JUDGMENT OF THE COURT (First Chamber)

1 October 2009 *

In Case C-141/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 3 April 2008,

Foshan Shunde Yongjian Housewares & Hardware Co. Ltd, established in Foshan (China), represented by J.-F. Bellis, avocat, and G. Vallera, Barrister,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by J.-P. Hix, acting as Agent, and E. McGovern, Barrister, instructed by B. O'Connor, Solicitor,

defendant at first instance,

* Language of the case: French.

Commission of the European Communities, represented by H. van Vliet, T. Scharf and K. Talabér-Ritz, acting as Agents, with an address for service in Luxembourg,

Vale Mill (Rochdale) Ltd, established in Rochdale (United Kingdom),

Pirola SpA, established in Mapello (Italy),

Colombo New Scal SpA, established in Rovagnate (Italy),

represented by G. Berrisch, and G. Wolf, Rechtsanwälte,

Italian Republic, represented by R. Adam, acting as Agent, and W. Ferrante, avvocato dello Stato, with an address for service in Luxembourg,

interveners at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič (Rapporteur), A. Tizzano, A. Borg Barthet and E. Levits, Judges,

Advocate General: E. Sharpston,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 25 March 2009,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2009,

gives the following

Judgment

1 By its appeal, Foshan Shunde Yongjian Housewares & Hardware Co. Ltd. seeks to have set aside the judgment of the Court of First Instance of the European Communities in Case T-206/07 *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2008] ECR II-1 ('the judgment under appeal'), by which the Court of First Instance dismissed the action brought by the appellant seeking annulment of Council Regulation (EC) No 452/2007 of 23 April 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ironing boards originating in

the People's Republic of China and Ukraine (OJ 2007 L 109, p. 12) ('the contested regulation'), inasmuch as it imposes an anti-dumping duty on imports of ironing boards manufactured by the appellant.

Legal context

2 For the purposes of determining the existence of dumping, Article 2(1) to (6) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 2117/2005 of 21 December 2005) (OJ 2005 L 340, p. 17) ('the basic regulation'), lays down general rules on the method to be used for determining what is known as the 'normal value'.

3 Article 2(7)(a) of the basic regulation lays down a special rule on the method to be used for determining the normal value for imports from non-market economy countries.

4 However, Article 2(7)(b) of the basic regulation provides that the general rules laid down in Article 2(1) to (6) are to apply to certain countries, including the People's Republic of China, if it is shown on the basis of claims by one or more producers subject to the investigation that market economy conditions prevail for that producer or producers.

5 The criteria and procedure for determining whether that is the case are set out in Article 2(7)(c) of the basic regulation. That provision is worded as follows:

'A claim under [Article 2(7)] (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— …

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

— …

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'

6 The second paragraph of Article 20 of the basic regulation, which is entitled 'Disclosure', provides that the parties may request final disclosure of the facts and

considerations on the basis of which it is intended to recommend the imposition of definitive measures. Article 20(4) and (5) provide as follows:

'4. Final disclosure shall be given in writing. It shall be made … as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9.... Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.'

Background to the dispute

7 The appellant, a company established in Foshan (China), manufactures and exports ironing boards to, inter alia, the European Union.

8 As a result of complaints lodged by Vale Mill (Rochdale) Ltd, Pirola SpA and Colombo New Scal SpA ('the intervening companies'), on 4 February 2006 the Commission published a notice of initiation of an anti-dumping proceeding concerning imports of ironing boards originating in the People's Republic of China and Ukraine (OJ 2006 C 29, p. 2).

9 On 23 February 2006, the appellant submitted a claim seeking market economy treatment under Article 2(7)(b) of the basic regulation. In June 2006, the Commission carried out investigations at the appellant's registered office and at that of a company linked to the appellant for the purposes of establishing whether the appellant could be granted that status and determining the normal value of the products in question on the Chinese market.

10 By letter of 11 August 2006, the Commission informed the appellant that it did not consider that it met the criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation and that it could not therefore be granted market economy treatment. In the Commission's view, the appellant's accounting records and the audit reports were not in line with International Accounting Standards ('IAS'). By letter of 15 September 2006, the Commission responded to the representations made by the appellant by way of reply and informed it of its decision not to grant it market economy treatment.

11 On 30 October 2006, the Commission adopted Regulation (EC) No 1620/2006 imposing a provisional anti-dumping duty on imports of ironing boards originating in the People's Republic of China and Ukraine (OJ 2006 L 300, p. 13) ('the provisional regulation'). That regulation confirmed rejection of the appellant's claim for market economy treatment and imposed a provisional duty of 18.1% on imports of ironing boards manufactured by it.

12 On 1 December 2006 and 18 January 2007, the appellant submitted written observations on the provisional regulation, including observations on the issue of the determination of market economy treatment. It also submitted oral observations during a hearing at the Commission's headquarters on 19 January 2007. Subsequently, it sent to the Commission official statistics on Chinese monthly imports of steel products during 2004 and 2005.

13 By letter of 20 February 2007, the Commission sent to the appellant a final general disclosure document and a specific final disclosure document (together, 'the final disclosure documents of 20 February 2007'). In the first document, the Commission stated its intention to grant the appellant market economy treatment and, as a consequence, to reduce its definitive dumping margin to 0%, in view of the fact that its claim was plausible and justified in the light of new information and explanations.

