

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 14 May 2009¹

1. In brief, the present appeal² concerns a Chinese exporter subject to an anti-dumping investigation, whose request for its normal prices to be assessed in the same way as those of an exporter operating in a market economy was initially rejected by the Commission but later reviewed more favourably, only to suffer an unexpected final rejection.

2. Before the Court of First Instance, the exporter argued that the Commission had (i) wrongly considered itself precluded from changing the initial assessment and (ii) allowed insufficient time for the exporter to react to the final assessment.

3. That Court found that (i) it was only incidentally that the Commission had observed that it was not permitted to reassess old facts; consequently, (ii) even if sufficient time had been allowed for the exporter's reaction, that reaction could have related only to the incidental observation rather

than to the substantive reasons for the rejection, so that the exporter's rights of defence were not affected.

4. The exporter now claims that the finding in relation to the Commission's reasons was a manifest misinterpretation of the evidence, so that, if sufficient time had been allowed, a reaction could have been relevant.

5. This Court will have to determine, first and foremost, whether 'the clear sense of the evidence has been distorted' by the Court of First Instance. Otherwise, it has in principle no jurisdiction to assess the value which should be attached to that evidence.³ Only if there has been such distortion will it be able to examine the arguments relating to the failure to allow sufficient time for a reaction.

¹ — Original language: English.

² — Against the judgment of the Court of First Instance in Case T-206/07 *Foshan Shunde Yongjian Housewares & Hardware v Council* [2008] ECR II-1 (the 'judgment under appeal').

³ — See, most recently, Case C-487/06 P *British Aggregates Association v Commission and United Kingdom* [2008] ECR I-10505, paragraph 97.

Anti-dumping procedures and legislation

6. Protection of Community industry against dumped imports is regulated essentially by Council Regulation (EC) No 384/96⁴ ('the basic regulation').

7. According to Article 1(1) and (2) of that regulation, an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury. A product is dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

8. Under Article 5(1), an investigation to determine the existence, degree and effect of dumping is to be initiated upon written complaint made on behalf of the Community industry. Article 6 regulates the investigation procedures, while Articles 2 to 4 set out, essentially, the criteria to be applied.

9. Article 2 concerns the determination of dumping. It lays down rules for determining the normal value (Part A, paragraphs 1 to 7) and export price (part B, paragraphs 8 and 9) to be compared (part C, paragraph 10) in order to establish the dumping margin (part D, paragraphs 11 and 12). Only part A is relevant to the present case.

10. According to the first subparagraph of Article 2(1), normal value is based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. It is determined in accordance with rules set out in the remainder of paragraphs 1 to 6, which are appropriate for undertakings operating in a market economy.

11. For other undertakings, the first subparagraph of Article 2(7)(a) provides: '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, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.'

⁴ — 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.

12. However, under Article 2(7)(b), in investigations concerning imports from, inter alia, the People's Republic of China (considered to be a non-market economy), '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'.

13. Article 2(7)(c), which was decisive in determining whether the exporter in the present case qualified for the above treatment (known as 'market economy treatment', also abbreviated to 'MET'), sets out various criteria which must *all* be shown to be fulfilled in order to qualify. Among those criteria, the second indent of the first subparagraph states that firms must have 'one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes'.⁵

14. The last subparagraph of Article 2(7)(c) specifies: 'A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'⁶

15. In *Nanjing Metalink*,⁷ the Court of First Instance interpreted that provision as being 'intended, in particular, to ensure that the question [whether to accord market economy treatment] is not decided on the basis of its effect on the calculation of the dumping margin'. It went on to state that 'the last sentence of Article 2(7)(c) of the basic regulation is to be interpreted as meaning that it precludes the institutions from re-evaluating evidence they had at the time of the initial determination as to market economy treatment. That provision does not, however, preclude the grant of market economy treatment from being discontinued if a change in the factual situation on the basis of which such treatment was conferred no longer permits the conclusion that the producer concerned operates under market economy conditions'.⁸

5 — This appears to relate to Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2003 L 261, p. 1). International Accounting Standard ('IAS') 1 concerns the presentation of financial statements.

