JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

17 June 2009 *

In Case T-498/04,

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

applicant,

supported by

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

intervener,

* Language of the case: English.

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

defendant,

supported by

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

intervener,

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

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of O. Czúcz, President, I. Labucka (Rapporteur) and M. Prek, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2008,

gives the following

Judgment

Legal context

1 Article 2(1) to (7) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended ('the basic regulation'), lay down, for the purpose of determining the existence of dumping, rules concerning calculation of the amount known as the 'normal value'. Thus, Article 2(1) provides for the main method, according to which '[t]he normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.

2 Article 2(7) of the basic regulation lays down a special rule for imports from non-market economy countries. That provision reads as follows:

'(a) In the case of imports from non-market economy countries …, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis …

(b) In anti-dumping investigations concerning imports from … the People's Republic of China, Ukraine, Vietnam and Kazakhstan and any non-market economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

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

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

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

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

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

3 Article 11(5) of the basic regulation provides:

'The relevant provisions of this regulation with regard to procedures and the conduct of investigations, excluding those relating to time-limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4 [of this article] …'

Background to the dispute

4 The applicant, Zhejiang Xinan Chemical Industrial Group Co. Ltd, is a company incorporated under Chinese law and listed on the Shanghai Stock Exchange. Glyphosate is one of the main products produced and sold by the applicant on the Chinese and world markets. It is a basic herbicide chemical widely used by farmers throughout the world.

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

6 On 18 November 2002, following publication of a notice of the impending expiry of the anti-dumping measures applicable to imports of glyphosate originating in the PRC (OJ 2002 C 120, p. 3), the Commission received a request for review of those measures under Article 11(2) of the basic regulation, submitted by the European Glyphosate Association ('the EGA'). On 15 February 2003, the Commission published a notice of initiation of an expiry and an interim review, under Article 11(2) and (3) of the basic regulation, of the anti-dumping measures applicable to imports of glyphosate originating in the PRC (OJ 2003 C 36, p. 18).

7 On 4 April 2003, following the initiation of the investigation, the applicant submitted to the Commission the completed claim form for producers claiming the status of an undertaking operating under market economy conditions ('MES'), requesting the Commission to recognise that it had MES by virtue of Article 2(7)(b) of the basic regulation. Also, on 30 April 2003, the applicant submitted the completed questionnaire intended for exporting producers of glyphosate in the PRC.

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

9 On 5 December 2003, the Commission informed the applicant of its intention to reject the claim for the grant of MES ('the communication of 5 December 2003'). On 16 and 23 December 2003, the applicant submitted its observations on that communication.

10 By letter of 6 April 2004, the Commission confirmed its decision refusing to grant the applicant MES.

11 On 7 April 2004, the Commission informed the applicant of the essential facts and considerations on the basis of which it intended to propose the imposition of definitive anti-dumping measures. The applicant submitted its observations on that communication on 19 April 2004.

12 On 24 September 2004, on a proposal from the Commission, the Council adopted Regulation (EC) No 1683/2004 imposing a definitive anti-dumping duty on imports of

glyphosate originating in the PRC (OJ 2004 L 303, p. 1; 'the contested regulation'). With regard to the applicant's claim for MES, recitals 13 to 15 in the preamble to the contested regulation state:

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

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

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

13 As recital 17 in the preamble to the contested regulation states:

'In this respect, it was established that [the applicant] was subject to significant State control with regard to setting of its export prices of the product concerned as explained in recital 14…'

14 Since the request for MES was refused, the normal value was determined, in accordance with Article 2(7)(a) of the basic regulation, on the basis of data obtained from producers in a market economy third country, namely the Federative Republic of Brazil (recitals 23 to 30 in the preamble to the contested regulation).

15 Article 1 of the contested regulation provides:

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

…

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

Procedure and forms of order sought by the parties

16 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 23 December 2004.

17 By document lodged at the Court Registry on 5 April 2005, the Commission applied for leave to intervene in support of the form of order sought by the Council. By order of 13 June 2005, the President of the First Chamber of the Court of First Instance granted such leave. By letter lodged at the Court Registry on 28 June 2005, the Commission informed the Court of First Instance that it waived its right to lodge a statement in intervention but that it would appear at the hearing.

18 By a document lodged at the Court Registry on 25 April 2005, the Association des utilisateurs et distributeurs de l'agrochimie européenne (Audace) sought leave to intervene in support of the form of order sought by the applicant. By order of 8 July 2005, the President of the First Chamber granted such leave. He reserved the decision on the merits of the applications for confidential treatment lodged by the applicant and the Council. The non-confidential versions of the documents submitted by the parties were disclosed to Audace.

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

20 By letters of 2 and 15 December 2005 respectively, the Council and the applicant stated that they withdrew their applications for confidential treatment vis-à-vis Audace. Consequently, copies of the confidential documents were sent to Audace.

21 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was, consequently, assigned.

22 As a member of the chamber was unable to sit in the present case, the President of the Court of First Instance designated another judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure of the Court of First Instance.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, to request the applicant to reply to certain questions and produce a document. The applicant complied with that request within the period prescribed.

24 The parties, apart from Audace which did not take part in the hearing, presented oral argument and answered the questions put to them by the Court of First Instance at the hearing on 2 July 2008.

25 The applicant claims that the Court of First Instance should:

— annul Article 1 of the contested regulation in so far as it concerns the applicant;

— order the Council to pay the costs.

26 Audace claims that the Court of First Instance should:

— annul Article 1 of the contested regulation in so far as it concerns the applicant;

— order the Council to pay the costs occasioned by the intervention.

27 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

28 The Commission contends that the Court should dismiss the action.

Law

29 The applicant puts forward, in essence, three pleas in law in support of its action. The first alleges, essentially, infringement of Article 2(7)(c) of the basic regulation. The second alleges failure to fulfil obligations under Paragraph 6 of Annex II to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the Anti-Dumping Agreement') and Article 18(4) of the basic regulation, as well as breach of the applicant's fundamental rights. The third plea in law alleges breach of the principle of the protection of legitimate expectations. In addition, the applicant maintains that the Community institutions did not take appropriate account of the anti-dumping investigations opened in parallel against it in non-member countries and suggests, in the reply, that the refusal to grant it MES arises from a failure to take proper account of the Community's international obligations under the rules of the World Trade Organisation ('the WTO').

30 Before examining the complaints raised in connection with the first plea in law (see paragraph 43 et seq. below) and having regard to the parties' arguments on the scheme of Article 2(7) of the basic regulation and on the burden of proof in relation to the establishment of MES, as well as to those relating to the grounds for refusing to grant MES in this case, it is necessary to define, at the outset, the framework and subject-matter of the present dispute.

Preliminary remarks

31 Article 2(7) of the basic regulation concerns the calculation of the normal value in the case of imports from a non-market economy country. Until the amendment introduced under Council Regulation (EC) No 905/98 of 27 April 1998 amending the basic regulation (OJ 1998 L 128, p. 18), the normal value was always calculated, for all non-market economy countries, by what is known as the 'analogue country method', that is to say on the basis of the price or constructed value in a comparable market economy third country.

32 It is however clear from the preamble to Regulation No 905/98 that in 1998 the Council considered that 'the process of reform in Russia and the [PRC] ha[d] fundamentally altered their economies and ha[d] led to the emergence of firms for which market economy conditions prevail[ed]' and that 'both countries ha[d] as a result moved away from the economic circumstances which inspired the use of the analogue country method' (fourth recital). The Council took the view that 'it [was] appropriate to revise the Community's anti-dumping practice in order to be able to take account of the changed economic conditions' in those two countries and that 'in particular, it [was] appropriate to specify that normal value [might] be determined in accordance with the rules applicable to market economy countries in cases where it [could] be shown that market conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned' (fifth recital). The Council stated, finally, that 'an examination of whether market conditions prevailed [would] be carried out on the basis of properly substantiated claims by one or more producers subject to investigation' (sixth recital).

33 Thus, following that amendment, the normal value is, under Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from the PRC, to be determined in accordance with Article 2(1) to (6) of the basic regulation, if it is shown, on the basis of properly substantiated claims by one or more producers subject to investigation and in accordance with the criteria and procedures set out in Article 2(7)(c), that market economy conditions prevail for that or those producers as regards the manufacture and sale of the like product concerned. However, when that is not the case, the analogue country method set out in Article 2(7)(a) of the basic regulation is to apply.

