JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
20 June 2001 *

In Case T-188/99,

Euroalliages, whose head office is in Brussels (Belgium), represented by D. Voillemot and O. Prost, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by N. Khan and, subsequently, by V. Kreuschitz, acting as Agents, assisted by A.P. Bentley, Barrister, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 1999/426/EC of 4 June 1999 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Poland (OJ 1999 L 166, p. 91),

* Language of the case: French.

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

composed of: A.W.H. Meij, President, K. Lenaerts, A. Potocki, M. Jaeger and J. Pirrung, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2000,

gives the following

Judgment

Facts and procedure

1 Following a complaint lodged by the applicant in December 1990, the Commission adopted on 30 June 1992 Regulation (EEC) No 1808/92 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt (OJ 1992 L 183, p. 8).

2 The duty on the product concerned was fixed at 32% by Council Regulation (EEC) No 3642/92 of 14 December 1992 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in Poland and Egypt and authorising the definitive collection of the provisional anti-dumping duty (OJ 1992 L 369, p. 1).

3 The Commission accepted the price undertakings given by an Egyptian exporting producer and a Polish exporting producer (Decision 92/331/EEC of 30 June 1992 and Decision 92/572/EEC of 14 December 1992 accepting the undertakings of an Egyptian producer and a Polish producer, respectively, in connection with the anti-dumping proceeding concerning imports of ferro-silicon originating in Poland and Egypt respectively, OJ 1992 L 183, p. 40 and OJ 1992 L 369, p. 32).

4 Definitive anti-dumping measures were also imposed on imports of ferro-silicon originating in other countries by Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil (OJ 1993 L 302, p. 1) and also by Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China (OJ 1994 L 77, p. 48).

5 On 21 December 1996 the Commission published a notice of the impending expiry of anti-dumping measures concerning imports from Egypt and Poland (OJ 1996 C 387, p. 3), which stated that the undertaking of the Egyptian exporting producer would expire on 5 July 1997 and the undertaking of the Polish exporting producer, together with the anti-dumping duties imposed by Regulation No 3642/92, would expire on 20 December 1997.

6 Following publication of that notice, the applicant lodged a request on 28 March 1997 for an expiry review under Article 11(2) 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, 'the basic regulation').

7 Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of a review under Article 11(2) of the basic regulation, the Commission published a notice of initiation of such a proceeding in the *Official Journal of the European Communities* (OJ 1997 C 204, p. 2) and commenced an investigation. The dumping investigation covered the period from 1 July 1996 to 30 June 1997 ('the investigation period'). The injury inquiry covered the period from 1993 up to the end of the investigation period.

8 In accordance with the first subparagraph of Article 11(2) of the basic regulation, the measures initiated by Regulation No 3642/92 remained in force pending the outcome of the review.

9 On 1 February 1999 the Commission informed the applicant of the main facts and considerations on the basis of which it intended to recommend terminating the proceeding without imposing any measures.

10 Since the applicant had opposed terminating the proceeding, the Commission confirmed its position in a letter to the applicant dated 25 March 1999.

11 On 4 June 1999 the Commission adopted Decision 1999/426/EC terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Poland (OJ 1999 L 166, p. 91, 'the contested decision').

12 In recital 14 in the preamble to that decision, the Commission states that 'the question of dumping was not pursued' in view of its findings on the situation of the Community industry and the recurrence of injury.

13 As regards the situation on the Community market in ferro-silicon, the Commission concludes that the Community industry has benefited from the anti-dumping measures in force, which have served their purpose in removing the injury caused by imports from Egypt and Poland. As regards the likelihood of continuation or recurrence of injury, it concludes that the expiry of the measures applying to imports from those two countries is not likely to lead to continuation or recurrence of injury.

14 The contested decision was notified to the applicant on 1 July 1999.

15 By application lodged at the Registry of the Court of First Instance on 20 August 1999 the applicant brought the present action.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. The parties presented oral argument and their replies to the Court's questions at the hearing on 13 December 2000.

Forms of order sought

17 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

19 The Commission, whilst recognising that the contested decision is of direct and individual concern to the applicant, considers, although it raises no formal objection of inadmissibility, that the application is inadmissible because the applicant has no legal interest in bringing proceedings.

20 The Commission observes first of all that it made clear in the contested decision that, should its situation deteriorate due to dumped imports, the applicant was free to lodge a new complaint, but no complaint was lodged.

21 It goes on to say that if the Court of First Instance were to annul the contested decision it would be in the interest of the applicant, which relies on factors which arose after the investigation period, to lodge a new complaint in order for those factors to be taken into account.

22 Lastly, the Commission argues that, contrary to what the applicant contends, annulment of the contested decision would not result in revival of the measures applying on 1 July 1999 or submission to the Council of a proposal to retain those measures. It refers in that connection to the provisions of Article 1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103; 'the WTO Anti-dumping Agreement') which provides that an anti-dumping measure may not enter into force until an investigation has been conducted in accordance with the provisions of that Agreement.

23 The applicant does not deny that it had the opportunity to lodge a new complaint. It considers, however, that Article 11(2) of the basic regulation constitutes a specific provision which entitles the Community industry, on expiry of the period during which the anti-dumping measures apply, to have them retained where it is shown that there is a likelihood that injurious dumping may recur. It considers that the Community should apply that provision in full.

24 In the applicant's view, the consequences of annulling the contested decision would not be the same as the consequences of introducing a new complaint.