6 — The advisory committee set up by Article 15 of the basic regulation consists of representatives of each Member State and is chaired by a representative of the Commission.

7 — Case T-138/02 *Nanjing Metalink International v Council* [2006] ECR II-4347, in particular paragraphs 44 and 47.

8 — In that judgment the Court of First Instance had no reason to (and therefore did not) consider the contrary situation, where a change in the factual situation on the basis of which such treatment was refused might no longer permit the conclusion that the producer concerned did not operate under market economy conditions.

16. During the course of the investigation, provisional duties may be imposed by the Commission in accordance with Article 7. However, it is only if the facts as finally established show that there is dumping and injury caused thereby, and if the Community interest calls for intervention, that a definitive anti-dumping duty is to be imposed by the Council, acting on a proposal submitted by the Commission not later than one month before the expiry of any provisional duties and after consultation of the advisory committee (Article 9(4)). The whole procedure, in the event of imposition of a definitive duty, is to be concluded in all cases within 15 months of initiation (Article 6(9)).

17. The final provision of relevance is Article 20(4) and (5). Under Article 20, parties concerned by an investigation may obtain from the Commission disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures are imposed (paragraph 1), and ‘final disclosure’ of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures (paragraph 2). Article 20(4) and (5) reads as follows:

‘4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that

time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

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

Factual background

18. The facts are set out in paragraphs 4 to 23 of the judgment under appeal. Below, I summarise that account, also referring to and quoting from certain documents before the Court of First Instance, which have been referred to in the appeal.

19. On 4 February 2006, the Commission initiated an investigation into imports of ironing boards, including those manufactured and exported by Foshan Shunde Yongjian Housewares & Hardware Co. Ltd (‘Yongjian’),

established in Foshan, People's Republic of China.

words of paragraph 13 of the judgment under appeal:

20. Yongjian requested market economy treatment on 23 February 2006. Following enquiries, the Commission replied on 11 August 2006 that it did not consider the criterion laid down in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation to be met, because Yongjian's accounting records and audit reports were not in line with international accounting standards. Further correspondence followed in September 2006, but the Commission maintained its position.

21. The Commission then adopted Regulation (EC) No 1620/2006,⁹ which confirmed rejection of Yongjian's claim for market economy treatment and imposed a provisional duty of 18.1% on imports of ironing boards manufactured by it.

22. Yongjian continued to submit observations and statistics in support of its claim for market economy treatment. Then, in the

'By letter of 20 February 2007, the Commission sent the applicant a final general disclosure document and a specific disclosure document. In the first document the Commission stated its intention to grant the applicant MET. [¹⁰] The Commission stated, on the one hand, that the flaws in the company's accounting practices noted at the provisional measures stage had no significant impact on the financial results entered in the accounts and, on the other hand, that the incompleteness of the accounts, first, did not raise any problem as regards information on export sales since the Commission had already approved those data when it was in a position to check their reliability and, second, was not decisive as regards domestic sales, since they were not sufficiently significant to be representative. The Commission therefore stated that, in those circumstances, the normal value should be established on the basis of production costs and that the cost of steel was an essential element of these. In that regard, the Commission considered that the Chinese official statistics relating to steel imports submitted during the administrative procedure confirmed the reliability of the company's accounting data with regard to the cost of steel and thus enabled the normal value to be calculated on the basis of the value established in China.'

9 — Of 30 October 2006, imposing a provisional anti-dumping duty on imports of ironing boards originating in the People's Republic of China and Ukraine (OJ 2006 L 300, p. 13) ('the provisional regulation').

10 — The specific disclosure document concerned only the dumping calculations, and not the issues with which this case is concerned either at first instance or on appeal.

23. Consequently, the final general disclosure document showed a definitive rate of duty of 0% for Yongjian's ironing boards.

26. It may be helpful to set out here paragraphs 13 to 18 of the Italian Government's statement in intervention at first instance:¹¹

'13 At the meetings of the anti-dumping committee on 6 and 22 March 2007, several of its members opposed granting market economy treatment to the applicant undertaking.