14 The Commission stated that the flaws in the company's accounting practices noted at the provisional measures stage had no significant impact on the financial results entered in the accounts and that the incompleteness of the accounts, first, did not raise any problem as regards information on export sales, since the Commission had already approved those data when it was in a position to check their reliability and, second, was not decisive as regards domestic sales, since they were not sufficiently significant to be representative. The Commission therefore stated that, in those circumstances, the normal value should be determined on the basis of production costs and that the cost of steel was an essential element of these. The Commission considered that the Chinese official statistics relating to steel imports submitted during the administrative procedure confirmed the reliability of the company's accounting data with regard to the cost of steel and thus enabled the normal value to be calculated on the basis of the value established in China.

15 By letter of 2 March 2007, the intervening companies which instigated the anti-dumping proceeding submitted their observations on the final general disclosure document of 20 February 2007. They maintained, first, that the appellant did not meet the criterion set out in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation and, second, that the last sentence of Article 2(7)(c) of the basic regulation precluded the institutions from altering the determination of market economy treatment during the proceeding.

16 On 6 March 2007, the Advisory Committee set up under Article 15 of the basic regulation ('the Advisory Committee') examined the working document that had been

submitted to it by the Commission on 20 February 2007. A number of the members of the Advisory Committee objected to the granting of market economy treatment to the appellant.

17 By fax of 23 March 2007, the Commission sent to the appellant a revised final general disclosure document and a revised specific disclosure document (together, 'the revised final disclosure documents of 23 March 2007') from which it is apparent that the Commission had reversed its position of 20 February 2007 as to whether to grant the appellant market economy treatment. It considered, inter alia, that the appellant's practice of offsetting and grouping sales transactions together in its accounts on a summary basis, contrary to the accrual basis, constituted an infringement of the IAS, which was incompatible with the requirements laid down in Article 2(7)(c) of the basic regulation.

18 On the same day, the Commission also sent to the members of the Advisory Committee the revised final working document for consultation. That document was approved by the Advisory Committee on 27 March 2007 upon conclusion of a written procedure.

19 On 29 March 2007, the Commission submitted to the Council the proposal for definitive measures based on the revised final general disclosure document of 23 March 2007.

20 The time-limit set for the appellant to submit its observations on the revised final disclosure documents of 23 March 2007 was 29 March 2007. That time-limit was extended by the Commission to 2 April 2007 at the appellant's request.

21 The appellant submitted its observations on those documents on 2 April 2007. It challenged the Commission's finding that it did not meet the conditions for market economy treatment and requested the Commission not to accept the intervening companies' submission that the last sentence of Article 2(7)(c) of the basic regulation precluded the Commission from altering its original decision not to grant it that status.

22 The Commission replied by letter of 4 April 2007, reaffirming its findings as regards non-fulfilment of the conditions for granting market economy treatment. It pointed out, moreover, that the case-law on the assessment of claims for that status did not permit reassessment of old facts.

23 By letter of 5 April 2007, the appellant asked the Commission to propose to the Council definitive measures based on the final general disclosure document of 20 February 2007, since the market economy treatment determination was, in the appellant's view, based on an error of law.

24 On 23 April 2007, the Council adopted the contested regulation, which imposed a definitive anti-dumping duty of 18.1% on imports of ironing boards manufactured by the appellant.

The proceedings before the Court of First Instance and the judgment under appeal

25 By application lodged at the Registry of the Court of First Instance on 12 June 2007, the appellant brought an action for the annulment of the contested regulation in so far as it

imposes an anti-dumping duty on imports of ironing boards manufactured by it. On the same day, it applied for the proceedings to be expedited and its application was granted. The intervening companies and the Italian Republic were granted leave to intervene in the proceedings before the Court of First Instance in support of the form of order sought by the Council.

26 By the judgment under appeal, the Court of First Instance dismissed the appellant's action, which was based on two pleas, alleging, respectively, an error of law in the application of Article 2(7)(c) of the basic regulation and infringement of the rights of the defence and of Article 20(5) of the basic regulation.

27 In support of its first plea, the appellant submitted that the only explanation supplied by the Commission to justify its sudden change of position regarding the grant of market economy treatment was to be found in the letter of 4 April 2007, in which the Commission stated that the case-law on the examination of claims for such status did not permit reassessment of old facts. Article 2(7)(c) of the basic regulation, as interpreted in Case T-138/02 *Nanjing Metalink* v *Council* [2006] ECR II-4347, does not in any way preclude the Commission from being able, in circumstances such as those of the present case, to alter its initial position. Moreover, the interpretation advocated by the Commission, in particular of the last sentence of that provision, is also incompatible with the principle of sound administration. The proposal for definitive measures was therefore based on an infringement of that provision, which in turn invalidates the contested regulation.

28 In its assessment of the first plea, the Court of First Instance sought to ascertain, at paragraphs 42 to 50 of the judgment under appeal, whether the Commission revised its proposal in the final disclosure documents of 20 February 2007 on the ground that it was not permitted to reassess old facts. It pointed out, first, that in the contested regulation, in particular in recitals 12 to 14 in the preamble, the reason for the refusal to alter the market economy treatment determination made in the provisional regulation was not the prohibition on the reassessment of old facts laid down in the last sentence of

Article 2(7)(c) of the basic regulation, but the fact that the appellant's accounts were not in line with the IAS and the absence of any new evidence likely to affect that assessment.