25 The applicant is of the opinion, moreover, that the Commission's argument has the effect of depriving the Community industry of any judicial protection in the event of termination of a review proceeding.

Findings of the Court

26 It is settled case-law that a claim for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. Such an interest can be present only if the annulment of the measure is itself capable of having legal consequences (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 and 60, and the case-law cited).

27 In this case, annulment of the contested decision would have a number of different legal effects. First, Article 231 EC provides that if an action for annulment is well founded the act concerned is to be declared void. Annulment of the decision terminating the review initiated at the applicant's request would mean, therefore, according to the first subparagraph of Article 11(2) of the basic

regulation, that the measures under review would remain in force until that review was concluded. Such a result would not be contrary to Article 1 of the WTO Anti-dumping Agreement, as annulment of the contested decision would render the measures originally adopted following a proper investigation applicable once more. That is not the same as applying anti-dumping measures without a prior investigation, which is prohibited by Article 1 of the Agreement.

28 Second, Article 233 EC provides that the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. In that regard, the Court of First Instance held in Case T-2/95 *Industrie des poudres sphériques* v *Council* [1998] ECR II-3939, paragraphs 87 to 95, that Article 233 EC leaves it to the Commission to decide either to resume the proceeding on the basis of all the acts in the proceeding which were not affected by the annulment ordered by the Court, or to conduct a new investigation relating to a different reference period, on condition that it complies with the conditions deriving from the basic regulation. In either case, however, these would be investigations in the context of an expiry review under Article 11(2) of the basic regulation and not an investigation initiated in accordance with Article 5(1) of that regulation following a new complaint.

29 Last, the Commission's argument in this case would, as it admits itself, mean that complainants would have no right of appeal against decisions terminating a review under Article 11(2) of the basic regulation, thus seriously limiting the possibility of reviewing the legality of such decisions. That conception of a legal interest in bringing proceedings is incompatible with the procedural rights conferred on Community producers by Article 11(2) of the basic regulation, which include a right of appeal against the decision adopted following the review.

30 Consequently, the applicant's interest in bringing proceedings cannot be denied in this case.

Merits

31 The applicant bases its case on a single plea, alleging infringement of Article 11(2) of the basic regulation and, more particularly, a manifest error of assessment of the likelihood of injury recurring. The first limb of that plea alleges infringement of the rules applying to reviews initiated under Article 11(2) of the basic regulation, whilst in connection with the second limb the applicant puts forward specific complaints concerning the Commission's assessment of the facts in the contested decision.

Infringement of the rules applying to reviews initiated under Article 11(2) of the basic regulation

32 The applicant claims that the Commission, first, erred in law as regards application of the criteria for assessing the likelihood of injury recurring and, second, was wrong in considering that factors relating to a period after the investigation period could not be taken into account.

The criteria for assessing the likelihood of injury recurring

— Arguments of the parties

33 The applicant considers that it is possible under the second subparagraph of Article 11(2) of the basic regulation to identify appropriate criteria in order to demonstrate the likelihood of injury recurring, namely, evidence, first, of continued dumping, second, that removal of injury is partly or solely due to

the existence of the measures and, third, that the circumstances of the exporters or market conditions are such that they would indicate the likelihood of further injurious dumping. It points out that those three criteria are alternatives and not cumulative and that they are not the only factors for assessing the likelihood of injury recurring. The criteria in the second subparagraph of Article 11(2) of the basic regulation which are to be taken into account for the purposes of initiating the review must be the same as those applying as regards the decision to retain duties under the first subparagraph of Article 11(2) of that regulation.

34 The applicant is of the view that the first two of the three criteria set out in the second subparagraph of Article 11(2) of the basic regulation are met in this case, since the Commission acknowledged that dumping had persisted and that the measures in question had removed the injury.

35 According to the applicant, it follows that the Commission's discretion in implementing Article 11(2) of the basic regulation was 'limited' in this case. It considers that since it provided initial evidence with regard to the third criterion, as regards the circumstances of the exporters and market conditions, the Commission should endeavour to rebut that evidence before claiming that those measures should be abolished.

36 With regard to the third criterion, the applicant considers that the provisions of Article 3(9) of the basic regulation concerning the concept of a 'threat of injury' may be relevant in order to have a better understanding of the concept of 'a likely recurrence' of injury. It contends that the relevance of that provision is confirmed by the judgment of the Court of First Instance in Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, and by the judgment of the Court of Justice in Case C-245/95 P *Commission* v *NTN Corporation and Koyo Seiko* [1998] ECR I-401, relating to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community

(OJ 1988 L 209, p. 1), Article 15 of which already referred, although not in the same terms, to the concepts mentioned in Article 11(2) of the basic regulation. The American legislation on expiry reviews is relevant for assessing the 'circumstances of the exporters and the market conditions', since it takes into account a 'number of factors' in order to determine whether, at the end of such a review, the conditions for retaining the measures are met. The applicant considers that the factors mentioned in the American legislation could appropriately supplement the concepts quoted by way of example in Article 11(2) of the basic regulation.

37 The Commission acknowledges that it confirmed in its letter of 25 March 1999 that dumping had persisted during the investigation period, but states that it did not consider that question in the contested decision. It challenges the applicant's contention that in this case continued dumping would lead to the likelihood of injury recurring.