24. In March 2007, the Commission received observations from the complainants, who, in the words of paragraph 14 of the judgment under appeal, 'maintained, on the one hand, that the applicant did not meet the criterion set out in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation and, on the other hand, that in any event the last sentence of Article 2(7)(c) of the basic regulation precluded the institutions from amending the MET during the proceeding'.

14 In particular, the Commission was accused of having infringed Article 7(2) (c) [sic] of the basic anti-dumping regulation, as interpreted by the judgment of 14 November 2006 in Case T-138/02 *Metalink*.

15 Essentially, market economy treatment cannot be accorded to third-country undertakings subject to dumping investigations once the first three months of the investigation have passed, unless there has been a relevant change of circumstances.

25. On 6 and 22 March 2007, the advisory committee examined the Commission's proposals of 20 February. In the words of paragraph 15 of the judgment under appeal: 'A number of the members of the Advisory Committee protested the granting of MET to the applicant.'

16 That was not the case for the Chinese undertakings to which the Commission intended to grant MET belatedly. More-

¹¹ — Quoted by Yongjian in its appeal; my translation from the original Italian.

over, the reasons which had justified refusing such treatment at the provisional stage were very serious and unlikely to be resolved rapidly: irregular accounts kept in violation of IAS principles.

Commission referred to and rejected Yongjian's arguments in favour of according market economy treatment, but made no reference to its previous intention to propose according such treatment and, consequently, gave no reasons for its change of position since 20 February.

17 That position was put firmly by the Italian delegation to the anti-dumping committee meeting on 6 March 2007 and was followed by the delegations of Portugal, Lithuania, France, Spain, Poland, Greece, Belgium and the Czech Republic.

18 Following that strong opposition from Member States and faced with a clear breach of the *Metalink* case-law, the Commission, confirming the position it had already taken in the provisional regulation, rejected the grant of market economy status to the three Chinese undertakings concerned, including the applicant, in the revised final disclosure document of 23 March 2007.'

27. On the evening of Friday 23 March 2007, the Commission faxed Yongjian a revised final general disclosure document and a revised final specific disclosure document. In those documents, it confirmed its initial refusal to accord market economy treatment on the ground, essentially, that Yongjian's accounting practices were in clear breach of international accounting standards. Consequently, a definitive rate of duty of 18.1% was proposed for Yongjian's products. The

28. Yongjian was initially allowed until Thursday 29 March 2007 (six calendar days) in order to comment or make representations. On Monday 26 March, it requested to inspect the file, and was granted access on Tuesday 27 March. On Wednesday 28 March, it requested that the time allowed to submit comments be extended by a week.

29. The Commission replied on 29 March, pointing out that Yongjian had already inspected the file four times and that the only new information introduced comprised the revised disclosure documents. It also stated that those documents 'did not essentially present new findings ... but rather confirmed [the Commission's] provisional findings'. It concluded: 'Consequently, we do not consider the grounds invoked to justify this request for extension sufficient. However, we could exceptionally agree to extend the deadline to Monday 2 April 2007.' Thus, Yongjian was finally allowed 10 calendar days in which to comment or make representations.

30. Meanwhile, on 23 March 2007, the Commission had sent the advisory committee the revised final working document for consultation. That document was approved by the committee on 27 March 2007, following a written procedure. The Commission had also submitted the proposal for definitive measures, based on the revised final general disclosure document, to the Council on 29 March 2007.

31. Yongjian submitted its observations to the Commission on 2 April 2007, challenging the finding that it did not meet the conditions for market economy treatment and requesting the Commission not to accept the complainants' submission that the last sentence of Article 2(7)(c) of the basic regulation precluded it from revising its initial determination.

32. The Commission replied by letter of 4 April 2007 to Yongjian's lawyer. In so far as is relevant, it stated as follows:

'On 20 February 2007, the Commission services disclosed their intention to change the Market Economy Treatment (MET) determination and, consequently, the dumping margins and duty rates of three Chinese exporting producers, including your client, and invited comments from the parties

concerned. This disclosure did not constitute in any event a new MET determination.

As it is clearly stated in the Revised Final General Disclosure Document, the Commission continued to seek and verify all information it deemed necessary for its definitive findings (see recital 4). In this way the Commission did not deprive any interested party of its right to submit properly substantiated comments.