29 The Court of First Instance went on to observe that it was not clear from the revised final disclosure documents of 23 March 2007 that the reason for the Commission's decision not to grant the appellant market economy treatment was the prohibition on reassessment of old facts.

30 Finally, the Court of First Instance pointed out that the only document in which the Commission states that the case-law relating to the determination of market economy treatment does not permit a reassessment of old facts is the Commission's letter of 4 April 2007. However, at paragraph 49 of the judgment under appeal, it considered that it is clear from that letter as a whole that the Commission's observation that it was not permissible to reassess old facts is incidental, as the institution based its decision not to propose granting market economy treatment on an assessment of whether the appellant satisfied the relevant substantive criteria.

31 The Court of First Instance concluded, at paragraph 50 of the judgment under appeal, that the appellant's assertion that the Commission based its arguments in this case on a prohibition on the reassessment of old facts has no basis in fact. It held, on that ground, that the first plea could not be accepted and that any discussion concerning the interpretation of the last sentence of Article 2(7)(c) of the basic regulation and of the judgment in *Nanjing Metalink* v *Council* was therefore irrelevant.

32 The Court of First Instance added, at paragraph 54 of the judgment under appeal, that the fact that the statement of reasons in the contested regulation does not explain in what way the findings in the final general disclosure document of 20 February 2007 are unfounded and the fact, assuming it established, that the Commission provided no explanation in that regard are not in themselves sufficient to render the contested regulation unlawful.

33 The second plea, alleging infringement of the right of the defence and of Article 20(5) of the basic regulation, was rejected at paragraphs 63 to 76 of the judgment under appeal. The appellant argued that that infringement arises from the fact that the Commission submitted to the Council the proposal for definitive measures based on the revised final general disclosure document of 23 March 2007 barely six days after that document had been sent to the appellant, without waiting until the ten-day period prescribed in Article 20(5) of the basic regulation had expired, and four days before the date set by the Commission for the appellant to submit its observations.

34 At paragraphs 63 to 70 of the judgment under appeal, the Court of First Instance held, first, that as a result of that action the Commission did in fact infringe Article 20(5) of the basic regulation. It found, inter alia, that the Commission cannot submit its proposal to the Council before the expiry of the 10-day period prescribed in that provision. According to the Court of First Instance, that interpretation must be accepted in view of the wording of Article 20(4) of the basic regulation and the need to interpret Article 20(4) and (5) of that provision in such a manner that those paragraphs are consistent with each other and to ensure that any representations made by interested parties are actually taken into account by the Commission. It therefore observed that the very fact that a proposal for definitive measures has already been submitted to the Council is in itself likely to influence the conclusions that may be drawn from those representations.

35 Moreover, the Court of First Instance held, in that connection, that the Commission was required to inform the parties concerned that it had adopted a new position, as set out in the revised final disclosure documents of 23 March 2007. The Court of First Instance stated that since it makes express reference to 'different facts and considerations', Article 20(4) of the basic regulation does not support the view put forward by the Commission that mere alteration of the assessment of factual information that remains unchanged does not require any communication to the interested parties.

36 However, the Court of First Instance found, at paragraphs 71 to 76 of the judgment under appeal, that the infringement of Article 20(5) of the basic regulation did not affect the content of the contested regulation and hence the applicant's rights of defence and could not, therefore, result in the unlawfulness and annulment of that regulation. Thus,

it pointed out that such an infringement could result in annulment of the contested regulation only if it were possible that, due to that irregularity, the outcome of the administrative procedure might have been different and thus in fact adversely affected the appellant's rights of defence.

37 The Court of First Instance stated that, so far as the question of determining market economy treatment is concerned, the case file does not show that the revised final disclosure documents of 23 March 2007 contained new factual information that had not previously been brought to the attention of the appellant. It observed that in those documents the Commission merely informed the appellant of its intention to change its earlier position and thus maintain the decision originally adopted on 15 September 2006 and implemented in the provisional regulation. The appellant had already had the opportunity, at an earlier stage in the administrative procedure, to give its view on the position set out once again in those documents.

38 The Court of First Instance found at paragraph 75 of the judgment under appeal that the appellant's observations in its letter of 2 April 2007 concerning the application of the last sentence of Article 2(7)(c) of the basic regulation and the judgment in *Nanjing Metalink* v *Council* did not, in any event, influence the content of that regulation since, as was found in the context of the first plea, the decision not to grant market economy treatment was based on the application of the substantive criteria.

The appeal

39 The appellant asks the Court to set aside the judgment under appeal and to grant the form of order sought by it before the Court of First Instance, namely to annul the contested regulation in so far as it applies to the appellant.

40 The Council, the intervening companies and the Italian Republic contend that the appeal should be dismissed. The Commission asks the Court to declare the appeal inadmissible or to dismiss it.

41 The appellant puts forward two grounds of appeal, alleging, respectively, an incorrect assessment of the importance of the discussion concerning the interpretation of Article 2(7)(c) of the basic regulation as a result of manifest distortion of the documents in the case-file and an incorrect conclusion as to the effect of the infringement of Article 20(5) of that regulation.