34 As the Court of First Instance has previously decided, it is clear from Article 2(7) of the basic regulation and from the abovementioned recitals in the preamble to Regulation No 905/98 that the Community institutions are under an obligation, in cases such as this, to conduct their examination on a case-by-case basis, as the PRC cannot yet be regarded as a market economy country. The normal value of a product originating in the PRC can therefore be determined in accordance with the rules applicable to market economy countries only 'if it is shown … that market economy conditions prevail for this producer or producers' (see, to that effect, Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 52).

35 Moreover, it is apparent from the abovementioned provisions that the burden of proof lies with the exporting producer wishing to avail himself of MES. Article 2(7)(c) of the basic regulation provides that the claim 'must … contain sufficient evidence'. Accordingly, there is no obligation on the Community institutions to prove that the exporting producer does not satisfy the criteria laid down for the recognition of such status. On the contrary, it is for the Community institutions to assess whether the evidence supplied by the exporting producer is sufficient to show that all the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled (*Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, paragraphs 53 and 54).

36 It follows that if any doubt remains as regards the question whether the criteria set out in Article 2(7)(c) of the basic regulation are satisfied, because, for example, the

exporting producer concerned did not provide, or was not in a position to provide, the necessary information or because it did not cooperate fully in the investigation, and, therefore, it is not possible for the Community institutions to determine whether or not market economy conditions prevail, MES cannot be granted.

37 It is also clear from the case-law that, in the context of assessing factual situations of a legal and political nature in the country concerned in order to determine whether an exporter may be granted MES, the Community institutions enjoy a wide discretion. Consequently, the review by the Community courts of such assessments by the institutions must be confined to ascertaining whether the procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers (see *Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, paragraphs 48 and 49 and the case-law cited).

38 In this case, it is not in dispute between the parties that the applicant was refused MES solely on the ground that it had not shown that it satisfied the condition set out in the first indent of Article 2(7)(c) of the basic regulation and, more particularly, that intended to ensure that 'decisions of firms regarding prices, costs and inputs … are made in response to market signals reflecting supply and demand, and without significant State interference in this regard'.

39 As the applicant points out, it is clear from the communication of 5 December 2003 that the Commission considered that the other criteria set out in the second to fifth indents of Article 2(7)(c) of the basic regulation were met. Moreover, as regards the first indent of Article 2(7)(c) of the basic regulation, the Commission expressed no objection concerning the costs of major inputs which, in the terms of that provision, should 'substantially reflect market values'. It concluded that, where it was possible to compare prices of domestically supplied and imported raw materials, only minor differences had been found. Likewise, the Council admitted, in its pleadings, that MES had not been

granted to the applicant on the ground that the institutions had concluded that the applicant had not shown that its decisions were taken without significant State interference.

40 It follows that the applicant was fully informed of the grounds for the refusal of its request for the grant of MES and that, contrary to its submission, the lack of any precise statement in the contested regulation as regards which of the criteria under Article 2(7)(c) of the basic regulation was not satisfied cannot be regarded as evidence of a lack of objectivity or impartiality on the institutions' part. Furthermore, it is clear from the applicant's arguments that it understood perfectly the full significance of the refusal of its request for MES.

41 As is clear from the contested regulation and as the Council points out in its pleadings, the institutions' conclusion that the applicant had not shown that it met the condition set out in the first indent of Article 2(7)(c) of the basic regulation was based, in essence, first, on certain findings concerning State control over the applicant and on those concerning the appointment and composition of its board of directors (recital 13 in the preamble to the contested regulation), and, second, on the finding that, with regard to the setting by the applicant of export prices for the product concerned, the State exercised significant control by means of a procedure of stamping and verifying export contracts (recital 14 in the preamble to the contested regulation and as expressly stated by recital 17 therein).

42 It must be held, in that context, that the first plea in law, alleging, essentially, infringement of Article 2(7)(c) of the basic regulation, consists, first, in a claim that the institutions failed to examine whether the applicant's decisions regarding prices, costs and inputs were adopted in response to market signals and whether they were so without significant State interference. Consequently, those complaints concern, principally, the grounds set forth in recital 13 in the preamble to the contested regulation and it is therefore in that context that they fall to be examined. It will then be appropriate to address separately the complaints putting in issue the institutions' assessment relating to export prices.

The complaints concerning the Council's assessment regarding State control over the applicant and the appointment and composition of its board of directors

43 The applicant claims that, in order to assess whether it was operating in market economy conditions, the Council applied a test incompatible with Article 2(7)(c) of the basic regulation. The applicant submits that it provided evidence sufficient to show that its decisions regarding prices, costs and inputs were made in response to market signals reflecting supply and demand without significant State interference in that regard, and that such evidence was not properly taken into account by the Council. It observes, consequently, that the findings in recital 13 in the preamble to the contested regulation, relating to the State's minority shareholding and to the appointment and composition of the board of directors, even assuming that they were consistent with the evidence, are not matters justifying, in themselves, the refusal of MES. However, the applicant also challenges the factual accuracy of the Council's assessment, claiming that it is contradicted by the materials in the administrative file.

44 The Court considers it opportune to examine those complaints together.

Arguments of the parties

45 The applicant claims that it fully discharged the burden of proof upon it by producing, at the start of the investigation, evidence sufficient to show that its business decisions were made in response to market signals reflecting supply and demand without significant State interference in that regard.

46 In that respect, the applicant refers to the evidence relating to its prices, costs and purchases of inputs. It argues that it established that it negotiated prices at arm's length, seeking to ensure that they were sufficient to cover the company's full cost of production and provide a reasonable profit and that, as the Commission admitted in the

communication of 5 December 2003, prices of domestically supplied and imported raw materials were almost the same, thus demonstrating that the applicant sourced raw materials in the domestic market at prices reflecting market values.

47 The applicant submits that the Council does not state in the contested regulation that there was significant State interference in its business decisions. Likewise, the investigation file contains no evidence showing that the applicant's decisions concerning prices, costs and inputs did not respond to market signals reflecting supply and demand without significant State interference. The applicant notes, also, that the Commission examined its documents relating to prices, costs and purchases of inputs during its on-the-spot verification and raised no concern regarding their accuracy and that such evidence was not contested or rebutted in the institutions' conclusions.

48 As regards the Council's finding, in recital 13 in the preamble to the contested regulation, that 'the company was under a significant State control and influence', the applicant submits that it does not reach the threshold set out in the first indent of Article 2(7)(c) of the basic regulation and, therefore, did not permit the Council to refuse the application for MES.

49 It submits that the wording of that provision requires the Community institutions to assess whether the evidence produced by the exporting producer is sufficient to show that its business decisions respond to market signals and are taken without significant State interference. Thus, the absence of 'significant State interference' must be assessed, objectively and factually on the basis of the evidence, 'in regard' to each aspect of the business decisions encompassed in the first indent of Article 2(7)(c) of the basic regulation. In the applicant's submission, in view of the meaning of the term 'interference', a situation in which the State is not involved in the business decisions, or is involved but does not prevent them from responding to market signals reflecting supply and demand, does not constitute 'interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation. The applicant observes, moreover, that that provision accepts a situation of State interference unless that interference is 'significant'.

50 On that point, Audace adds that, in English, the concept of 'interference' clearly refers to 'an element of meddling, tampering or actual contamination'. It states that it is a 'transitive concept' and that the State must interfere 'with' a particular decision or action, which must fall within one of the categories mentioned in the first indent of Article 2(7)(c) of the basic regulation. The wording of that provision in the other official languages confirms that interpretation ('intervention significative' in the French version and 'Staatseingriffe' in the German version). According to Audace, that concept cannot be validly assimilated to the concepts of 'control' or 'influence' which are 'intransitive concepts', the State being able to exercise a degree of influence without, thereby, actually tampering with decisions or actions. Moreover, the use of the phrase 'in this regard' ties such interference to decisions on prices, costs and inputs.