In line with the aforesaid principle and following the comments of the Community industry in this respect, the Commission services decided not to proceed with the MET changes but to confirm their provisional findings. In fact it was finally established that the effects of the accounting practices in question, which as it has already been indicated were found in breach of the IAS could not be considered immaterial.

Your client's explanations provided after the Provisional Disclosure were evaluated with the Community industry comments submitted following the Final Disclosure of 20 February 2007 and it was established that the accounts of your client were not audited in line with IAS because your client was found to disregard the accrual basis of accounting (contrary to IAS 1.25), to perform offsetting

(contrary to IAS 1.32) and to group transactions together instead of representing them separately (contrary to IAS 1.13 and IAS 1.29). All the aforesaid discrepancies were not commented by the auditors.

provisions of Article 2(7) of the basic Regulation i.e. it had to be established on the basis of the price or constructed value in an [analogous] country.

Your client with its submission of 2 April 2007 continues to repeat the same arguments, already submitted before the Definitive Disclosure, on the accounting discrepancies and their compliance or not with IAS but as you are well aware jurisprudence in the assessment of MET claims does not allow a reassessment of old facts.

As regards the determination of the export price, we note that your client had never contested in its submissions either on Provisional or Final Disclosure the fundamental principles of the Commission services' determination as regards export sales made directly to unrelated customers. Your client's comments referred only to the exchange rate used or to technical details on the Excel presentation of the grouped PCNs used for the dumping calculations (both being addressed either in the General or in the Specific Final Disclosure Document). The logical conclusion of the above is that your client had accepted the Commission services' findings. Therefore, submissions made now on this matter cannot be taken into consideration.

As to the new data on the steel prices provided by your client after the Provisional Disclosure we note that this information was also evaluated with the Community industry comments submitted following the Final Disclosure of 20 February 2007 and it was established that the new information on steel prices does not allow a new assessment of all the shortcomings of the accounts found for your client.

Article 20(4) of the basic Regulation provides that Final Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council, but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible. This was the purpose of the Revised Final General Disclosure Document of 23 March 2007.

Therefore, since the new evidence of the steel prices could not have an impact on the MET determination, your client's normal value had to be determined in line with the relevant

However, please note that the Commission is prepared to review the MET situation of your client in one year if sufficient evidence is made available in this respect.’

met, and that the basic obligation laid down in the last sentence of Article 2(7)(c), as interpreted in that judgment, must therefore apply. ...’

33. As regards the Commission’s reasons for changing its view, it may be helpful to note at this point that, at point 23 of its defence before the Court of First Instance,¹² the Council stated:

‘The Commission did indeed, in February 2007, envisage modifying its position on MET in response to evidence which it regarded at that time as “considerable”. In the first disclosure document, it indicated that it could envisage proposing such a change on the basis of a re-evaluation of the data and of the confirmation of certain steel import prices, regarded as new evidence. It was ready to conclude that there were thus sufficient “new data and explanations” to justify revising the MET solution adopted. None the less, after receiving observations from interested parties and consulting the anti-dumping committee, the Commission changed its view of those considerations and confirmed the solution initially adopted, namely that the applicant was not entitled to MET, having regard to the second indent of Article 2(7)(c), to the absence of sufficient new elements and to the perfectly clear text of Article 2(7)(c). It concluded that the conditions required for revising the solution initially adopted, as set out in the *Nanjing Metalink International* judgment, were not

34. By letter of 5 April 2007, Yongjian asked the Commission to propose definitive measures based on the final general disclosure document of 20 February 2007, since the determination regarding market economy treatment was, in its view, based on an error of law.

35. However, on 23 April 2007, the Council adopted the contested regulation¹³ imposing, inter alia, a definitive anti-dumping duty of 18.1% on imports of ironing boards manufactured by Yongjian.

Procedure and judgment at first instance

36. Yongjian sought annulment of that regulation in so far as concerned it. The Commission, the three complainants representing the

12 — Quoted by Yongjian in its appeal; my translation from the French.

13 — Regulation (EC) No 452/2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ironing boards originating in the People’s Republic of China and Ukraine (OJ 2007 L 109, p. 12).