38 As regards evidence that the circumstances of the exporters or the market conditions are such as to imply the likelihood of further injurious dumping, the Commission considers that a distinction should be made as to whether injury continued despite the measures or whether it was removed by those measures. If the dumping continued to cause injury despite the anti-dumping measures, there can be no question that they should be allowed to expire. However, if the anti-dumping measures removed injury whilst they were in force, the Commission considers that it is obliged to determine whether it is appropriate to retain them in order to avoid the recurrence of dumping injurious to the Community industry. It is of the view that it should take into account any improvement in the circumstances of the Community industry which resulted from the imposition of anti-dumping measures.

39 The Commission contends that there is a clear distinction between the case envisaged in Article 3(9) of the basic regulation (the threat of injury) and that envisaged in Article 11(2) of that regulation (recurrence of injury). The applicant cannot therefore draw an analogy between those two provisions, especially since

a threat of injury is very difficult to prove and the institutions have adopted anti-dumping measures on the ground of such a threat only in a very few cases.

40 At the hearing the Commission stated that the concept of injury within the meaning of Article 11(2) of the basic regulation included the threat of injury. It considers, however, that the argument that the expiry of anti-dumping measures encourages the recurrence of such a threat is a purely hypothetical one. In practice, the investigation will always examine the likelihood of the recurrence of injury.

— Findings of the Court

41 The first subparagraph of Article 11(2) of the basic regulation provides that an anti-dumping measure is to expire five years after introduction 'unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury'.

42 It is clear from that provision that retention of a measure depends on the result of an assessment of the consequences of its expiry, that is, on a forecast based on hypotheses regarding future developments in the situation on the market concerned. It is also clear that the mere possibility that injury might continue or recur is insufficient to justify retaining a measure; that is dependent on the likelihood of continuation or recurrence of injury being established.

43 In that regard, it is of no relevance that the French text of the first subparagraph of Article 11(2) of the basic regulation, unlike the other language versions, does not use words meaning 'likely' or 'likelihood'.

44 The basic regulation should be interpreted in the light of the WTO Anti-dumping Agreement (see Case T-256/97 *BEUC* v *Commission* [2000] ECR II-101, paragraphs 66 and 67), Article 11.3 of which provides that any definitive anti-dumping duty is to be terminated not later than five years from its imposition 'unless the authorities determine, in a review..., that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury'. In that regard, the use of the verbs 'établir' and 'favoriser' in the French version of the basic regulation implies that the measures can be retained only if the review has shown that their expiry would create conditions that would encourage the continuation or recurrence of injury. It is not necessary therefore for there to be proof of the continuation or recurrence of injury, merely that there should exist a likelihood of this. A requirement of likelihood therefore appears implicitly in the French text of the basic regulation also.

45 In the present case the parties agree that injury was removed while the measures at issue were in force. The Commission had, therefore, to consider the likelihood of injury recurring.

46 Such consideration calls for an appraisal of complex economic questions in which the Community institutions have a wide discretion. Judicial review of such an assessment must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of appraisal of those facts or a misuse of powers (Case T-51/96 *Miwon* v *Council* [2000] ECR II-1841, paragraph 94).

47 It should also be noted that the first sentence of the first subparagraph of Article 11(2) of the basic regulation, which lays down the conditions under which anti-dumping measures may be retained, stipulates that there must be a likelihood that injury will continue or recur but does not expressly state the criteria which the Community authorities must take into consideration when assessing that likelihood.

48 The second subparagraph of Article 11(2) of the basic regulation, however, provides:

'An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such a likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping'.

49 It is clear from the wording of that provision that its purpose is not to lay down conditions for retaining measures but conditions in which an expiry review should be held following a request on behalf of the Community industry. Consideration of those conditions is done on the basis of the evidence submitted in support of the request. In that regard, the three criteria given as examples in the second sentence of the provision are alternatives and not cumulative.

50 It is appropriate to examine in the light of those considerations the applicant's contention that those three criteria are relevant for the purposes of assessing whether, in the context of the first subparagraph of Article 11(2) of the basic regulation, it is necessary to order that those measures be retained.

51 First of all, the point should be made that, despite the ambiguity of the French text in this respect, the second subparagraph of Article 11(2) of the basic regulation should not be read as meaning that 'proof' (la preuve) of one of the three possible situations mentioned in the second sentence of that subparagraph is required in order to demonstrate, for the purposes of initiating a review, the likelihood that injury will continue or recur. The three situations mentioned in

that sentence must be viewed in the light of the first sentence of that subparagraph, which states that a review is to be initiated where the request contains 'sufficient evidence' of the likelihood that injury will continue or recur. The second sentence is intended to provide examples of appropriate evidence. It can be seen, therefore, from the broad logic of Article 11(2) of the basic regulation that it is sufficient for the purposes of initiating a review that the request submitted on behalf of the Community industry be supported in particular by evidence of one of the three circumstances listed in the second sentence of the second subparagraph of Article 11(2).

52 It follows that, so far as the first situation is concerned, a review should be initiated on the basis of sufficient evidence that dumping and injury are continuing; it is not necessary that continuation be already established. However, the existence of such evidence should not prejudice the result of the review. Where continuation of dumping and injury is established before the review is initiated, by contrast, the Commission has quite rightly stated that there can be no question of allowing the measures to expire. That is not so in the present case, however, since the injury was removed by the measures at issue.