51 More particularly, the applicant notes that it is not control which constitutes the criterion provided for in the first indent of Article 2(7)(c) of the basic regulation and submits, consequently, that the State's minority shareholding is not a factor from which it could be inferred that the condition set out in that provision was not satisfied. It claims, also, that no published decision has ever denied MES to a company by reason of a minority shareholding held by the State or by State-owned companies and that the Commission itself must have formed the opinion, during the investigation, that such shareholding was not an obstacle to the grant of MES since, otherwise, the on-the-spot verification it carried out would have been meaningless.

52 Likewise, the applicant disputes the relevance of the institutions' assertions relating to the appointment and composition of its board of directors. It points out, as regards the alleged appointment of the board of directors by the State shareholders, that the fact that most of the other shareholders do not take part in the annual meeting cannot lead to the conclusion that there is significant State interference in the applicant's business decisions. It argues, also, that the members of the board do not represent any particular shareholder and do not interfere in the company's decisions regarding prices, costs and inputs. Such interference would have been against both Chinese company law and the applicant's articles of association. Therefore, the applicant submits that the presence of alleged State officials or officials of State-owned enterprises on the board of directors

was, of itself, not a factor from which it could be inferred that the condition set out in the first indent of Article 2(7)(c) of the basic regulation was not satisfied.

53 The applicant suggests that the Council's interpretation means that, in practice, many of China's modern, commercial and well-managed limited liability companies would not, by reason of a State minority shareholding, be able to demonstrate that 'market economy conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned', which runs counter to the aim pursued by the adoption of Regulation No 905/98. The applicant submits that it is a clear example of such new and successful Chinese companies, listed on a stock exchange and operating without restrictions in market economy conditions to maximise profits and the value of the dividends distributed to shareholders. It argues, also, that significant State shareholdings in companies of the European Union illustrate the fact that State shareholdings do not entail State interference in the company's business decisions. Likewise, persons with connections to the public sector are involved in several of the most competitive companies of the Union.

54 Besides, the applicant maintains that, even on the assumption that the minority State shareholding is relevant, as the Council argues, it is insufficient to justify the refusal of MES in this case, since the evidence which the applicant presented showed that the shareholders did not interfere in the company's decisions on prices, costs and inputs and that the State shareholding did not prevent them from responding to market signals reflecting supply and demand. The applicant states that none of its observations concerning the 'safeguards' preventing the State from interfering with its business decisions was analysed or challenged by the institutions in their pleadings. That approach is in contrast to the institutions' usual practice according to which they assess in detail, even where companies are entirely or predominantly State owned, the measures taken by the company concerned to prevent State interference in the circumstances in question.

55 In any event, the applicant denies the factual accuracy of the institutions' assertions.

56 First, the applicant submits that, contrary to the institutions' assertions, the State's minority shareholding in its capital does not enable the State, either in fact or in law, to control the applicant, since, as it showed in the investigation, the law applicable and its own articles of association provide guarantees preventing State shareholders interfering in its commercial decisions or the management of the company and prohibiting them from harming the rights and legitimate interests of the company and its other shareholders. In addition, it submits that the shareholding of one of its State shareholders arose from a normal commercial transaction.

57 Secondly, as the applicant established in the investigation, contrary to the Council's statement in the contested regulation, the members of its board of directors are not appointed by the State but are elected by the shareholders' meeting. As it also explained, the applicant and its shareholders are 'protected' from such interference by Chinese company law, its own articles of association and the listing rules of the Shanghai Stock Exchange.

58 Thirdly, the applicant denies the Council's assertion that 'the majority of the directors of the board were either State officials or officials of State-owned enterprises'. In that regard, it claims that it established, first, that none of its directors or managers were State officials and that Chinese company law, echoed by its articles of association, prohibited State officials from holding posts as directors, supervisors or managers of companies and, second, that only two directors (out of a total of nine) were managers in State-owned companies, in this case, two corporate shareholders in the applicant. Responding to the Council's arguments in the defence, the applicant argues that it is erroneous to regard its directors as being affiliated to the State on the basis of the sole fact that they were employed by the applicant or because they were professors of universities which are, in the Council's terms, 'State owned and operated educational establishments'.

59 Finally, the applicant and Audace dispute the arguments relied upon by the Council in the course of the proceedings to justify its approach.

60 Thus, first, as regards the Council's argument that the evidence for examining whether the applicant's 'transactions' are carried out in response to market signals is irrelevant with respect to the issue of State interference, the applicant submits that it is clear from the case-law and the practice of the institutions themselves that each indent of Article 2(7)(c) constitutes a condition concerning a single set of factual circumstances which must be examined together. The five indents of that article concern five main aspects of the essential characteristics necessarily possessed by firms operating in a market economy system. The first indent relates to the manner in which the entity concerned adopts its business decisions and is designed to assess whether those decisions are taken 'by the business and for the business' or whether they are 'tainted' by other considerations prevailing in non-market economy systems. The applicant submits consequently that where, as in this case, the institutions recognise that its business decisions 'are made in response to market signals reflecting supply and demand' and that 'the costs of major inputs substantially reflect market values', there is a presumption that those decisions are also taken 'without significant State interference in this regard', above all where there is no evidence establishing the contrary and the conditions in the four other indents of Article 2(7)(c) of the basic regulation are entirely fulfilled.

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

62 Secondly, as regards the Council's assertion that it is not necessary to consider whether the State interfered with particular business decisions, because 'the PRC is still a non-market economy country in which only a few companies operate according to market economy conditions', the applicant observes that in 1998 the Council itself formally recognised that the substantial developments in the Chinese economy justified amending Article 2(7) of the basic regulation. In addition, it is clear from the institutions' decision-making practice that the grant of MES to undertakings

established in the PRC is far from being so exceptional. On that point Audace adds that the aim of Article 2(7)(b) of the basic regulation is to enable qualified Chinese exporters, however few they may be, to show case by case that they are subject to market economy forces, China being a member of the WTO. The approach taken by the Council would appear to subvert that process and prejudge the answer to be given.

63 Thirdly, replying to the Council's arguments relating to the burden of proof on the exporter concerned and the institutions' discretion, the applicant notes that the limits to the Council's powers have been clearly defined by the case-law and claims, in particular, that the guarantees conferred by the Community legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. The applicant submits that in this case the institutions have clearly failed to comply with those obligations and that, consequently, their appraisal of the facts was not proper.

64 Fourthly, contrary to the Council's submission in the defence, the applicant argues that Article 2(7)(b) and (c) of the basic regulation are not to be interpreted strictly and that the institutions' approach should be flexible and open to the possibility that ever more companies satisfy the criteria for MES. It points out, indeed, that that provision constitutes an 'exception to an exception', that is to say an exception to the analogue country method, which, under the basic regulation and the Anti-Dumping Agreement, is itself an exception to the principal method for determining the normal value. In addition, under the Protocol on the Accession of the PRC to the WTO, annexed to the Decision of 10 November 2001 of the Ministerial Conference of the WTO (WT/L/432 of 23 November 2001; 'the Protocol on the PRC's Accession to the WTO'), it is a temporary and transitional solution.

65 Finally, the applicant also refutes the Council's arguments that the references to Chinese company law are irrelevant. It submits that they go against the efforts made by the PRC to establish a market economy and contradict the reasons for the introduction of MES by the basic regulation. It maintains, in addition, that such law was enacted quite recently and applies rules similar to those in force in the principal modern economies, including those of various Community Member States.

66 The Council contends that the interpretation given to the first indent of Article 2(7)(c) of the basic regulation by the applicant and Audace is wrong and that the institutions applied the correct method in this case. It notes, in particular, that it is clear from the case-law that the method for determining the normal value set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down in Article 2(7)(a) and that, consequently, it must be interpreted strictly. In addition, it observes that the burden of proving that all those criteria are fulfilled lies with the producer concerned and that the institutions enjoy wide discretion with respect to the granting of MES.

67 The Council contends that 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation does not require the institutions to assess whether the State has interfered in individual business decisions if the State itself takes such decisions or prevents them from being taken. It is sufficient to establish that the State exercises significant control over the exporter in the PRC.

68 In that regard, the Council states that the PRC is still a non-market economy country in which only a few companies operate according to market economy conditions. It therefore submits that it is sufficient, in order to establish that the State participates in business decisions, to establish that the State participates with a significant weight in the overall decision-making of the company. That may take various forms, including participation in shareholder and board meetings.