The first ground of appeal

Arguments of the parties

42 By its first ground of appeal, the appellant submits that the Court of First Instance failed properly to address the first plea for annulment, which it rejected on the basis of a finding that is clearly at odds with the documents in the case-file, namely that the discussion concerning the interpretation of Article 2(7)(c) of the basic regulation and paragraph 44 of *Nanjing Metalink* v *Council* was irrelevant for the purposes of this case.

43 The first part of this ground of appeal alleges that, since the substantive inaccuracy of that finding is apparent from documents on the case-file, in particular the pleadings of the Council and the Italian Republic, the Court of First Instance erred in law.

44 The appellant thus submits that the Council itself recognised that it was precisely because the Commission considered that the conditions necessary for altering the position originally adopted, as set out in *Nanjing Metalink* v *Council*, were not met that it reverted to that position. The Italian Republic also confirmed that the question of the interpretation of the last sentence of Article 2(7)(c) of the basic regulation in the light of *Nanjing Metalink* v *Council* in fact played a decisive role in the Commission's decision to propose definitive measures based on its original position. In those circumstances and in the absence of new factual information in the revised final disclosure documents of 23 March 2007, which the Court of First Instance itself commented upon at paragraph 72 of the judgment under appeal, that court's finding that the question was merely 'incidental' is manifestly incorrect.

45 In the second part of the first ground of appeal, the appellant submits that the Court of First Instance was wrong not to rule on that question.

46 The Council is of the view that, due to its selective nature, the first ground of appeal cannot cast doubt on the Court of First Instance's assessment of the facts. The arguments put forward by the appellant in that connection fail to take account of all the evidence on the case-file and omit in particular to refer to the three documents relied on by the Court of First Instance. Moreover, the defence lodged by the Council in the proceedings before the Court of First Instance does not contain any evidence. The Council also disputes that the interpretation of Article 2(7)(c) of the basic regulation had a significant impact on the present case because the outcome of any interpretation would be the same. In any event, irrespective of whether the interpretation had a significant impact, it is not possible to conclude that the Commission accepted the argument that it was not permitted to alter its original decision.

47 The Commission entertains doubts as to the probative force of the representations made by the Council and the Italian Republic in that context since they are not a party to

the proceedings and are therefore ill-placed to judge the grounds which led the Commission to revert to its original position. In any event, those representations do not prove that the Court of First Instance distorted the evidence. In fact, in taking the decision to revert to its original position, the Commission took into account the new evidence provided by the appellant but concluded, in the light of all the representations made, considered as a whole, that notwithstanding that evidence, market economy treatment could not be granted in view of the substantial deficiencies in the appellant's accounts. The proposal for definitive measures was therefore based, not on any prohibition on altering the original decision not to grant that status, but on the conclusion that the appellant did not meet the relevant substantive criteria. The Commission maintains that it would have altered its original decision if it had been convinced that the appellant had put forward new evidence justifying the grant of that status.

48 The Italian Republic submits that the Court of First Instance was correct in finding that there were no new facts or new documents capable of justifying the Commission changing its original decision concerning the grant of market economy treatment. Accordingly, the Commission based its conclusion, which led it to confirm its original decision, not only on the prohibition on changing its opinion but also on the decisive consideration that the serious irregularities which had been established could not be disregarded as a result of new evidence. The Commission's letter of 4 April 2007 sets out at considerable length the numerous reasons which led it to confirm its original decision. The fact that, in the circumstances, the conditions under which the Commission would have been permitted exceptionally to change its position on granting market economy treatment were not met is but one of those reasons.

49 The intervening companies submit that the first ground of appeal is manifestly unfounded in so far as the appellant has failed to demonstrate that the Court of First Instance distorted the evidence produced before it. The appellant has failed in particular to refute the Court of First Instance's detailed assessment of the relevant documents, which is sufficient for the first ground of appeal to be rejected. Moreover, neither the pleadings lodged by the Council and the Italian Republic before the Court of First Instance nor paragraph 72 of the judgment under appeal, to which the appellant refers, support the conclusions which it seeks to draw from them. The appellant companies submit, in the alternative, that the appellant's interpretation of *Nanjing Metalink* v *Council* is incorrect.

Findings of the Court

50 The first ground of appeal relied on by the appellant, arguing that the Court of First Instance erred in considering that it was not required to rule on the question of the interpretation to be given to the last sentence of Article (2)(7)(c) of the basic regulation, is based on the assertion that the Court of First Instance distorted the evidence in the case-file in reaching the conclusion that, in the circumstances, the Commission did not base its decision on the fact that it was not permitted to reassess old facts and that any discussion of that question was therefore irrelevant.

51 It should be noted that the Court of First Instance based its decision on recitals 12 and 14 in the preamble to the contested regulation, on the revised final disclosure documents of 23 March 2007 and on the Commission's letter of 4 April 2007.

52 The Court of First Instance stated, at paragraphs 43 to 45 of the judgment under appeal, that it was not clear from the contested regulation or the revised final disclosure documents of 23 March 2007 that the reason for the Commission's refusal to grant the applicant market economy treatment was the prohibition on reassessment of old facts. In that context, the Court of First Instance observed, inter alia, that those documents justified the refusal to grant that status because the appellant's accounting practices were not in line with the IAS and were therefore based on a substantive criterion. The appellant has not called into question those findings.