Community industry,¹⁴ and the Italian Republic all intervened in support of the Council.

37. Yongjian put forward two pleas in law: (i) misinterpretation of Article 2(7)(c) of the basic regulation and (ii) breach of Article 20 of the basic regulation and of the rights of the defence.

First plea: misinterpretation of Article 2(7)(c) of the basic regulation

38. Yongjian argued that the Commission's only explanation for its sudden change of position was in the letter of 4 April 2007: that the case-law did not permit reassessment of old facts. (If, however, the true reason was different, the proposal submitted to the Council failed to state the reasons on which it was based, in breach of Article 253 EC.)

39. The reference to the case-law could only be to *Nanjing Metalink*. However, according to that judgment, the last sentence of Article 2(7)(c) of the basic regulation seeks

to ensure that the question of market economy treatment is determined objectively, not on the basis of its effect on the calculation of the dumping margin. The institutions are thus precluded from reassessing information available to them at the time of the initial determination, but not from revoking market economy treatment if it appears from changed circumstances or new evidence that the company concerned does not fulfil the necessary criteria. Such a rule presupposes that a decision on market economy treatment is taken before a decision on normal value.

40. In the present case, however, the Commission took both steps at the same time. There was thus no reason to deal differently with Yongjian's status under Article 2(7)(c) and with other aspects of the provisional assessment that might be reviewed. Since the Commission had concluded that the initial determination as to market economy treatment was unjustified for the reasons given in the final disclosure document of 20 February 2007, and had not explained why those reasons might be wrong, it was not only entitled but obliged to correct its determination. The proposal for definitive measures therefore infringed Article 2(7)(c) of the basic regulation, invalidating the contested regulation.

41. The Court of First Instance noted first that recitals 12 to 14 of the contested

14 — Vale Mill (Rochdale) Ltd, Pirola SpA and Colombo New Scal SpA ('the complainants').

regulation showed that ‘the reason for the refusal to alter the MET determination made in the provisional regulation was not the prohibition on the reassessment of old facts contained in the last sentence of Article 2(7)(c) of the basic regulation, but rather the fact that the applicant’s accounts were not in line with the IAS and the absence of any new evidence likely to affect that finding. The refusal therefore arose from application of the substantive criteria of the second indent of the first subparagraph of Article 2(7)(c) of that regulation’.¹⁵

‘Your client with its submission of 2 April 2007 continues to repeat the same arguments, already submitted before the Definitive Disclosure, on the accounting discrepancies and their compliance or not with IAS but as you are well aware jurisprudence in the assessment of MET claims does not allow a reassessment of old facts.’¹⁷

44. The Court went on, at paragraphs 47 to 50 of its judgment:

42. Nor did the revised disclosure documents indicate that the reason for the refusal to grant market economy treatment was the prohibition on reassessment of old facts; the Commission’s arguments related only to the non-conformity of Yongjian’s accounting practices.¹⁶

43. The Court of First Instance then referred to the Commission’s letter of 4 April 2007, as ‘the only document in which the Commission states that the case-law concerning the MET determination does not permit a reassessment of old facts’. It quoted the relevant paragraph:

‘47 As is clear from that letter, the Commission was referring to the case-law prohibiting the reassessment of old facts for the purposes of rejecting arguments which the applicant had put forward before the final disclosure document was sent. In reply to a question put by the Court during the hearing, the Commission stated, and was not contradicted by the applicant on this point, that the arguments to which that observation related were contained in the letter of 1 September 2006, sent by the applicant before the initial MET determination on 15 September 2006 and put into effect in the provisional regulation.

¹⁵ — Paragraph 44 of the judgment under appeal.

¹⁶ — Paragraph 45.

¹⁷ — Paragraph 46; the relevant section of the letter is quoted in its entirety above, at point 32.

48 It should be noted, however, that in its letter of 4 April 2007 the Commission based its refusal to grant MET on the ground that, in breach of the IAS, the applicant's accounts disregarded the accrual basis of accounting, performed offsetting and grouped transactions together instead of representing them separately. The Commission pointed out in that regard that the auditors had not commented on those points. The Court of First Instance notes that the Commission also stated that the information on steel prices did not allow for a new assessment to be made of the shortcomings discovered in the applicant's accounts.

concerning the interpretation of the last sentence of Article 2(7)(c) of the basic regulation and of paragraph 44 of the judgment in *Nanjing Metalink v Council* is irrelevant.'