69 In the Council's view, if the State controls a company, it also interferes with its decisions, even if it does not 'meddle' or 'tamper' with individual decisions or 'contaminate' them, as Audace requires. In that case, the decisions of the company are State decisions taken by virtue of the general control it exercises and that will necessarily apply to the categories of decisions covered by the first indent of Article 2(7)(c) of the basic regulation. Thus, in the Council's submission, if the holding of shares by the State gives rise to State control, it also leads to State interference which is, by definition, significant.

70 The Council contends that, under the first indent of Article 2(7)(c) of the basic regulation, State interference and arm's length prices are two different issues and the verification that prices and costs reflect market values is not the sole aim of the MES determination. As is apparent from the use of the conjunction 'and' in the wording of the first indent of Article 2(7)(c) of the basic regulation, an exporter must demonstrate two separate facts: first, that its decisions are made in response to market signals and, second, that its decisions are taken without significant State interference. The Council argues, consequently, that evidence of the prices of particular transactions is irrelevant to the question of State influence and declines to address the arguments that the applicant has devoted to that question in its application.

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

72 Furthermore, the Council disputes the existence of an established practice whereby the institutions examine in detail the measures to prevent State interference adopted by the exporter under investigation. In any event, the Council submits that the applicant did

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

73 As regards the comparison of the applicant's situation with that of a company in a market economy country, the Council contends that it ignores the fact that the PRC is still a non-market economy country and that, in that context, State-controlled companies do not, by definition, operate under market economy conditions.

74 The Council adds that it depends on the circumstances of each case whether the State participation in overall decision-making is of sufficient weight to constitute 'interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation. In the present case, the institutions concluded that the grounds of refusal set out in the contested regulation, 'taken together', were sufficient to conclude that the applicant had not shown that it operated free of State interference.

75 The Council's final contention is that, contrary to the applicant's case, the grounds set out in recital 13 in the preamble to the contested regulation are borne out by the administrative file.

76 First, the Council observes that the institutions' conclusion that the State, despite not holding the majority of the shares, controlled the applicant was based on an assessment of the distribution of the shares. In fact, the State shareholding (40.98%) is extremely concentrated, being shared by only three State-owned entities, whereas the private shareholding (59.02%) is widely dispersed, thus enabling the State-owned shareholders to control the shareholders' meetings. In addition, the fact that the unequal distribution of the State-owned shares and the non-State-owned shares allows the State to control the company is confirmed by the manner of representation of the shares at the annual shareholders' meeting held during the investigation period, at which 90% of the shares represented were held by the State or State-owned companies.

77 Secondly, the Council points out that, since the members of the applicant's board of directors were elected at shareholders' meetings which, as is clear from the above, were controlled by the State-owned shareholders, it was, in fact, the latter who appointed the board of directors.

78 Thirdly, as regards the composition of the board of directors, the Council contends that it is clear from the table provided by the applicant in its letter of 10 September 2003, in response to a request for information from the Commission, that only two of the nine members of the board had no affiliation with the State. All the others were employed by State-owned or State-controlled companies or institutions. In a non-market economy country it may be assumed that the State controls all economic activities and therefore it is difficult to see how employees of State-owned or State-controlled entities could be free from the influence or their employer, namely the State, and would not act in the same manner as State officials.

Findings of the Court

79 In recital 13 in the preamble to the contested regulation, the Council stated as follows:

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

80 It is, at the outset, appropriate to point out that, contrary to what the applicant seems to infer (see paragraph 56 above), the institutions did not assert, either in the contested regulation or during the investigation, that the State was directly involved in decisions concerning the applicant's day to day management, that the State-owned shareholders harmed the legitimate rights or interests of the company or other shareholders or that the way in which the State acquired its shareholding was incompatible with market economy conditions. Apart from the assertions relating to the applicant's board of directors, the institutions confined themselves to holding that there was State control on the basis of findings relating to the distribution of the shareholdings in the applicant, without expressing a view on the question how, in particular, that control was or could be in practice exercised. The applicant has not put in issue the Council's assertion that the shareholders' meetings, including those which decided on the composition of the board of directors, were controlled by the State shareholders.

81 It is therefore appropriate to examine whether the finding that there was such State control could justify the refusal of MES.

82 In that regard, State 'control' or 'influence' is not a criterion expressly laid down in the first indent of Article 2(7)(c) of the basic regulation. It must therefore be determined whether, as the Council contends, State control, as found in this case, necessarily entails 'significant State interference', within the meaning of that provision.

83 The first indent of Article 2(7)(c) of the basic regulation requires that, to qualify for MES, the exporting producer concerned must, in particular, submit sufficient evidence that 'decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard'.

84 It is clear from the wording of that provision that the question of whether or not there is significant State interference must be assessed in the light of the way that 'decisions of firms regarding prices, costs and inputs' are made. It requires the exporting producer concerned to show that its decisions are made both 'in response to market signals' and 'without significant State interference'. In addition, the use of the words 'in this regard' further accentuates the connection between the relevant decisions and the State interference. Consequently, conduct by the State which is not such as to influence those decisions cannot constitute 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation.

85 Furthermore, in view of the wording, purpose and context of that provision, the concept of 'significant State interference' cannot be assimilated to just any influence on the activities of an undertaking or to just any involvement in its decision-making process, but must be understood as meaning action by the State which is such as to render the undertaking's decisions incompatible with market economy conditions.

86 The very use of the expression 'significant … interference' is evidence of the Community legislature's intention to allow a certain degree of State influence over an undertaking's activities or of State involvement in its decision-making process if it has no effect on the manner in which its decisions concerning prices, costs and inputs are made.

87 It is also to be noted that, according to the terms of Article 2(7)(b) and (c) of the basic regulation, the criteria set out in the first to fifth indents of Article 2(7)(c) are designed to identify the producers subject to an anti-dumping investigation, for which 'market economy conditions prevail … in respect of the manufacture and sale of the like product concerned' (Article 2(7)(b) of the basic regulation; see also the fifth recital in the preamble to Regulation No 905/98) and which 'operate under market economy conditions' (Article 2(7)(c) of the basic regulation). Furthermore, the application of the rules laid down in Article 2(1) to (6) of the basic regulation presupposes that certain data are available, such as the prices paid or payable, the cost of production and sales 'in the ordinary course of trade' and relating primarily to the product under investigation (Article 2(1) of the basic regulation). It is in that context that the criteria under Article 2(7)(c) of the basic regulation require that undertakings wishing to claim MES operate in market-economy conditions and that prices, costs and the set of basic books of account be reliable (see, to that effect, Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council* [2003] ECR II-4741, paragraph 41).

88 It must therefore be held that the condition in question is intended to determine whether the relevant decisions of the exporting producers concerned are based on purely commercial considerations, appropriate for an undertaking operating under market economy conditions, or whether they are distorted by other considerations, appropriate to State-run economies.

89 In that regard, the Council correctly notes that, for the purposes of interpreting and applying the first indent of Article 2(7)(c) of the basic regulation, account must be taken of the fact that the States referred to in Article 2(7)(b) are not regarded as States with

market economies, and that is so despite the reforms which have been achieved there (see, to that effect, *Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, paragraphs 51 and 52). That is an assessment by the Community legislature of the economic, legal and political situation in those non-member countries, which is expressly recognised in Article 2(7) of the basic regulation and which justifies the specific treatment reserved for imports from those States as regards the determination of the normal value. It must be presumed, therefore, that the conditions in which undertakings operate in those countries are not, unless there is evidence to the contrary, comparable to those in market economy countries.

90 Thus, more particularly, in the context of a non-market economy country, the fact that a company established in that country is State-controlled may raise doubts as regards the question of whether the State exceeds the role of a normal shareholder which respects the rules of the market and whether the company's management is sufficiently independent of the State to be able to make decisions concerning prices, costs and inputs autonomously and in response to market signals reflecting supply and demand. In addition, it is clear from the first indent of Article 2(7)(c) of the basic regulation, in the words of which decisions of firms are 'made', that the Community legislature specifically required that the concerned undertaking's decision-making process be free from any significant State interference. Thus, it is for the company to show that its decisions on prices, costs and inputs are made independently, based on considerations typical of a market economy, namely, in particular, the maximising of profit, and that they are not influenced by considerations peculiar to the State. The taking of independent decisions on commercial grounds is, generally, a characteristic of the private sector and, consequently, it is legitimate for the Community institutions, in the exercise of the wide discretion they enjoy in that domain, to take account, in their examination of the evidence produced by the exporter concerned, of the fact that the undertaking concerned is State-controlled.