53 The Court of First Instance pointed out at paragraphs 46 and 47 of the judgment under appeal that the Commission's letter of 4 April 2007 in fact referred to the case-law of that court prohibiting reassessment of old facts. However, the Court of First Instance also stated, at paragraph 48 of that judgment, that in that letter the Commission based its decision not to grant market economy treatment on the ground that, first, the appellant's accounts did not comply with the IAS and, second, that it was not possible,

on the basis of the information on steel prices, for a new assessment to be made of the shortcomings discovered in the those accounts.

54 The appellant does not dispute those findings but disagrees with the Court of First Instance's assessment, which is based on those findings, at paragraph 49 of the judgment under appeal that it is clear from that letter as a whole that the Commission's observation that it was not permissible to reassess old facts is incidental, as the Commission based its decision not to propose granting market economy treatment on an assessment of whether the appellant complied with the relevant substantive criteria.

55 The appellant is therefore requesting the Court to substitute its own assessment for that made by the Court of First Instance.

56 However, according to the established case-law of the Court of Justice, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (see Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29; Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 35; and Case C-425/07 P *AEPI* v *Commission* [2009] ECR I-3205, paragraph 44).

57 In so far as concerns the Commission's letter of 4 April 2007, the Court of First Instance did not distort its content. As pointed out by the Advocate General at points 77 and 78

of her Opinion, while it would be possible to interpret that letter in the manner advocated by the appellant, the fact nevertheless remains that such an interpretation is not the only possible conclusion to be drawn from the text of that letter.

58 Moreover, the Court cannot accept the appellant's argument that the only possible explanation for the change in the Commission's position is that it allowed itself to be convinced by the arguments put forward by the intervening companies and some Member States within the anti-dumping committee, which maintained that the last sentence of Article 2(7)(c) of the basic regulation precluded the Commission from altering its original decision not to grant the appellant market economy treatment.

59 As the Court of First Instance pointed out at paragraph 14 of the judgment under appeal, the intervening companies based their representations regarding the final general disclosure document of 20 February 2007, submitted by letter of 2 March 2007, primarily on the argument that the appellant did not meet the substantive criterion set out in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation.

60 It is apparent from that letter that the intervening companies argued, inter alia, that that criterion must be interpreted strictly and, for the purpose of assessing that criterion, it is irrelevant whether the flaws in the appellant's accounts, which were not disputed by the appellant and are in breach of the IAS in a number of respects, actually had an impact on the results entered in the accounts. They also submitted that the appellant's explanations in that regard are in any event incorrect and that the Commission did not provide any explanation as to the reason why it accepted them. Finally, they argued that the evidence of prices of Chinese steel imports was irrelevant to the question whether the appellant's accounts were consistent with the IAS and that, in any event, the appellant mainly used exclusively domestic steel.

61 The Commission explained in the statement in intervention which it lodged with the Court of First Instance that, as a result of the representations made by the intervening companies and the doubts expressed by some Member States at the idea that market economy treatment might be granted to the appellant on the basis of figures provided by it on the price of steel imports from China, it continued to reflect on the matter. In the light of those representations, it reached the conclusion that, in view of the deficiencies established in the appellant's accounts, it was not possible for it to consider on the basis of those figures that the criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation was met and that it therefore had no option but to refuse to grant that status to the appellant. The Commission also points out, in that connection, that it did not consider itself to be under any obligation to propose to the Council measures which it knew to be incorrect and that it is of the view that *Nanjing Metalink* v *Council* cannot be interpreted as imposing such a restriction.

62 Accordingly, the Court of First Instance was entitled to conclude, on the basis of the documents on the case-file, that, contrary to the appellant's submissions, the reason for the change in the Commission's position between the final disclosure documents of 20 February 2007 and the revised final disclosure documents of 23 March 2007 was not because it was prohibited from changing the original decision not to grant that status to the appellant but as a result of considerations relating to the interpretation of the substantive criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation.

63 Moreover, that finding is not called into question by the appellant's argument that the content of the submissions at first instance of the Council and the Italian Government show that the reason for the change of position was the prohibition on changing the original decision. As the Advocate General stated at paragraphs 79 and 80 of her Opinion, even if those submissions could be regarded as 'evidence', the fact remains that other evidence on the case-file, in particular the statement in intervention lodged by the Commission before the Court of First Instance, indicates that the outcome of those submissions was the opposite of what the appellant contends. Given that the

submissions of the Council and the Italian Republic have no absolute probative force and the Court of First Instance is required to make a global appraisal of all the evidence before it, that court cannot be said to have distorted that evidence by accepting, in essence, the explanation provided by the Commission itself for its change of position rather than the explanation allegedly suggested by parties who are not party to the Commission's internal decision-making process.

64 The Court of First Instance cannot therefore be said to have distorted the evidence before it by finding that there is no factual basis for the appellant's claim that the Commission's decision in the present case was based on a prohibition on the reassessment of old facts.

65 It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

66 By its second ground of appeal, the appellant submits that the Court of First Instance erroneously concluded that the breach of its rights of defence, established by that court, could not result in annulment of the contested regulation on the ground that there was, in any event, no possibility that the administrative procedure could have resulted in a different outcome. Since the question of the interpretation of Article 2(7)(c) of the basic regulation is not an incidental but a fundamental issue, that breach deprived the

appellant of the opportunity to demonstrate to the Commission that its interpretation was incorrect and that the Commission was perfectly entitled to propose to the Council definitive measures based on the conclusions in the final general disclosure document of 20 February 2007. The appellant's situation was therefore adversely affected since it was deprived of the possibility of a radically different outcome to the administrative procedure.