45. After dealing briefly with a number of other points not in issue on appeal, the Court of First Instance therefore dismissed Yongjian's first plea in law.

49 It is therefore clear from that letter as a whole that the Commission's observation that it was not permissible to reassess old facts is incidental, as the institution based its refusal to grant MET on an assessment of whether the applicant complied with the relevant substantive criteria.

Second plea: breach of Article 20 of the basic regulation and of the rights of the defence

50 It is clear therefore that the applicant's assertion that the Commission based its arguments in this case on a prohibition on the reassessment of old facts has no basis in fact. Since the first plea cannot be accepted on that ground, any discussion

46. Yongjian argued that, under Article 20(4) and (5) of the basic regulation, the Commission must make final disclosure of the essential facts and considerations on the basis of which it intends to recommend the imposition of definitive measures at least 10 days before presenting its proposal to the Council, to allow the parties to submit observations and the Commission to take them into consideration. In this case, however, the Commission presented the proposal for definitive measures based on the revised final disclosure document barely six days after that document was sent to Yongjian, and four days before the date set for it to submit its observations.

47. To that extent, the Court of First Instance essentially agreed with Yongjian. It noted first that Article 20(5) of the basic regulation, although it does not state that the Commission must wait for the expiry of the 10-day time-limit before submitting its proposal to the Council, cannot be interpreted inconsistently with Article 20(4), which requires the Commission to give final disclosure not later than one month before submitting any proposal for final action to the Council. Consequently, the Commission cannot submit its proposal to the Council before the expiry of the 10-day time-limit.¹⁸

48. It then dismissed the Council's argument that the Commission could take representations into account by amending its proposal to the Council. Article 250(2) EC allows the Commission to amend its proposal in order to facilitate a convergence of views within the institution or institutions involved in the decision-making process, but that is not appropriate for taking adequate consideration of representations by the parties.¹⁹ Moreover, such representations may have significant consequences for the content of the final act. The fact that a proposal for definitive measures has already been submitted is in itself likely to influence the conclusions that may be drawn from those representations. Thus, if the Commission could submit its proposal to the Council before receiving representations from interested parties, that

might have an adverse effect on whether they can effectively be taken into account.²⁰

49. In the present case, the Commission was required to inform Yongjian of its new position, based on a new or different consideration within the meaning of Article 20(4) of the basic regulation, namely that the information on the price of steel imports did not alter the inferences to be drawn for market economy treatment purposes from Yongjian's failure to comply with the IAS. Article 20(4) did not support the Commission's view that mere alteration of the assessment of unchanged factual information does not require any communication to the interested parties. Where an assessment of the relevant factual information is envisaged for the first time, it must be sent to the interested parties so that they can submit their observations in that regard. Since the revised final disclosure documents were sent to Yongjian on 23 March 2007 and the proposal for definitive measures was submitted to the Council on 29 March 2007, six days later, the Commission did not comply with the requirements of Article 20(5).²¹

50. Having taken that view, the Court of First Instance none the less dismissed Yongjian's second plea.

18 — Paragraph 65, citing Case T-147/97 *Champion Stationery and Others v Council* [1998] ECR II-4137, paragraphs 81 to 83.

19 — Paragraph 66, citing Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 36.

20 — Paragraph 67.

21 — Paragraphs 68 to 70.

51. It considered that failure to comply with the 10-day time-limit in Article 20(5) of the basic regulation could result in annulment of the contested regulation only if there were a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome actually affecting Yongjian's rights of defence.²² However, the revised final disclosure documents contained no new factual information not previously brought to Yongjian's attention, and Yongjian had had the opportunity, earlier in the procedure, to give its view on the position set out again in the revised final disclosure documents of 23 March 2007. Moreover, apart from the arguments concerning the last sentence of Article 2(7)(c) of the basic regulation, Yongjian did not, in its letter of 2 April 2007, put forward any new arguments in response to the Commission's new position. Its observations in that letter concerning the last sentence of Article 2(7)(c) and the judgment in *Nanjing Metalink* did not, in any event, influence the content of the contested regulation. As had been found in the context of the first plea, the refusal to grant market economy treatment was based on application of the substantive criteria in the second indent of the first subparagraph of Article 2(7)(c).²³

The appeal

52. Yongjian has put forward two grounds of appeal, which I summarise below, together with the written and oral submissions of the Council, the Commission and the complainants, and the written submissions of the Italian Republic.