91 However, State control, as established in this case, is not, as such, incompatible with the taking of commercial decisions by the undertaking concerned in keeping with market

economy conditions and, in particular, does not mean that its decisions on prices, costs and inputs are based on considerations unrelated to an undertaking operating under such conditions.

92 The approach advocated by the Council in the course of the proceedings, which is also apparent from recital 13 in the preamble to the contested regulation, assimilating State control to 'significant State interference', within the meaning of the first indent of Article 2(7)(c) of the basic regulation, leads to the exclusion, in principle, of State-controlled companies from entitlement to MES, irrespective of the real factual, legal and economic context in which they operate, and, more particularly, of whether they submitted evidence sufficient to show that the State did not exceed the role of a normal shareholder in a market economy country, that the undertaking's decisions were made freely and independently of considerations peculiar to the State and that those decisions were therefore based exclusively on purely commercial considerations, appropriate to an undertaking operating under market economy conditions.

93 It is appropriate to note, in particular, in that context, that the Council's assertions concerning the appointment and composition of the applicant's board of directors cannot, in the light of the contents of the Court file, put in doubt the fact that the control which the State exercises over the company remains, as the applicant maintains, within the limits of the usual mechanisms of the market.

94 First, as regards the appointment of the board of directors, it is clear from the Court file that neither the State nor State bodies have the right to appoint, directly, one or more directors. As the applicant showed in the request for MES, under its articles of association the members of the board of directors are appointed by the general meeting. In addition, as is not disputed by the institutions and as, on the contrary, is clear from the contents of the Court file and the Council's arguments, the assertion made in recital 13 in the preamble to the contested regulation concerns precisely the fact that, because of the wide dispersion of the private shareholdings, which allows the State shareholders to control general meetings, it is they who decide, in practice, on the composition of the board of directors. That fact alone does not lead to the conclusion that the State shareholders are in a position different, or act differently, to a private minority

shareholder which, because of the dispersion of the majority shareholding, in fact controls the shareholders' meetings. Therefore, it cannot constitute a ground for refusing the applicant MES.

95 Second, as regards the composition of the board of directors, in the light of the contents of the Court file and the Council's arguments, the assertions concerning the existence of connections between the majority of the board of directors and the State are based also on the mere fact that the applicant is State-controlled. Whereas the institutions have raised no objection as regards two of the nine directors, they have complained of three other directors being in an employment relationship (as regards the 'General Manager' and 'Vice General Manager') or connected by a contract for the supply of services (as regards the Chairman of the board of directors) with the applicant, while the latter was State-controlled. That fact alone cannot be regarded as being incompatible with market economy conditions and cannot found an argument, in the absence of other information about their connections with the State, that the decisions of those directors at board meetings are influenced by considerations peculiar to the State. In those circumstances, without it being necessary to examine the applicant's arguments as regards the other directors, the ground that the majority of the board of directors had connections with the State which were incompatible with market economy conditions must be rejected.

96 It must therefore be held that the findings set forth in recital 13 in the preamble to the contested regulation contain no matter justifying the refusal of MES in this case. In particular, the Council's conclusion that the applicant is subject to 'a significant State control and influence', amounts only, in the light of the contents of the Court file, to an assertion that the applicant is State-controlled.

97 Thus, since the criterion of State control is not one of the those expressly stated in the provision in question, the Council's approach is incompatible with the system which it itself established by inserting, by virtue of Regulation No 905/98, the provisions of Article 2(7)(b) and (c) into the basic regulation, which are based on the examination on a case-by-case basis, by the Community institutions, of the sufficiency of the evidence

provided by exporting producers subject to the anti-dumping investigation and wishing to avail themselves of MES.

98 It must be concluded, consequently, that the applicant correctly pointed out that the grounds set out in recital 13 in the preamble to the contested regulation show that, in order to assess whether the evidence which the applicant had provided was sufficient, the institutions applied a criterion not laid down in Article 2(7)(c) of the basic regulation. Whilst State control over an undertaking is a matter which may possibly be taken into account, it is not sufficient, by itself, to demonstrate the existence of 'significant State interference' within the meaning of that provision.

99 Admittedly, the burden of proof lies on the exporting producer wishing to avail itself of MES. However, in this case, the applicant provided the Commission with various documentary evidence intended to show that it satisfied the criterion set out in the first indent of Article 2(7)(c) of the basic regulation. That evidence was, however, judged to be irrelevant because of the assimilation of State control to 'significant State interference' within the meaning of that provision.

100 Thus, the applicant provided evidence which had, moreover, been requested by the Commission itself in its questionnaire for producers claiming MES and which related to decisions taken during the investigation period in respect of costs, contract negotiations, price fluctuations, the regulatory environment (in respect of prices, distribution and export licences) and to the process for decision-taking within the company. It is noteworthy, in that regard, that the Council does not challenge the applicant's arguments that the Commission examined its documents relating to prices, costs and purchases of inputs during the on-the-spot inspection and expressed no reservation in regard to their veracity. By contrast, the Council expressly admitted, in the course of the proceedings, that the Community institutions had decided that the evidence relating to particular commercial decisions was not relevant to their assessment of whether the criterion set out in the first indent of Article 2(7)(c) of the basic regulation was satisfied, and, in particular, of whether those decisions had been adopted without significant State interference.

101 Likewise, neither the wording of the contested regulation nor the documents in the investigation file can lead to the conclusion that the institutions took account of the evidence submitted by the applicant in the request for MES, and repeated several times during the investigation, concerning the guarantees in its articles of association, in Chinese company law and in the listing rules of the Shanghai Stock Exchange, in order to assess the extent to which those guarantees were evidence sufficient to demonstrate that the applicant's decisions concerning prices, costs and inputs were made without significant State interference. The same applies to the evidence relating to the conduct of the State and private shareholders in votes at the shareholders' general meeting and to that relating to the origins of the State shareholding. In particular, that evidence is not addressed in the part entitled 'State influence' in the communication of 5 December 2003. The same applies to the letter of 6 April 2004, by which the Commission confirmed its decision to refuse the applicant MES.

102 It follows from all the foregoing that the circumstances set forth in recital 13 in the preamble to the contested regulation cannot justify the Council's conclusion, drawn in recital 15, that the applicant did not meet all the criteria set in the first indent of Article 2(7)(c) of the basic regulation.

103 Those findings are not put in question by the Council's argument that, according to the case-law, the Community institutions have a wide discretion in a case like the present.

104 The foregoing findings are not based on an evaluation of the factual, legal or political situations which encompass a wide discretion of the institutions in that field but are based on the determination of the scope of the relevant rules of law established by the Council. In its scrutiny of legality, the Community judicature conducts a full review as to whether the institutions properly applied the relevant rules of law (see, to that effect, Case T-374/04 *Germany* v *Commission* [2007] ECR II-4431, paragraph 81).

105 It is appropriate to point out, indeed, that, by Article 2(7)(b) and (c) of the basic regulation and, in particular, by laying down precise criteria for the grant of MES, the Council limited its own discretion, with the aim, moreover, of taking account of the 'changed economic conditions' in China (fifth recital in the preamble to Regulation No 905/98). Thus, its assessment in respect of that requirement must be carried out within the limits of those rules of law and the exercise of the wide discretion in that domain cannot lead to the imposition of criteria for the grant of MES which go beyond those set out in Article 2(7)(c) of the basic regulation.

106 Furthermore, where the Community institutions have a wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance and those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and the right of the person concerned to make his views known and to have an adequately reasoned decision (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case T-413/03 *Shandong Reipu Biochemicals* v *Council* [2006] ECR II-2243, paragraph 63). Consequently, in a case like the present, whilst the Community courts cannot intervene in the assessment reserved for the Community authorities, it is nevertheless for the courts to satisfy themselves that, as part of the investigation which the institutions are obliged to carry out for the purposes of Article 2(7)(b) and (c) of the basic regulation, they took account of all the relevant circumstances put forward by the exporting producer and that they appraised them with all due care (see, to that effect and by analogy, *Shandong Reipu Biochemicals* v *Council*, paragraph 64). However, as has been pointed out above, an erroneous interpretation of the applicable legal rules in this case led the institutions to fail to take proper account of the relevant evidence put forward by the applicant.