53 So far as the second situation is concerned, admittedly a review should be conducted where the request contains sufficient evidence that removal of the injury is due in whole or in part to the existence of measures. However, removal alone does not support the conclusion that it is likely that injury will recur if the measures expire. If it were otherwise, anti-dumping measures which have served their purpose by removing injury would never be permitted to expire.

54 The third situation concerns expressly the likelihood of further injurious dumping. It is not necessary, however, in order for a review to be initiated, that the circumstances of exporters and the market conditions which make recurrence of dumping and injury likely be actually established. The request for a review need merely contain evidence on which to base the relevant inquiry.

However, in order to retain measures in accordance with the first subparagraph of Article 11(2) of the basic regulation, the circumstances surrounding that likelihood must be established on the basis of the results of an investigation.

55 It is clear from that analysis of Article 11(2) of the basic regulation that the three situations listed in the second subparagraph of that provision do not, as such, constitute criteria for assessing the likelihood of recurrence of injury within the meaning of the first subparagraph of Article 11(2).

56 The interpretation to the effect that the conditions for initiating a review should not be confused with the conditions for retaining the measures is confirmed in *NTN Corporation and Koyo Seiko* v *Council*, cited in paragraph 36 above (paragraphs 58 to 60), and *Commission* v *NTN Corporation and Koyo Seiko*, cited in paragraph 36 above (paragraphs 41 and 42), which related to Articles 14 and 15 of Regulation No 2423/88. In that connection, it should be noted that Article 15 of Regulation No 2423/88, which concerns expiry reviews, differs from Article 11 of the basic regulation in that it only provided for the initiation of a review and did not expressly lay down the conditions under which measures could be retained. In those circumstances, both the Court of Justice and the Court of First Instance held that it was not necessary to adopt the same criteria as those on which initiation of the review was based when deciding to retain measures. That applies all the more as regards the basic regulation, which lays down expressly the conditions governing the retention of measures.

57 It should be added that both the basic regulation and the WTO Anti-dumping Agreement lay down strict conditions for the retention of measures, stipulating that the likelihood of the recurrence of dumping and injury must have actually been established by the competent authorities on the basis of an inquiry.

58 There is thus no support for the applicant's argument that once the first two criteria in the second subparagraph of Article 11(2) of the basic regulation had been checked the Commission was bound to propose that the measures in question be retained since there was initial evidence concerning the third criterion which it had not rebutted.

59 As regards also the provisions of Article 3(9) of the basic regulation and the United States anti-dumping legislation, which the applicant considers relevant for defining the criteria for assessing the likelihood of injury recurring, it should be noted that when the Commission investigates whether such likelihood exists, it must assess the situation on the market as a whole. The choice of criteria to be adopted for the purposes of that assessment is a matter in each case for the Commission's discretion. It can be declared unlawful by the Court of First Instance only if there is a manifest error.

60 The only specific allegation in this respect was made by the applicant in the reply and concerns the taking into account of the level of dumping established during the investigation period. This claim will be considered in paragraphs 115 to 118 below.

61 Apart from this specific point, the applicant did not rely on any manifest errors in the choice of the criteria which the Commission considered in the contested decision. Nor did it state how the result of the assessment of whether injury would recur would have been different if the Commission had applied the criteria contained in Article 3(9) of the basic regulation or in the United States legislation.

62 Consequently, the applicant's arguments concerning, in general, the assessment criteria to be taken into account in order to determine the likelihood of injury recurring would not in this case affect the validity of the contested decision.

Consideration of factors relating to a period after the investigation period

— Arguments of the parties

63 The applicant claims that the Commission did not take into account, in its analysis of the likelihood of dumping and injury recurring, factors which arose after the investigation period, which ended on 30 June 1997. As it involved an assessment of a future event, consideration of such factors was justified. The Commission also departed from its normal practice in other cases. Consideration of subsequent factors was all the more necessary in this case since the review had exceeded the time-limit of one year laid down in Article 11(5) of the basic regulation.

64 The third subparagraph of Article 11(2) of the basic regulation provides that the Commission must take account of all the relevant and duly documented evidence presented during the investigation, which in this case took place between 1 July 1996 and 1 July 1999.

65 As a subsidiary point, the applicant contends that in this case the end of the investigation period is not the same as the end of the period of five years after the introduction of the measures, referred to in the first subparagraph of Article 11(2) of the basic regulation, which was 20 December 1997. It considers therefore that it is necessary in any event to take into account factors relating to the period ending on 20 December 1997 rather than 30 June 1997.

66 Lastly, the applicant states that its claims are based mainly on factors relating to the investigation period but that those are supplemented and confirmed by factors subsequent to that. Those factors were brought to the attention of the

Commission during the administrative procedure and the institution concerned could easily have checked them.

67 According to the Commission, the likelihood of continuation or recurrence of dumping and injury should be assessed taking into account solely factors relating to a reference period which should not go beyond the last day of the five-year period. It is only those factors, therefore, which may justify continuation of the measures.

68 The Commission is of the view that that rule does not mean that the investigation period cannot end a few months before the end of the five-year period.

69 Lastly, the Commission states that if the representatives of the Community industry contend that there are factors relating to the period after the investigation period which justify the adoption of anti-dumping measures, they would be better advised to lodge a fresh complaint rather than to put forward those factors in the context of the investigation initiated under Article 11(2) of the basic regulation.