First ground of appeal: finding clearly at odds with the content of the case-file

53. Yongjian submits, essentially, that the Court of First Instance erred in law by concluding that the interpretation of Article 2(7)(c) of the basic regulation and paragraph 44 of *Nanjing Metalink* was irrelevant, inasmuch as that conclusion was manifestly at odds with the content of the case-file. Consequently, it was also wrong not to rule on the fundamental question whether the last sentence of Article 2(7)(c) prevented the Commission from reconsidering its initial decision not to grant market economy treatment.

54. Its arguments concentrate on the first part of that submission, and rely heavily on the

22 — Paragraph 71, citing Case 30/78 *Distillers Company v Commission* [1980] ECR 2229, paragraph 26, and Case T-35/01 *Shanghai Teraoka Electronic v Council* [2004] ECR II-3663, paragraph 331.

23 — Paragraphs 72 to 75.

statements made by the Italian Government and the Council in their pleadings at first instance,²⁴ to the effect that the Commission reverted to its original position in response to objections that a reassessment would be contrary to the last sentence of Article 2(7)(c) of the basic regulation as interpreted in *Nanjing Metalink*. It is quite clear from the case-file, Yongjian submits, that that matter was not incidental but fundamental to the Commission's last-minute change of heart, and thus to the final decision to impose an anti-dumping duty of 18.1%, rather than 0%. The Court of First Instance's finding to the contrary is a clear distortion of the evidence within the meaning of the case-law, and therefore subject to review by the Court of Justice.

55. The Council, the Commission and the complainants all stress the case-law to the effect that the Court of First Instance has exclusive jurisdiction to find and appraise the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it or the clear sense of the evidence has been distorted²⁵ and that, where the appellant alleges such distortion, he must indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to the distortion.²⁶

56. The Council then points out that Yongjian refers only to the statements, in their pleadings, by the Council (in fact an argument based on evidence already available to the Court of First Instance) and the Italian Government (reflected in that Court's statement that '[a] number of the members of the Advisory Committee protested the granting of MET to the applicant'). It does not refer to the probative texts on which the Court of First Instance did base its conclusion, namely, the recitals in the contested regulation, the reasons given in the revised final disclosure document and the explanation given in the Commission's letter of 4 April 2007.

57. The Commission adds that observations by the Council and the Italian Government cannot be evidence of the Commission's own reasons for reverting to its original view. Those reasons were given in its proposal to the Council and were based on Yongjian's non-compliance with the applicable substantive criteria.

58. The Italian Government points out that Yongjian has not challenged the facts and findings of fact on the basis of which the Court of First Instance concluded that, in reverting to its initial assessment, the Commission did not rely to any material extent on the last sentence of Article 2(7)(c) of the basic regulation.

²⁴ — Quoted above at points 26 and 33, respectively.

²⁵ — Case C-390/95 P *Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraph 29.

²⁶ — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 50.

59. At the hearing, the complainants asserted that the true reason for the change of position was that, in the final disclosure document of 20 February 2007, the Commission had accepted Yongjian's view that non-compliance with international accounting standards was an impediment to market economy treatment only if it had an effect on dumping calculations, but that it was then swayed by their own argument that formal non-compliance was an impediment, regardless of effect, which was the basis for the revised document of 23 March.

60. Both the Italian Government and the complainants stress that, according to *Nanjing Metalink*, a refusal to grant market economy treatment can be reversed only if there is a change in the known facts, whereas Yongjian had sought only to show that the accounting irregularities, which it accepted, had no impact on its prices.