107 It must be noted, moreover, that the Council correctly submitted that the method of determining the normal value of a product set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down for that purpose in Article 2(7)(a), which is, in principle, applicable to imports from non-market economy countries and is, therefore, to be interpreted strictly (*Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council*, cited in paragraph 87 above, paragraph 39, and *Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, paragraph 50). However, that cannot validate the Council's approach assimilating, as a matter of principle, State control, as observed in recital 13 in the preamble to the

contested regulation, to 'significant State interference' within the meaning of the first indent of Article 2(7)(c), and doing so without taking into account the evidence of the real factual, legal and economic context in which the applicant operates. That approach is tantamount, in fact, as has just been decided, to the imposition of criteria for the grant of MES which go beyond those set out in Article 2(7)(c) of the basic regulation.

108 Finally, it would not be appropriate to accede to the applicant's request that the Court rule on the question whether the evidence which the applicant provided was or was not sufficient to decide that the criterion in the first indent of Article 2(7)(c) of the basic regulation was met, since that assessment is reserved to the Community institutions. As the Council correctly submits, it is for the Community institutions to assess, case by case, whether the evidence supplied by the exporting producer is sufficient to show that the criteria laid down by Article 2(7)(c) of the basic regulation are met and for the Community judicature to examine whether the institutions' assessment is vitiated by manifest error (see, to that effect, *Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, paragraphs 52 and 53). It is not, therefore, for the Court of First Instance to undertake such an assessment in place of the institutions concerned.

109 It follows from the foregoing that the present complaints must be upheld.

The complaints regarding the Council's assessment relating to the setting of the applicant's export prices

110 The applicant submits that the Council's assessment relating to the setting of the applicant's export prices cannot be a basis for refusing to grant it MES. First, it points out, in essence, that export sales are not relevant to the examination of the request for MES and that the Council therefore misconstrued Article 2(7)(b) and (c) of the basic

regulation. Secondly, the Council's assessment concerning the setting of the applicant's export prices is vitiated by manifest error.

The complaint alleging misconstruction of Article 2(7)(b) and (c) of the basic regulation

— Arguments of the parties

111 The applicant claims that, since the procedure for stamping export contracts by the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters ('the CCCMC') relates to the export price and not to sales of the product concerned on the Chinese domestic market, it cannot be a valid basis for refusing the applicant MES. The Council's assessment to the contrary effect is based on a construction of the first indent of Article 2(7)(c) of the basic regulation which is incompatible with the general scheme of the Anti-Dumping Agreement, the Protocol on the PRC's Accession to the WTO and the basic regulation.

112 It notes, in that regard, that Article 2(7) of the basic regulation and Article 15 of the Protocol on the PRC's Accession to the WTO concern the determination of the normal value and are based on the taking into account of the sale of the product concerned on the Chinese domestic market. Export prices are, by contrast, a different concept in the basic regulation which is governed by different rules. The applicant submits that such construction is confirmed by the preamble to Regulation No 905/98, by the case-law of the Court of First Instance (*Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above) and by the institutions' own constant practice whereby, to assess whether there is 'significant State interference', they always take account of decisions relating to prices on the domestic market in question, not export prices.

113 The Council contends that it is irrelevant that the CCCMC contract stamping procedure relates only to export transactions. It submits that the applicant is confusing the conditions for granting MES with the determination of the normal value and the calculation of the export price in the event of MES being granted. However, for MES to be granted, the exporter must provide sufficient evidence that there is no State interference regarding the undertaking's prices and sales. That condition is not met if the State intervenes with regard to export prices. Moreover, the Council submits that, in paragraphs 94 to 109 of the judgment in *Shanghai Teraoka Electronic* v *Council*, cited in paragraph 34 above, the Court of First Instance placed particular emphasis on the institutions' conclusions regarding State-controlled export prices.

— Findings of the Court

114 Whilst the applicant correctly notes that Article 2(7) of the basic regulation concerns the determination of the normal value, which, for the purposes of that regulation, is a different concept to that of export prices, it does not follow that the conduct of the exporting producers concerned as regards export prices is wholly irrelevant for the purposes of applying Article 2(7)(b) and (c) of the basic regulation.

115 That provision makes the determination of the normal value in accordance with the rules set out in Article 2(1) to (6) of the basic regulation subject to the demonstration by the producer concerned that it operates under market economy conditions. There is no reason to think that 'market economy conditions' should concern exclusively the domestic activities of the producer in question. On the contrary, it cannot be denied that the absence of restrictions as regards exports and, in particular, the freedom to negotiate export prices are characteristics peculiar to a market economy.

116 There is also nothing to support the applicant's argument in the wording of the five indents of Article 2(7)(c) of the basic regulation which state what evidence the producer

should provide so as to be regarded as operating under market economy conditions. Indeed, there is no indication in those provisions that they refer exclusively to the domestic activities of the producers concerned. In particular, the reference to 'decisions of firms regarding prices' is not accompanied by any reservation by virtue of which those decisions should concern only the producer's domestic market.

117 As regards paragraph 15(a) of the Protocol on the PRC's Accession to the WTO, cited by the applicant, it also refers to the criterion of 'market economy conditions' as regards, in particular, the sale of the like product, without stating that it is referring exclusively to sales on the domestic market.

118 It must, consequently, be held that the applicant has not established that the concept of 'market economy conditions', used in both the basic regulation and the Protocol on the PRC's Accession to the WTO, did not concern export prices. Therefore, possible restrictions on the freedom to set export prices could legitimately be the basis for refusing to grant MES and the institutions therefore made no error of law in that regard.

119 Finally, it must be noted that, in its comments of 16 December 2003, the applicant itself admitted the relevance of the analysis of export sales in the context of the first indent of Article 2(7)(c) of the basic regulation. It stated, in fact, that if the State prevented exports because the price was too low, the Commission had to take it into account for the purposes of the assessment as to whether there was significant State interference, whilst fully maintaining, however, that such was not the case as regards the product concerned.

120 Accordingly, the present complaint must be rejected.

The complaint alleging manifest error of assessment by the Council as regards the setting of the applicant's export prices

— Arguments of the parties

121 The applicant claims, in essence, that it showed that its export prices were freely set on the sole basis of commercial considerations and without any interference by the State. Therefore, the Council's assessment relating to the CCCMC's export contract stamping procedure is vitiated by manifest error.

122 In that regard, first, the applicant refers to the evidence and explanations given to the Commission and subsequently verified by it at the on-the-spot inspection, which established that its price decisions were based on purely commercial considerations and were neither dictated nor controlled by the State. The applicant established, in particular, that no authorisation was necessary to sell the product concerned on the domestic or world market and that no price regulation resulted from the action of State bodies.

123 Second, as regards the CCCMC, the applicant explained that it was neither directed nor controlled by the State but was a non-governmental body founded by its members. The applicant submits, also, that the file of the investigation contains evidence establishing that the indicative price was not fixed by the CCCMC but by the Chinese glyphosate producers themselves and that it was not a binding minimum export price but an indicative, guide price. Thus, no 'compliance' with that price was required, and the procedure for stamping export contracts was a mere formality.

124 More specifically, the applicant explained that the Chinese glyphosate producers agreed among themselves on the need for guided export pricing in order to minimise the risks of anti-dumping investigations in foreign markets. The CCCMC's role in that

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

125 Thirdly, the applicant claims that it established that all its export contracts in the investigation period had been stamped by the CCCMC, regardless of price, and, therefore, that the alleged minimum export price was not binding and certainly was not binding so far as the applicant was concerned. In that respect, it refers to certain information which it provided during the investigation which was verified by the Commission at the on-the-spot inspection, such as copies of export contracts and invoices, and complete lists of its export sales to the Community and to other markets in the investigation period, all such documents showing prices, including the average unit price of export sales, which were lower than the guide price. It also provided a certificate from the CCCMC confirming that it had stamped all the applicant's glyphosate export contracts in the investigation period.