— Findings of the Court

70 According to Article 11(5) of the basic regulation, which corresponds to Article 11.4 of the WTO Anti-dumping Agreement, the expiry review should be conducted in accordance with the rules concerning the procedures and conduct of investigations contained in particular in Article 6 of the basic regulation. Thus, the same procedural safeguards apply in the conduct of the investigation in respect of retention of measures after the five-year period has expired as applied when the measures were originally imposed.

71 Article 6(1) of the basic regulation provides that 'information relating to a period subsequent to the investigation period shall, normally, not be taken into account'.

72 The third subparagraph of Article 11(2) of the basic regulation provides:

'In carrying out investigations under this paragraph, the exporters, importers, the representatives of the exporting country and the Community producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions shall be reached with due account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.'

73 Contrary to what the applicant appears to think, that provision does not derogate with regard to expiry reviews from the rule contained in Article 6(1) of the basic regulation. The requirement it imposes on the Commission to take 'all relevant evidence' into account refers to evidence resulting from the investigation conducted according to the provisions of Article 6 of the basic regulation.

74 Fixing an investigation period and precluding consideration of factors arising subsequently are intended to ensure that the results of the investigation are representative and reliable. This applies as regards both investigations conducted in the context of a review and those initiated in accordance with Article 5 of the basic regulation. Consequently, the rule that information relating to a period subsequent to the investigation period is not, normally, to be taken into account applies also to investigations relating to expiry reviews.

75 By using the term 'normally', Article 6(1) of the basic regulation does, however, allow exceptions to that rule. In that regard, it has been held that the Community institutions cannot be required to incorporate in their calculations data relating to a period after the investigation period unless such data disclose new developments which make the proposed anti-dumping duty manifestly inappropriate (Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 88).

76 The question therefore arises whether that exception concerns only the situation referred to by the Court of First Instance in *Sinochem*, cited in the preceding paragraph, that is to say where developments arising after the investigation period preclude the imposition of measures, or whether such factors may also be taken into consideration as regards, in particular, measures in the case of an expiry review, in order to justify retention of those measures. In that regard it should be pointed out that the basic regulation and the WTO Anti-dumping Agreement lay down strict conditions in respect of both the imposition and the retention of measures. In particular, Article 11(2) of the basic regulation makes the retention of protective measures after the expiry of a five-year period conditional upon the conduct of an investigation in accordance with the basic regulation in order to establish the factual data from which the likelihood of recurrence of injury may be inferred.

77 However, where the results of such an investigation are insufficient to justify retaining anti-dumping duties, the basic regulation provides that they should expire. That means that factors which arise after the investigation period cannot be taken into account in order for duties to be retained. Consequently, the judgment in *Sinochem*, cited in paragraph 75 above, concerns only the case in which factors arising after the investigation period, which have not been established by means of an investigation conducted in accordance with the procedural safeguards required by the basic regulation and the WTO Anti-dumping Agreement, are taken into account in the decision not to impose, or to retain, anti-dumping duties.

78 The obligation to base the retention of anti-dumping duties solely on information gathered in the course of an investigation conducted in accordance with the basic regulation and the WTO Anti-dumping Agreement should not be affected by the fact that the review procedure in this case lasted longer than twelve months, contrary to what is provided in Article 11(5) of the basic regulation.

79 As for the argument that the Commission should have taken into account all the factors relating to the period before 20 December 1997, the date on which the period of five years from the introduction of the measures expired, it should be observed, first, that the Commission has a discretion as regards determining the investigation period (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86). Since the review proceeding requires a certain amount of time, it is appropriate that the investigation period should end a few months before the expiry of the five-year period. Moreover, the considerations relating to compliance with the procedural safeguards during the investigation preclude the Commission from taking into account factors which arose between the end of the investigation period and the expiry of the five-year period.

80 Lastly, the applicant's contention conflicts with its own argument that the present application is admissible. It cannot, on the one hand, obtain judicial review of the expiry review conducted by the Commission under Article 11(2) of the basic regulation without the possibility of the submission of a fresh complaint being raised in argument against it and, on the other hand, demand that factors likely to be the subject of a fresh complaint be taken into consideration in the context of that judicial review.

81 Therefore the applicant's argument that the Commission should have taken into consideration factors which arose after the investigation period is unfounded.

Complaints regarding the assessment of the facts

Arguments of the applicant

82 The applicant is of the opinion that in view of all the information which the Commission had at its disposal during the review proceeding it could not fail to conclude that there was a likelihood of injury recurring. It considers that the Commission made manifest errors in its assessment of seven specific aspects of the contested decision.

83 First, the applicant submits that the Commission made errors regarding the volume of imports. It claims first that the Commission failed to have regard to the fact that the trend in the volume of imports, particularly at the end of the investigation period and thereafter, provided clear evidence that injury had recurred. In the reply it contends that the Commission omitted to add together the imports from Egypt and Poland. As regards imports from Poland in particular the applicant submits there was an error on the part of the Commission regarding the trend in such imports during and after the investigation period. As regards imports from Egypt, the applicant submits first that the Commission failed to have regard to the fact that the reduction in such imports during the investigation period was only temporary, and secondly that the Commission erred in estimating the quantity of such imports during that period, since the relevant figure given in the contested decision differs from that stated by the Egyptian exporting producer in its reply to the questionnaire.

84 Second, the applicant contends that the Commission failed to have regard to the conclusions it should have drawn from the increase in the Community market share formed by imports from Poland and Egypt.