67 The Council, supported by the Commission, the intervening companies and the Italian Republic, endorses the Court of First Instance's finding that infringement of Article 20(5) of the basic regulation should not result in annulment of the contested regulation because, in the present case, there was no infringement of the appellant's rights of defence.

68 According to those parties, the second ground of appeal is based on incorrect premisses, in particular that the appellant could have put forward new arguments which might have led the Commission to change its opinion, that the reason for the Commission's decision to revert to its original position was the prohibition on altering that position and that the Court of First Instance found that the appellant's rights of defence had been infringed. The Commission concludes that the second ground of appeal is inadmissible or ineffective. The intervening companies maintain that it is manifestly inadmissible or unfounded and also argue that the appellant fails to identify the finding in the judgment under appeal which it disputes and does not state clearly the error in law for which it criticises the Court of First Instance.

69 However, the Council, the Commission and, as an alternative plea, the intervening companies take issue with the Court of First Instance's interpretation of Article 20(4) and (5) of the basic regulation that that provision imposes a 10-day period within which representations are to be made in all cases when the Commission bases its decision on facts or considerations different from those in the final disclosure document. That interpretation does not follow from the wording of Article 20(4) of the basic regulation, is disproportionate and gives rise to considerable practical difficulties for the Commission vis-à-vis the express time-periods prescribed in that regulation.

70 The Commission submits, inter alia, that the revised final disclosure documents of 23 March 2007 constitute, essentially, a form of 'disclosure' for the purpose of Article 20(4) of the basic regulation and not a form of 'final disclosure' for the purpose of Article 20(5) of the regulation and therefore the period prescribed in Article 20(5) is not applicable.

71 Furthermore, the Council submits that the general rights of the defence continue to apply regardless of the interpretation to be given to Article 20(5) of the basic regulation and that the periods available under those rights depend on the circumstances of the individual case. A period of 10 days following notification by the Commission of facts and considerations different from those in the final disclosure document is not always necessary for the purpose of ensuring that the rights of the defence are respected.

Findings of the Court

72 The second ground of appeal is directed against the Court of First Instance's finding at paragraph 76 of the judgment under appeal that the infringement by the Commission of Article 20(5) of the basic regulation did not affect the content of the contested regulation and hence the applicant's rights of defence.

73 As a preliminary point, it should be noted that, contrary to the submissions of the Council and the Commission in particular, the Court of First Instance did not err in law in finding, at paragraph 70 of the judgment under appeal, that the Commission infringed Article 20(5) of the basic regulation by sending its proposal for definitive measures to the Council only six days after communicating to the appellant the revised final disclosure documents of 23 March 2007 and thus before the expiry of the 10-day period laid down in that provision.

74 The Court of First Instance was correct in stating that the Commission was required in the circumstances to inform the appellant of its new position, as set out in the revised final disclosure documents of 23 March 2007, and that in sending those documents it was required to comply with the period prescribed in Article 20(5) of the basic regulation.

75 It is clear, first, that, contrary to what the Commission and the Council tend to suggest, in the present case the question does not arise as to whether even the most minor change in a final disclosure document must also be classified as a form of 'disclosure' within the meaning of that provision, requiring compliance with the period prescribed in the provision.

76 In that context, it is sufficient to state that in the present case what is at issue is not such a minor change but a fundamental change of position on the part of the Commission between the communication of the final disclosure documents of 20 February 2007 and the communication of the documents of 23 March 2007, that change having important consequences for the appellant, entailing in particular the proposal for a definitive anti-dumping duty of 18.1% rather than 0%, as envisaged in the initial final disclosure document.

77 Next, the Court of First Instance was correct in finding that, since Article 20(5) of the basic regulation is applicable, it was not permissible for the Commission to send its proposal to the Council before the expiry of the period laid down in that provision.

78 As the Court of First Instance pointed out, that interpretation follows not only from regulative context of which that provision forms part but is also necessary in order to ensure that account is taken, in a manner that is effective and without prejudice, of any representations made by the interested parties. The very fact that a proposal for definitive measures has already been put to the Council is, in itself, capable of influencing the consequences that may be drawn from those representations.

79 Finally, it cannot be that difficulties encountered by the institutions in complying with the periods prescribed in the basic regulation should result in an infringement of the periods prescribed in that regulation for the protection of the rights of defence of the undertakings concerned. On the contrary, the onus is on the institutions, in particular the Commission, to take account of the time constraints imposed by the regulation while at the same time respecting the rights of defence of those undertakings.

80 Moreover, in the present case the Commission itself granted the appellant a period of 10 days, which the Commission must respect if it is not to be in breach of the principle of sound administration.

81 As regards the arguments put forward by the appellant in support of its second ground of appeal, it should be noted at the outset that the Court of First Instance was correct in finding at paragraph 71 of the judgment under appeal that failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation can result in annulment of the contested regulation only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus in fact adversely affected the applicant's rights of defence (see, to that effect, Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26; Case C-142/87 *Belgium* v *Commission, 'Tubemeuse'* [1990] ECR I-959, paragraph 48; and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31).

82 However, since the appellant submits that the Court of First Instance erred in law in applying that case-law, it is necessary to consider whether that court was entitled, on the basis of the reasoning set out at paragraphs 72 to 75 of the judgment under appeal, to reach the conclusion that, in the present case, the appellant's rights of defence were not adversely affected.