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

127 Furthermore, the applicant maintains that the Council's argument based on the fact that only two glyphosate producers in the PRC requested MES is 'plain speculation' and 'unacceptable'. In any event, the applicant states that, in fact, several Chinese exporters were overwhelmed by the offensive that had been waged against them by Monsanto in the anti-dumping investigations taking place almost in parallel worldwide and preferred not to spend additional funds on their defence in the European Union market. Audace also dwells specifically on that point, observing that the Council's argument betrays its perfunctory and prejudicial approach to its assessment in this case.

128 Finally, the applicant claims that, should the Council's finding relate to a situation in which the CCCMC could refuse to stamp an export contract because of the price, that possibility could not, in view of the practice which the applicant demonstrated and without any actual demonstration of a refusal to stamp, justify the refusal of the applicant's request for MES. A right of veto without any use of that right cannot constitute State interference, let alone significant State interference. In any event, it maintains that it demonstrated that the mechanism concerned was not designed to allow such interference.

129 The applicant also observes that export formalities are not uncommon, even in the European Union. For example, an export licence is a compulsory requirement for the export of foodstuffs under the Common Agricultural Policy (CAP). The applicant submits that governments intervene constantly, at both the micro- and macro-economic level in all market-economy countries, and the imposition of anti-dumping duties is a classic example of such intervention to protect the local industry. The difference between market and non-market economy systems is therefore connected with the introduction of the concept of degree ('significant') into that of 'State interference'.

130 The Council contends, in essence, that there was a very efficient control system in place, that it was run by the State through the CCCMC and customs authorities and that it therefore constituted interference by the Government of the PRC in the setting of the

applicant's export prices. In those circumstances, the price actually set by the applicant and, in particular, the fact that the CCCMC stamped contracts in which the price was lower than the 'floor price' is irrelevant.

131 In that regard, the Council points out that, in its response to a request from the Commission for additional information, the applicant explained that, within the CCCMC, there was a glyphosate export coordination group which met to determine the appropriate 'floor price' for export sales. Most exports were made at prices above that 'floor price', which remained unchanged for two years. According to the applicant, all export contracts had to be submitted to the CCCMC, which checked the selling prices and stamped the contract if the selling price exceeded the 'floor price'. The Government of the PRC directed the Chinese customs authorities not to permit exports to take place unless the contract bore the CCCMC's stamp.

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

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

Chinese glyphosate producers themselves, the Council submits that it is contradicted by the wording of an extract from the CCCMC's information brochure which reads as follows:

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

134 In addition, according to the Council, if the price was, apparently, set by all the glyphosate producers, it was effectively set by the State since the vast majority of producers were State-owned or State-controlled companies. In that regard, the Council observes that of 39 glyphosate producers in the PRC, as identified in the review request, only two requested MES. The Council thereby infers that the other 37 producers themselves concluded that they did not fulfil the criteria required for obtaining MES, which means that they were owned or controlled by the State.

135 The Council points out that, since the customs authorities did not permit exports unless the contract was stamped by the CCCMC, the CCCMC was likewise in a position to veto any export which did not respect the 'floor price'. In its submission, that really and truly forced the exporters, including the applicant, to respect the 'floor price', even if the CCCMC had sometimes stamped export transactions for which the export price was below that price.

136 Finally, in reply to the applicant's arguments that export formalities are not uncommon, the Council contends that State interference in a market economy, where all companies, even if they are fully State-owned, operate, in principle, according to market criteria, cannot be compared to that which takes place in a non-market economy country in which a company which is controlled by the State does not operate according to market criteria. However, the setting of the general framework under

which companies operate, even if it affects companies' decisions, including on price, does not constitute, in the Council's submission, State interference in the sense of the first indent of Article 2(7)(c) of the basic regulation.

— Findings of the Court

137 A preliminary point to note is, as observed above, that possible restrictions on the freedom to set export prices must be taken into account in the assessment of whether the criteria set out in Article 2(7)(c) of the basic regulation are satisfied. Thus, it was for the applicant to prove, in particular, that its export sales were consistent with the conduct of an undertaking operating under market economy conditions and, particularly, that it was free to decide on export prices, by reference to purely commercial considerations without significant State interference.

138 In that regard, in the request for MES, in reply to the Commission's questionnaire for producers wishing to obtain that status, the applicant stated, in essence, that it had full trading rights for exports and imports, that its export sales were the result of negotiations based on business parameters and that there was no State involvement in the setting of the prices, quantities, conditions or terms of sale. It also produced the supporting documentary evidence requested by the Commission, including, in particular, a list of sales into the Community during the investigation period and a list of the monthly quantities of export sales in the relevant product and the monthly average price for export sales during the investigation period.

139 As is clear from the contested regulation (recital 14 in its preamble and as expressly stated by recital 17) and as the Council observed in the course of the proceedings, the institutions concluded however that, by means of the CCCMC's export sale stamping

procedure, to which their attention had been drawn by the complainant, the State exercised significant control over the applicant as regards the setting of export prices of the product concerned, in a manner incompatible with the first indent of Article 2(7)(c) of the basic regulation. Also, in the communication of 5 December 2003, the Commission asserted that that mechanism should be regarded as 'significant State interference in the decisions of glyphosate exporters'. Save for those conclusions, the institutions have not put the applicant's statements in issue or accused the applicant of any lack of cooperation or failure to submit the information necessary to verify whether or not market economy conditions exist as regards its export activities.

140 The applicant does not dispute that the mechanism concerned exists, having itself provided, during the investigation, information relating to its functioning. It maintains however, in essence, that it established that such mechanism was not inconsistent with the criterion set out in the first indent of Article 2(7)(c) of the basic regulation. It is therefore for the Court of First Instance to review whether, in the light of the evidence submitted by the applicant during the investigation, the institutions could decide, without making a manifest error of assessment, that the ground relating to the mechanism of the CCCMC's export contract stamping procedure could lead to the conclusion that the applicant had not demonstrated that it met that criterion.

141 In that regard, first, it is clear from the applicant's statements in its letters of 24 June and 4 July 2003 in reply to the Commission's request for additional information relating to the request for MES, and from the comments it submitted on 16 and 23 December 2003 on the communication of 5 December 2003, that the system in question was established on the initiative of the glyphosate producers who were members of the CCCMC, which is a non-governmental body, with the aim of facilitating their compliance with the anti-dumping regulations and protecting them against complaints in that respect. It is from that point of view that the government adopted measures conferring on the CCCMC the right to stamp contracts and verify export prices for customs clearance. The applicant's statements to that effect are borne out by the contents of the CCCMC's brochure, translations of which were provided by the applicant, annexed to its letter of 24 June 2003, and by the EGA in its letter of 21 November 2003. Thus, according to the applicant's statements, the customs authorities check, in the course of customs procedures, whether the export contract has been stamped by the CCCMC but do not examine the price stipulated in the contract in question.

142 Secondly, it is clear from the abovementioned documents in the Court file that the price was set by the members of the glyphosate producers' group themselves. The statements which the applicant submitted in that regard are borne out by the CCCMC's document dated 29 December 2001, which was passed to the Commission during the on-the-spot verification at the applicant's premises and repeated by the applicant in an annex to its comments of 23 December 2003, from which it appears that the lowering of the reference price was the result of a 'vote' of the exporters concerned.

143 Thirdly, the applicant submitted a series of documents demonstrating that the price in question was not binding during the investigation period and that it was free to set export prices at a lower level.

144 Thus, even if, in its first comments concerning the CCCMC, in its letter of 24 June 2003, the applicant used the expression 'floor price', it stated afterwards, in its letter of 4 July 2003, that compliance with the price in question was not enforced either by the government, or by the CCCMC or by the producers themselves. According to those statements, the CCCMC's role consisted only in verifying the contract price, entering it in a database for statistical purposes and stamping the contract when that had been done. It explained that the stamp therefore did not mean that the CCCMC had approved the price but that the verification had taken place. As regards the customs authorities, the applicant made clear that they examined only whether the contract had been stamped. The statements that the price in question was not binding were subsequently repeated by the applicant in its letters of 16 and 23 December 2003.