85 Third, the applicant contends that the Commission made a manifest error of assessment as regards undercutting of prices by imports. First, the Commission failed to have regard to the fact that it was likely that if the measures were to expire prices charged by the Community industry might again be undercut by as much as 30%. Moreover, the applicant contends that despite the existence of the measures the contested decision established that exports from Egypt and Portugal were undercutting prices by 4.5% and 4.6% respectively, which had led to an increase in the volumes exported and the market shares of exporters from those two countries. In any event, the Commission failed to consider the likelihood that such undercutting would persist once the measures had expired. Lastly, the applicant contends that prices of ferro-silicon imported from Egypt and Poland fell after the investigation period.

86 Fourth, the applicant submits that the Commission made manifest errors regarding the likelihood of exports from Poland and Egypt being diverted to the Community market. First, the Commission failed to have regard to the likely trend in prices on the world market in ferro-silicon, which fluctuate considerably. Moreover, as regards the Egyptian exporting producer in particular, the Commission made a manifest error, on the one hand, as regards the conclusions to be drawn from that producer's capacity utilisation and the size of its stocks and, on the other hand, as regards the pattern of its sales. As regards the Polish exporting producer in particular, the Commission failed to have regard to that producer's forecasts of its capacity utilisation.

87 Fifth, the applicant contends that the Commission made a manifest error concerning the conclusions to be drawn from the removal by the anti-dumping measures of the injury caused to the Community industry.

88 Sixth, the applicant is of the view that the Commission failed to take into account the conclusions to be drawn from its finding that dumping had continued during the investigation period. It submits in that regard that the level of dumping found during that period was significant. The United States anti-dumping legislation

expressly refers to that criterion. The applicant therefore requests the Court of First Instance to order that the Commission should indicate what level of dumping was found. At the hearing it stated that the dumping margin recorded during the original investigation had been 61% as regards imports from Egypt and 44% as regards imports from Poland, which was a particularly high level. The fact that dumping had persisted whilst the measures were being applied and that the measures had removed the injury was very strong evidence of the need to retain them. The applicant is also of the view that evidence that the Egyptian and Polish exporting producers had failed to honour their undertakings during the period when the measures were applied is further evidence of the likelihood of injury recurring. It therefore requests the Court of First Instance to ask the Commission to produce the reports drawn up by those exporting producers regarding implementation of their undertakings.

89 Seventh, the applicant contends that the Commission failed to take into account the fact that the circumstances of the Community industry were such that injury was likely to recur.

Findings of the Court

90 It should be observed first of all that it follows from what was held in paragraphs 70 to 81 above that facts arising after the investigation period cannot be relied on by the applicant in order to challenge the legality of the contested decision.

91 It should also be observed that in order to justify a proposal to retain measures the Commission must establish the existence of specific circumstances from which it may be concluded that a return to injurious pricing is not only possible but likely.

92 In that regard, the Commission was obliged to take into account the fluctuations in the world market price of ferro-silicon. Both parties have stated that the trend in prices and in other conditions on that market are difficult to predict. Consequently, trends in prices and other world market conditions might have been such as to encourage Polish and Egyptian exporters to fix their prices at a level likely to cause injury to the Community industry, or, equally, to fix them at a non-injurious level. Where the unstable nature of a market makes it impossible to make valid predictions as to how it will develop it should not be inferred that a return to pricing which is injurious to the Community industry is in the interest of the exporters.

93 Similarly, the Commission was obliged to take into account the fact that in this case price undertakings had been accepted from the exporters concerned. Those exporters therefore benefited from the prices at a non-injurious level at which their products were being sold in the Community, which would not have been the case if anti-dumping duties had been imposed on them.

94 In that context, the Commission established in particular, in recital 18 of the contested decision, that the prices of the Egyptian and Polish exporting producers for exports to the Community were, during the investigation period, above the non-injurious level which had been calculated in order for their price undertakings to be accepted. That finding was not properly challenged by the applicant, which expressly stated in paragraph 42 of the reply that it did not deny that the Egyptian and Polish exporting producers had honoured their undertakings during the investigation period. Admittedly, it also raised in the reply the possibility of failure to honour those undertakings both before and after the investigation period and requested the Court to initiate a measure of inquiry in that regard. Those arguments are not, however, capable of invalidating the findings in paragraph 18 of the contested decision regarding the investigation period.

95 The fact that the Polish and Egyptian exporting producers charged on their own initiative prices higher that those imposed on them in the price undertakings indicates that those companies did not try to sell their goods at the lowest possible prices in order to be able to increase the volume of their sales and their market

shares. The conduct of the exporting producers during the investigation period does not therefore support the conclusion that they automatically reverted to new, injurious, pricing solely because the measures had expired.

96 The specific claims made by the applicant should be examined in the light of the above considerations.

97 As regards, first, the claim relating to the trend in the volume of imports, it should be stated first of all that the applicant does not dispute the accuracy of the figures taken from the statistics produced by the Statistical Office of the European Communities (Eurostat) concerning the volume of imports from the two countries concerned, which are given in recital 16 of the contested decision. It should also be noted that the trend in imports after the investigation period could not be taken into consideration by the Commission in order to justify retention of the measures in question (see paragraphs 70 to 81 above).