83 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting

that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (see, inter alia, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36; and Case C-287/02 *Spain* v *Commission* [2005] ECR I-5093, paragraph 37).

84 As is apparent from the findings of the Court of First Instance, in its letter of 2 April 2007, by which it submitted its observations on the revised final disclosure documents of 23 March 2007, the appellant put forward arguments relating both to whether it met the substantive criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation and whether, in the light of the last sentence of Article 2(7)(c), the Commission is bound in law by its original decision not to grant market economy treatment.

85 Moreover, it is not disputed that, in spite of the fact that that letter was sent to the Commission within the period laid down in Article 20(5) of the basic regulation, the Commission was unaware, as a result of its failure to comply with that period, of the content of that letter when it sent the proposal for definitive measures to the Council.

86 With regard, first, to the arguments set out in that letter relating to the substantive criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation, the Court of First Instance found, at paragraphs 72 to 74 of the judgment under appeal, that those arguments could not affect the content of the contested regulation for three reasons.

87 First, the case file does not show that the revised final disclosure documents of 23 March 2007 contained new factual information that had not previously been brought to the attention of the appellant. Next, the appellant had the opportunity at an earlier stage in the administrative procedure to give its view on the position set out once more in those documents. Finally, the letter of 2 April 2007 shows that the appellant did not put forward new arguments in response to the position adopted by the Commission.

88 Clearly, those reasons alone are not sufficient to rule out the possibility that the outcome of the administrative procedure could have been different if the Commission had been aware of the letter of 2 April 2007 before sending its proposal for definitive measures to the Council.

89 It should be noted in particular that, as stated at paragraph 61 above, the Commission itself explained in the statement in intervention which it lodged with the Court of First Instance that it was only after receiving the observations of the intervening companies and certain Member States that it changed the decision contemplated in the final disclosure documents of 20 February 2007 to grant the appellant market economy treatment.

90 It is therefore not disputed that the Commission changed its decision not on the grounds which supported its original decision not to grant that status to the appellant but in the light of the arguments presented to it by the intervening companies and certain Member States. Nor is it disputed that the purpose of those arguments was to show that the observations and documents submitted by the appellant should not have led the Commission to alter its original decision not to grant that status.

91 In those circumstances, it cannot be maintained on the basis of the reasons set out at paragraphs 72 to 74 of the judgment under appeal that the appellant's rights of defence were not in fact adversely affected by the fact that it was not given the opportunity effectively to make known its views on the issues raised in those arguments, in particular the issue as to whether, notwithstanding certain deficiencies in the appellant's accounts, it could have been granted market economy treatment on the basis of figures on the price of steel imported into China which it had provided during the administrative procedure.

92 In particular, in light of the conduct of that procedure and the fact that the Commission had already altered its position twice as a result of the observations submitted to it by the interested parties, it cannot be ruled out that the Commission might have altered its position once again because of the arguments put forward by the appellant in its letter of 2 April 2007, which related, according to the findings set out at paragraph 74 of the judgment under appeal, to the significance to be attached to the accounting shortcomings discovered and the inferences to be drawn from the information on the price of steel imports.

93 Respect for the rights of the defence is of crucial importance in procedures such as that followed in the present case (see, to that effect, Case C-49/88 *Al-Jubail Fertilizer* v *Commission* [1991] ECR I-3187, paragraphs 15 to 17, and by analogy, Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 55).

94 Moreover, according to the case-law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error (see *Thyssen Stahl* v *Commission*, paragraph 31 and the case-law cited).

95 Second, as regards the arguments put forward by the appellant in the letter of 2 April 2007 relating to whether the Commission is bound in law, in the light of the last sentence of Article 2(7)(c) of the basic regulation, by its original decision not to grant it market economy treatment, the Court of First Instance found at paragraph 75 of the judgment under appeal that those arguments did not, in any event, influence the content of the contested regulation since the decision not to grant that status was based on application of the substantive criterion.

96 The simple fact that the Commission based its decision not to grant that status in the revised final disclosure documents of 23 March 2007 on the substantive criterion in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation is not sufficient to rule out the possibility that the arguments concerning interpretation of the last sentence of Article 2(7)(c), which the appellant had the opportunity to put forward for the first time in that letter, could have influenced the content of the proposal for definitive measures.

97 Since it cannot be ruled out, as pointed out at paragraph 92 above, that the Commission would have altered its position once again as a result of the appellant's representations concerning the substantive criterion in its letter of 2 April 2007, the question whether the Commission could still alter its original refusal decision, notwithstanding the wording of the last sentence of Article 2(7)(c) of the basic regulation, was of particular importance.

98 Accordingly, even if the Commission had ultimately been convinced that the appellant met the substantive criterion, it could have proposed that it be granted market economy treatment only if it had been persuaded that, contrary to the arguments put forward by certain Member States and the intervening companies, it was not bound in law by its original decision not to grant that status.

99 Furthermore, contrary to the Court of First Instance's finding at paragraph 75 of the judgment under appeal, the relevance of that question is not in any way negated by the finding made at paragraphs 48 and 49 of that judgment that the Commission's observation in its letter of 4 April 2007 was merely incidental in so far as it stated that it was not permissible to alter its original decision not to grant the appellant market economy treatment.