145 Moreover, it is clear from the investigation file, that, at the on-the-spot verification, the applicant provided additional explanations on the mechanism in question and stated that in December 2001 it had been decided to stamp all contracts even if the price was below the reference price and that in 2002 (the investigation period) the CCCMC had stamped all the contracts. It also pointed out that, at a meeting held in February 2003, the reference price system was abandoned, with the contracts continuing to be subject to the stamping procedure, so that the CCCMC could collect annual statistical information. Those explanations were also sent to the Commission in the applicant's letter of 23 December 2003.

146 Those statements to the effect that the price in question was not binding are borne out by the other documents which the applicant submitted during the investigation.

147 First, as the applicant points out, it is clear from the Commission questionnaire to producers claiming MES and from the questionnaire for exporting glyphosate producers in the PRC that, during the investigation period, the applicant made two sales into the Community and that, in those two cases, the price was below the 'floor price', which appears from a document of the CCCMC dated 29 December 2001, which was passed to the Commission at the on-the-spot verification.

148 Secondly, as regards export sales to other countries, the applicant attached to the questionnaire for exporting glyphosate producers in the PRC a table showing, in particular, the quantities and value of those sales. It is apparent from them, and as the applicant notes, uncontradicted by the Council, that, as regards more than 200 sales during the investigation period, the average price was below the 'floor price'.

149 Thirdly, to support its statements at the on-the-spot verification, concerning the CCCMC's export contract stamping procedure, the applicant provided a sale contract, dated 26 November 2002, stipulating a price below the 'floor price' and bearing the CCCMC's stamp, as well as the invoices relating to it. As the applicant states, among the documents provided to the Commission at that verification were also other export sales invoices stipulating prices below the 'floor price'. The applicant points out, uncontradicted by the Council, that those documents were verified by the Commission. Furthermore, it also provided a CCCMC document dated 29 December 2001, in which it was stated that the price could fluctuate by reference to changes in market conditions. Later, in its comments of 16 and 23 December 2003, the applicant also drew the Commission's attention to the documents which it had passed to the Commission at the verification.

150 Finally, in its letter of 1 October 2003, lodged in response to the EGA's comments on its request for MES, the applicant also produced a document dated 15 September 2003, in which the CCCMC states that it stamped all the applicant's contracts in 2002 (the investigation period) and that the price was only a reference price. That document was also sent to the Commission in the applicant's letters of 16 and 23 December 2003.

151 Therefore, the abovementioned documents are capable of demonstrating that the mechanism in question had not been imposed by the State, that the price was set by the glyphosate producers who were members of the CCCMC themselves and that it had not entailed any actual restriction on the applicant's exports. Therefore, without putting in issue the probative value or sufficiency of that evidence, the institutions could not, without making a manifest error of assessment, conclude that, by means of the mechanism in question, the State had exercised significant control over the prices of the product concerned and that such mechanism constituted 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation.

152 That evidence and those statements were not put in issue by the institutions.

153 Thus, first, it is clear from the contents of the Court file that the institutions never challenged the applicant's statements that the CCCMC was a non-governmental body and they did not take issue with the applicant's statements that it was the glyphosate producers themselves who took the initiative in establishing the system in question, in order to minimise the risks of anti-dumping investigations on export markets and to enable the CCCMC to collect statistical information. Moreover, whilst the wording of the CCCMC's brochure, on which the Council relies (see paragraph 133 above), reveals that the government adopted measures which allowed the involvement of the customs authorities in the mechanism concerned, it does not, contrary to the Council's submission, contradict the applicant's statements that the mechanism was not imposed by the State and that the price was set by the glyphosate producers who were members of the CCCMC themselves.

154 In that regard, the Court rejects the Council's argument, in the course of the proceedings, that the fact that out of 39 glyphosate producers in the PRC only two requested MES means that they were owned or controlled by the State and, consequently, the 'floor price' was in fact set by the State. In fact, the allegation relating to the reasons for which those 37 producers did not request MES is completely unsupported and, moreover, that finding is not to be found anywhere in the institutions' written statements during the investigation or in the contested regulation.

155 Second, the institutions have not challenged the probative value or sufficiency of the evidence, including, in particular, the various invoices and contracts which the applicant produced, demonstrating that it was free to set export prices at a level below the 'floor price', but have confined themselves to making general assertions that export prices were State-controlled. Contrary to what the Council seems to assert, the evidence relating to the prices actually set by the applicant is entirely relevant for the purposes of examining the criterion set out in the first indent of Article 2(7)(c) of the basic regulation. In particular, it cannot, without putting in issue the probative value or sufficiency of that evidence, be asserted, as the Council has done to advocate the approach adopted in the contested regulation, that a very efficient system of State control was in place and that the applicant was in fact constrained to respect the 'floor price'.

156 In those circumstances, it seems that the only matter on which the institutions based their assessment was the CCCMC's right to refuse to stamp an export contract and therefore to veto exports which did not respect the 'floor price', because of the customs authorities' involvement in the system. That interpretation is also apparent from the wording of the communication of 5 December 2003, from which it is clear that the Commission considered that the CCCMC's right to veto exports which did not satisfy the conditions set by it was, in itself, 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation, and so found irrespective of the applicant's explanations that the price in question was indicative and that the mechanism concerned had been put in place in order to reduce the risk of anti-dumping investigations in third countries and to enable the CCCMC to gather statistical information.

157 However, that fact alone could not, in view of the abovementioned evidence, justify the refusal of MES in this case. For the purposes of assessing whether the applicant had demonstrated that it satisfied the criterion set out in the first indent of Article 2(7)(c) of the basic regulation, evidence tending to establish, first, that the mechanism concerned had not entailed any actual restriction as regards its export activities and, second, that such mechanism was not even conceived to enable State interference in connection with those activities cannot be disregarded.

158 It must be held, consequently, that the institutions' assessment relating to the CCCMC's role is not sufficient, in view of the evidence submitted by the applicant during the investigation, to found the conclusion that the applicant had not demonstrated that it met the criterion set out in the first indent of Article 2(7)(c) of the basic regulation.

159 Accordingly, the present complaint must be upheld.

160 As regards, finally, the Council's argument that, in essence, to succeed in its action the applicant had to demonstrate that it was the overall conclusion that there was significant State interference, based on all the grounds examined above — and not on each of those grounds taken separately — which was vitiated by a manifest error of assessment, the Court holds that those grounds cannot, even taken together, justify the refusal of MES in this case. It is apparent, indeed, from all the foregoing, that, in the institutions' analysis of the facts on which they relied in refusing MES, they did not take account of all the relevant evidence which the applicant had put forward to demonstrate that it made its decisions in response to market signals and without significant State interference in this regard. Therefore, none of those facts, even combined with others, can lead to the conclusion that the applicant had not demonstrated that it met the criterion set out in the first indent of Article 2(7)(c) of the basic regulation. Therefore the errors established above also vitiate the Council's overall conclusion.

161 Furthermore, because of the refusal of the applicant's request for MES, the normal value was determined so far as the applicant was concerned, pursuant to Article 2(7)(a) of the basic regulation, on the basis of data obtained from producers of a market economy third country, namely the Federative Republic of Brazil (recitals 23 to 31 in the preamble to the contested regulation) and it was particularly on that basis that an overall dumping margin for the entire PRC was calculated (recitals 36 to 39 in the contested regulation). Consequently, the refusal of the request for MES necessarily influenced the imposition, under Article 1 of the contested regulation, of a definitive anti-dumping duty as regards the applicant.

162 In those circumstances, the first plea in law must be upheld and Article 1 of the contested regulation annulled in so far as it concerns the applicant, without it being necessary to examine the applicant's other pleas in law and arguments.

Costs

163 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(4) of those Rules, institutions which intervened in the proceedings are to bear their own costs. Since the Council has been unsuccessful, it must be ordered to bear its own costs and to pay the applicant's and Audace's costs, in accordance with the forms of order sought. The Commission must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls, in so far as it concerns Zhejiang Xinan Chemical Industrial Group Co. Ltd, Article 1 of Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China;**

2. **Orders the Council to bear its own costs and to pay those of Zhejiang Xinan Chemical Industrial Group Co. Ltd and of the Association des utilisateurs et distributeurs de l'agrochimie européenne (Audace);**

3. **Orders the Commission to bear its own costs.**

Czúcz Labucka Prek

Delivered in open court in Luxembourg on 17 June 2009.

[Signatures]

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