98 The contention that the Commission omitted to add together the imports from Egypt and Poland in order to assess the likelihood of injury recurring has no factual basis and must therefore be dismissed; there is no need to decide the issue, raised by the Commission, of whether that contention could be relied on, for the first time, in the reply. In paragraph 34 of the contested decision the Commission states that 'imports from Egypt and Poland taken together remained significant'. Although the Commission did not give in the contested decision the figures corresponding to the sum of those imports, the applicant is not justified in maintaining that that institution failed to take into account all the imports from the two countries in question.

99 As regards imports from Poland in particular, the applicant denies specifically the statement made in the Commission's letter of 25 March 1999 that the rate of increase of imports from that State had fallen during the investigation period and the level of imports was stable in 1997 and 1998. That statement was not included in the contested decision, recital 34 of which states, when referring to the period taken into consideration for investigating injury, that imports from Poland 'increased, although from a low basis'. In those circumstances, it cannot be inferred from the statements made in the letter of 25 March 1999 concerning the period after the investigation period that the contested decision is vitiated by a manifest error with regard to the trend in the volume of imports.

100 The applicant's argument is not capable either of establishing that the Commission manifestly failed to take into account the trend in imports from Poland during the investigation period. In that regard, there is no need for the Court to rule on the accuracy of the various calculations made by the parties, on the basis of figures produced by the applicant, with regard to the trend in the quarterly average of imports from that country, since those figures relate to the period after the investigation period. However, the figures contained in the contested decision for the period taken into consideration as regards injury show a steep increase in imports from Poland between 1993 and 1995, a slight decrease in 1995 and a significant increase during the investigation period, and during the last two quarters of that period in particular. The contested decision does not show that the Commission failed to take that trend into account.

101 However, since the imports corresponding to that increase were made at non-injurious prices, the Commission did not make a manifest error in considering that the increase did not support the conclusion that injury was likely to recur.

102 As regards imports from Egypt in particular, the applicant has not shown that the Commission failed to take into account in the contested decision the temporary nature of their reduction. As was observed in paragraph 92 above, fluctuations in

the world market prices of ferro-silicon meant that the Commission was unable to predict that exports from Egypt to the Community would increase and that the prices of those exports would be injurious for the Community industry. The applicant does not, moreover, adduce any firm evidence from which the Commission should have inferred that such a price trend was likely.

103 Lastly, the claim concerning a discrepancy between the figure given in the contested decision for imports from Egypt during the investigation period (11 098 tonnes) and the figure of 18 564 tonnes provided by the Egyptian exporting producer for the same period should be dismissed. The Commission has explained this discrepancy in the defence, stating that it appears from the statistics that a large proportion of the quantity stated by that exporting producer entered the Community after the investigation period or was resold outside the Community. That plausible explanation has not been contested by the applicant.

104 As regards, secondly, the claim that the Commission failed to take into account the conclusions to be drawn from the increase in the share of the Community market occupied by imports from Egypt and Poland, the applicant does not dispute the facts contained in the contested decision in that regard either. It is clear from the contested decision that the market shares of those imports did indeed increase but were low during the investigation period (1.8% for the former and 4.8% for the latter) and in the preceding years. In a situation where price levels in the Community enable Community producers to make significant profits, the increase in the market shares of those imports is not sufficient to make recurrence of injury likely if the measures were to expire.

105 As regards, thirdly, the claim of undercutting of prices by imports, the applicant relies on three separate objections. With regard to the first, the applicant has not shown that it is likely that undercutting by Egyptian and Polish imports would rise to 30% if the measures were revoked. As stated in paragraph 93 above, the

exporting producers concerned have entered into price undertakings so that they benefit from the higher prices they charge. In those circumstances, expiry of the measures alone is not likely to lead automatically to such a significant fall in their prices.

106 With regard to the second objection, the persistence of the level of undercutting, as established in the contested decision during the investigation period, namely 4.6% and 4.5% in respect of imports from Poland and Egypt respectively, does not support the conclusion that injury is likely to recur. The Commission states in the contested decision that the measures adopted in 1992 removed the injury despite the persistence of such undercutting, and this is not disputed by the applicant.

107 Lastly, as regards the third objection, alleging a fall in prices of imports from Egypt and Poland after the investigation period, suffice it to say that, as stated in paragraphs 70 to 81, retention of the duties cannot be based on such factors.

108 As regards, fourthly, the claim alleging failure to take into account the likelihood of exports from Poland and Egypt being diverted towards the Community, it may be observed, first, that price fluctuations on the market concerned do involve the risk of such diversion. The existence of that risk is not sufficient, however, to establish that such diversion is likely, and even less to demonstrate that it would take place at injurious prices.

109 For the same reasons, the Court must dismiss the argument that the Commission underestimated the opportunities for diverting the Egyptian exporting producer's exports to the Community market. Admittedly, the fact that capacity utilisation was 94% during the investigation period need not prevent the exporting producer from deciding to divert part of its sales to the Community market, since exports

to that market during the period concerned formed only a minor part of its total exports. Likewise, the level of stocks declared by the Egyptian exporting producer supports the conclusion that an increase in its exports to the Community is possible. However, those factors are insufficient to show that it is likely.

110 As regards the Egyptian exporting producer's pattern of sales, the Commission recognises that it made an error in recital 37 of the contested decision in stating that the percentage of that producer's sales to the Community market fell from 68% in 1995 to 45% in the investigation period. In fact, 25% of its sales were to the Community during the investigation procedure. That error is not, however, such as to affect the outcome of the Commission's assessment of the likelihood of injury recurring. Indeed, although it was possible for the Egyptian exporting producer to divert a significant share of its sales to the Community market it is not possible to infer from this, in the light of price fluctuations on the world market, that such diversion was likely.