100 Admittedly, as the Court of First Instance was able to conclude at paragraph 50 of the judgment under appeal, it was possible as a result of that finding to reject the first plea in law, which was based on the premiss that the Commission had reverted to its original decision not to grant the appellant the status in question on the ground that it was prohibited from altering the decision.

101 However, that finding is not sufficient to show, in connection with the examination of the second plea, that the appellant's rights of defence were not adversely affected by the infringement of Article 20(5) of the basic regulation.

102 As pointed out at paragraph 78 above, the fact that the Commission submitted a proposal for definitive measures to the Council before receiving the appellant's letter of 2 April 2007 is likely to influence the conclusion which it could still have drawn from the observations in that letter. Had the Commission been aware of those observations before submitting its proposal for definitive measures, it would have had greater room for manoeuvre in its assessment of those measures and might have reached other conclusions, including as to whether it was permissible for it to alter its original decision not to grant the appellant market economy treatment.

103 It is clear that, in those circumstances, the Court of First Instance was not entitled to confine itself, as it did at paragraph 75 of the judgment under appeal, to referring to

paragraphs 48 and 49 of that judgment and thus to the content of the Commission's letter of 4 April 2007. Since, that letter was formulated only after the Commission had already sent its proposal for definitive measures to the Council and thus after it had infringed Article 20(5) of the basic regulation, the Court of First Instance should have considered whether the content of that proposal and of that letter might have been different if that provision had not been infringed.

104 It follows from the foregoing that the Court of First Instance was not entitled, on the basis of paragraphs 72 to 75 of the judgment under appeal, to rule out the possibility that the infringement by the Commission of Article 20(5) of the basic regulation was likely to affect the content of the contested regulation and, therefore, the appellant's rights of defence. Since the Court of First Instance therefore erred in law, the second ground of appeal must be upheld.

105 The judgment under appeal must therefore be set aside in so far as the Court of First Instance found that the appellant's rights of defence were not adversely affected by the infringement of Article 20(5) of the basic regulation.

The action before the Court of First Instance

106 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the Court of First Instance is set aside, the Court of Justice may give final judgment in the matter where the state of the proceedings so permits. That is the case here.

107 As stated at paragraph 81 above, failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation can result in annulment of the contested regulation only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus in fact adversely affected the applicant's rights of defence.

108 It is therefore necessary to consider whether it can be ruled out that there was such a possibility in the present case.

109 That would be the case if, even supposing that the Commission had been persuaded by the letter of 2 April 2007 that the appellant met the substantive criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation, it was prohibited under the last sentence of Article 2(7)(c) from altering its original decision not to grant the applicant market economy treatment.

110 The last two sentences of Article 2(7)(c) of the basic regulation provide that a determination whether the producer meets the substantive criteria laid down in that provision is to be made within three months of the initiation of the investigation and that the determination is to remain in force throughout the investigation.

111 In the light of the principles of compliance with the law and sound administration, that provision cannot be interpreted in such a manner as to oblige the Commission to propose to the Council definitive measures which would perpetuate an error made in the original assessment of those substantive criteria to the detriment of the undertaking concerned.

112 Accordingly, if the Commission realises in the course of the investigation that, contrary to its original assessment, an undertaking meets the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation, it must take appropriate action, while at the same time ensuring that the procedural safeguards provided for in the basic regulation are observed.

113 It follows that the Commission could still have altered its position following receipt of the appellant's letter of 2 April 2007.

114 Since it cannot therefore be ruled out that the Commission would have proposed to the Council definitive measures more advantageous to the appellant if it had been aware of the content of that letter and that, in that case, the Council would have accepted such a proposal, it is clear that the appellant's rights of defence were in fact adversely affected by the failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation, which led to the Commission not taking account of the content of that letter at the appropriate time.

115 The contested regulation must therefore be annulled in so far as it imposes an anti-dumping duty on imports of ironing boards manufactured by the appellant.

Costs

116 Under Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

117 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs of both sets of proceedings, in accordance with the form of order sought by the appellant.

118 Under the first subparagraph of Article 69(4) of the Rules of Procedure, which is also applicable to appeal proceedings under Article 118 of those rules, the Member States and institutions which intervene in the proceedings are to bear their own costs. In accordance with that provision, the Italian Republic and the Commission are ordered to bear their own costs. Pursuant to the third subparagraph of Article 69(4), the Court may order an intervener other than a Member State or an institution to bear its own costs. In accordance with that provision, the intervening companies are ordered to bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of 29 January 2008 in Case T-206/07 *Foshan Shunde Yongjian Housewares & Hardware* v *Council* in so far as the Court of First Instance found that Foshan Shunde Yongjian Housewares & Hardware Co. Ltd's rights of defence were not adversely affected by the infringement of Article 20(5) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community;**

2. **Annuls Council Regulation (EC) No 452/2007 of 23 April 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ironing boards originating in the People's Republic of China and Ukraine, in so far as it imposes an anti-dumping duty on imports of ironing boards manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd.;**

3. **Orders the Council of the European Union to pay the cost of the proceedings at first instance and the appeal proceedings;**

4. **Orders the Commission of the European Communities, Vale Mill (Rochdale) Ltd, Pirola SpA, Colombo New Scal SpA and the Italian Republic to bear their own costs.**

[Signatures]