largely circumvented the protective measures by constructing assembly units in the Community (see, in particular, Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community (OJ 1988 L 284, p. 36). In addition, the exporters partly absorbed the anti-dumping duties, with the result that there was found to have been practically no price increase on the Community market. It refers in that connection to the findings of increased dumping and undercutting made by the Commission during the review procedure.

92 Similar practices, the applicant claims, may be expected on the part of Japanese exporters and importers seeking to avoid price increases and loss of shares of the Community market after confirmation of the anti-dumping duties in Regulation No 2380/95. Regard should also be had to the construction of assembly plants in other Asian countries, and in particular the People's Republic of China, by Japanese photocopier manufacturers because statistics show an increase in exports from that country to the Community. The applicant claims to be in possession of evidence proving that the anti-dumping duties on the photocopiers at issue have been circumvented.

93 Under those circumstances, the Community industry should take all the steps necessary to avoid the absorption of anti-dumping duties and/or circumvention thereof by means of the assembly of photocopiers in the Community and/or in non-Member States by having recourse to the specific procedures provided for in the basic regulation on anti-dumping. However, the specific procedures to deal with absorption of anti-dumping duties (Article 12 of the 1994 basic regulation) and circumvention (Article 13 of that regulation) come into operation only when a request in that connection is made by the Community industry. Such a request must contain sufficient evidence or information to justify the initiation of an investigation. Moreover, the marshalling of evidence, the preparation and lodging of the application, consultations with the Member States, the initiation of the procedure, the investigations to be carried out by the Commission, and the preparation and adoption of the decision by the Community authorities would, in any event, require more than two years.

94 The limitation to two years of the period of application of Regulation No 2380/85 thus robs the Community industry of the legal protection conferred by the basic regulation on anti-dumping because that period is not sufficient to ensure the actual exercise of its rights under Articles 12 and 13 of the 1994 basic regulation. The limitation thus substantially impairs the rights of the Community industry.

95 Moreover, the Commission stated in a letter of 7 April 1995 that it was appropriate for the anti-dumping regulation to apply for such period as would allow the effective implementation of the anti-dumping measures and, if necessary, the initiation of the specific procedures provided for in the basic regulation.

96 The Council begins by emphasising that the applicant's allegations concerning the absorption or circumvention of anti-dumping duties in the future are pure speculation, wholly unsupported by evidence. The reference by the applicant to the

findings made in the context of the review procedure are irrelevant, as those findings relate to the past. Moreover, the intensification of dumping could be accounted for not only by the absorption of the anti-dumping duties but also by an increase in normal value. Finally, the Commission did not include undercutting in its calculations at the time of the procedure leading to the adoption in Regulation No 535/87 of the initial anti-dumping duty; there could therefore be no finding of increased undercutting.

97 Howsoever that may be, limiting the period of operation of Regulation No 2380/95 to two years cannot be regarded as depriving the applicant of the legal protection afforded by the 1994 basic regulation. In particular, applications made in respect of the procedures in question could refer to events prior to the adoption of Regulation No 2380/95 because, at the time of the review procedure, the anti-dumping duty imposed by Regulation No 535/87 was still in force. If necessary, the applicant could even have made those applications while the review was in progress.

98 In the present case, limiting the period of application of Regulation No 2380/95 to two years is justified by special circumstances. Consequently, even if that limitation were to be regarded as restricting the Community industry's right to avail itself of the procedures provided for in Articles 12 and 13 of the 1994 basic regulation, it is a consequence which must be accepted of the rules established by that regulation.

99 Moreover, if the applicant could show that the anti-dumping duties were being absorbed or circumvented, it could use the same evidence in support of a fresh application for review.

Findings of the Court

100 As a preliminary point it should be observed that this plea must be examined in the context of the basic regulation in force when Regulation No 2380/95 was adopted, that is to say the 1994 basic regulation, because any requests to initiate procedures designed to protect the Community industry against absorption or circumvention of the anti-dumping duties had to be lodged in accordance with the provisions of that regulation.

101 In the present case, there is no reason to conclude that limiting the period of operation of Regulation No 2380/95 to two years impaired the rights available to the Community industry in order to combat absorption or circumvention of the anti-dumping duty.

102 The applicant has adduced no evidence whatever capable of showing that there was, at the time when Regulation No 2380/95 was adopted, an imminent risk that the anti-dumping duties would be absorbed or circumvented. In any event, the 1994 basic regulation does not permit the adoption of definitive anti-dumping measures for a period exceeding five years and it is therefore inevitable that, after three years at the most, the definitive anti-dumping measures will lapse within two years or less if no application for review is made. It follows that even if it is difficult in practice for the Community industry to avail itself of the procedures which are designed to protect it against attempts to absorb and/or circumvent the anti-dumping duty when the anti-dumping measures are to lapse within two years, that situation is dictated by the rules established by the basic regulation.

103 This plea must therefore also be rejected.

The claim for production of documents

104 The applicant states that the Commission proposed that the definitive anti-dumping measures be applied until August 1998. However, during the discussions on that proposal within the Anti-Dumping Committee and the Council, representatives of certain Member States sought to have the period reduced. Since it is not aware of the reasons given for seeking the reduction, the applicant requests the Court to order the Commission and the Council to produce the minutes of the meetings of the Committee and the Council on the Commission's proposal.

105 However, examination of the institutions' internal file with a view to ascertaining whether the contested decision was influenced by factors other than those indicated in the statement of the reasons on which the decision was based or stated by the institution during the proceedings before the Court would constitute a special measure of inquiry. Such a measure would presuppose that the circumstances surrounding the decision in question give rise to serious doubts as to the real reasons and in particular, to suspicions that those reasons were foreign to the aims of Community law and thus amounted to a misuse of powers (see the order of the Court of Justice of 18 June 1986 in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11).

106 In the present case the applicant has not alleged misuse of powers, nor has it explained why it considers that the reasons stated in Regulation No 2380/95 may differ from the reasons cited during the procedure leading to its adoption.

107 Consequently, the applicant's request for production of documents cannot be granted.

108 In the light of all those considerations, the action must be dismissed.

Costs

109 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the other party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Council.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Vesterdorf Bellamy Moura Ramos

Delivered in open court in Luxembourg on 8 July 1998.

H. Jung B. Vesterdorf

Registrar President