111 As regards in particular the opportunities for diverting the Polish exporting producer's exports, the applicant has not demonstrated that the Commission made a manifest error in that respect. As regards the contention that the Commission failed to take into account that exporting producer's forecasts of its capacity utilisation, it should be noted first of all that the applicant does not challenge the Commission's finding that that utilisation was 93% during the investigation period. Admittedly, when assessing the likelihood of injury recurring the Commission must take into account not only utilisation during the investigation period but also the exporting producer's forecasts of future capacity utilisation, which it sent the Commission in connection with the investigation. However, the fact that the Polish exporting producer had forecast 84.7% utilisation for 1997 and 1998, and hence more available capacity than during the investigation period, is not sufficient to demonstrate that that available capacity would be used to increase exports to the Community, and that such exports would be priced at injurious levels.

112 In that connection, the applicant also denies — taking it out of context — the statement in paragraph 41 of the contested decision that any 'increase of exports to the Community could only be achieved at the expense of domestic sales or of exports to other third countries, which makes such a strategy even more unlikely'. That statement is part of an argument explaining that it would not be economically rational for the Polish exporting producer to endeavour, if the anti-dumping measures were allowed to expire, to cut its prices in order to increase its share of the Community market, since it had been able to consolidate its position on that market by charging non-injurious prices.

113 That view is not contradicted by the figures supplied by the Polish exporting producer and quoted by the applicant, which show that the former's exports to the Community rose during the investigation period as compared with 1996, whilst its sales on the domestic market and to other countries fell. The rise in sales in the Community during the investigation period took place at non-injurious prices.

114 As regards, fifthly, the claim concerning removal of injury, as was stated in paragraph 53 above the fact that injury has been removed by anti-dumping measures is not sufficient to establish the likelihood that injury will recur if those measures expire.

115 As regards, sixthly, the claim alleging failure to take into account the conclusions which the Commission was bound to draw from the continued dumping during the investigation period, it should be noted first of all that the Commission did not give an opinion in the contested decision as to whether dumping had continued during that period, or on any dumping margins. In that regard, it was appropriate for the Commission to examine only the question of the likelihood of injury recurring, since the measures could not be retained without that likelihood.

116 It is appropriate to add that, contrary to the applicant's view, the alleged continuation and the alleged dumping margin are not relevant, in this case, as regards the assessment of the likelihood of injury recurring. The injury which the Community industry might possibly suffer following the expiry of the price undertakings depends mainly on the level of undercutting by imports. The size of any dumping margin which may have existed whilst the measures were in force is not likely to have any direct influence in that regard. Admittedly, were an anti-dumping duty to expire and the amount of that duty to correspond to the dumping margin, that margin might have an effect as regards the level of undercutting by imports likely to take place after such a duty expired. In this case, however, it should be noted, first, that the Egyptian and Polish exporting producers had entered into price undertakings and, second, that the level of the anti-dumping duty imposed by Regulation No 3642/92 had been fixed on the basis of the injury threshold and not the dumping margin recorded at that time.

117 The applicant cannot therefore infer from the fact that the United States anti-dumping legislation allows the size of the dumping margin to be taken into account for the purposes of determining the likelihood of continuation or recurrence of injury in the context of an expiry review that the Commission was required to take that factor into account in this case.

118 Consequently, the claim that the Commission failed to take account of the conclusions which it should have drawn from the continuation and level of dumping during the investigation period is unfounded. As for the argument alleging in this context failure to honour price undertakings, the applicant acknowledges both that those undertakings were honoured during the investigation period and that the measures in question removed the injury. In those circumstances, it does not appear that failure to honour price undertakings before the investigation period, were it to be established, would have led the Commission to a different conclusion regarding the likelihood of injury recurring. It is not therefore appropriate to undertake the measures of inquiry requested by the applicant into the level of dumping and compliance with the price undertakings, and there is no need to rule on the admissibility of those requests made in the reply.

119 As regards, seventhly and lastly, the claim that the Commission failed to take into account the fact that the circumstances of the Community industry were such that recurrence of injury was likely, it should be observed that the applicant relies mainly on the fact that the share of the Community market held by that industry fell. In that regard, the Commission established, and was not contradicted by the applicant in that respect, that, despite that fall in its market share, the Community industry was able to increase its profits. According to the statements made by the applicant, those profits were even higher during the investigation period than in preceding years. In those circumstances, it was not a manifest error for the Commission to consider that injury was not likely to recur, despite the fall in the Community industry's market share.

120 It should be added that the applicant's opinion that in view of all the information which the Commission had at its disposal it could not fail to conclude that there was a likelihood of injury recurring if the measures were to expire is also unfounded. All the information supplied by the applicant shows that the possibility of injury recurring could not be ruled out. That possibility on its own is not sufficient, however, to justify retaining the measures.

121 It follows from the foregoing that the applicant has not demonstrated that the Commission made a manifest error of assessment in concluding that the likelihood of a recurrence of injury within the meaning of Article 11(2) of the basic regulation was not established. The application is therefore unfounded.

Costs

122 Under the first subparagraph of 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Meij Lenaerts Potocki

Jaeger Pirrung

Delivered in open court in Luxembourg on 20 June 2001.

H. Jung
Registrar

A.W.H. Meij
President