Second ground of appeal: erroneous conclusion regarding the effect of the breach of Article 20(5) of the basic regulation

61. Yongjian stresses the fundamental nature of the right to a fair hearing in Community law, and particularly in anti-dumping

procedures.²⁷ While accepting that a failure to respect that right can affect the validity of a contested measure only if, but for the irregularity, the result could have been different,²⁸ Yongjian submits that that is true only if there is *no possibility at all* of a different outcome.²⁹

62. In the present case, Yongjian reiterates, the interpretation of the last sentence of Article 2(7)(c) of the basic regulation was decisive in determining the imposition of an anti-dumping duty of 18.1%, rather than 0%. Consequently, the fact that Yongjian was deprived of any opportunity to demonstrate that the Commission's interpretation was wrong was a denial of the right to a fair hearing. That right, if it had been exercised, could have radically affected the outcome.

63. The Council points out that the Court of First Instance judged that the breach of Article 20(5) of the basic regulation did *not* affect the content of the contested regulation or, consequently, Yongjian's right to a fair hearing. That being so, Yongjian's argument is largely irrelevant. It is, in any event, based on an assumption of success in the first ground of appeal. Yongjian's right to be heard on the refusal to grant market economy treatment

27 — Case C-49/88 *Al-Jubail Fertilizer v Council* [1991] ECR I-3187, paragraph 16.

28 — See the case-law cited in footnote 22 above.

29 — Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601, paragraph 203.

was not affected, since it had had the chance to be heard earlier. Moreover, the Court of First Instance found as a fact — not challengeable on appeal — that Yongjian had neither submitted any new arguments in response to the Commission's position nor specified what arguments it could have submitted.

Interpretation of Article 20(4) and (5) of the basic regulation

64. The Commission submits that the ground of appeal is based on false premisses. In particular, it assumes that Yongjian would have been able to submit new and decisive arguments if the Commission had waited until after 2 April 2007 to put its proposal to the Council, and that the Commission was convinced that Yongjian deserved market economy treatment but believed itself to be precluded from granting that status by the *Nanjing Metalink* judgment. The Court of First Instance found that neither was the case, but Yongjian does not challenge those findings as a distortion of the evidence.

65. The Italian Government and the complainants agree essentially with the submissions of the Council and the Commission.

66. In addition, the Council, the Commission and the complainants take issue with the Court of First Instance's view that Article 20(5) of the basic regulation imposes a 10-day period for observations in *all* cases when the Commission bases its conclusion on facts or considerations different from those in the final disclosure documents.

67. At the hearing, the two institutions distinguished between (i) the final disclosure referred to in the first and second sentences of Article 20(4), (ii) facts and considerations which the Commission is not in a position to disclose at the time of final disclosure, referred to in the third sentence of Article 20(4), and (iii) different facts and considerations on which a subsequent decision may be based, referred to in the last sentence of that provision. The 10-day requirement applies, in their submission, only to (i), which covers the whole scope of the investigation and is thus much more important than any subsequent corrections. In the case of (ii) and (iii), a

right to reply always exists,³⁰ but the only requirement is that the period allowed should be reasonable in the light of the nature of the facts or considerations.

Assessment

First ground of appeal: finding clearly at odds with the content of the case-file

68. Both the institutions and the complainants stress that anti-dumping procedures are subject to strict time-limits,³¹ which would be difficult to respect if minor amendments led to an extension. The Commission adds that it could and would have amended its proposal to the Council if Yongjian had made relevant comments after the original proposal was submitted. The complainants submit that, if Yongjian's observations of 2 April 2007 had caused the Commission to change its position, a further 10-day period would have had to be allowed for the Community industry to comment, exceeding the overall time-limit for the procedure. It is only where new elements on which parties have not previously been able to comment are decisive that the Commission must inform them and allow 10 days for comments when it changes its position — not where, as here, all the elements relied on had been fully debated.

69. The central and essential element of this ground of appeal is the claim that, contrary to what the Court of First Instance found, the Commission did base its final view as to market economy treatment on the consideration that the last sentence of Article 2(7)(c) of the basic regulation precluded it from modifying its initial determination.

70. Yongjian is not challenging the accuracy of any actual finding of fact by the Court of First Instance but rather the appraisal by that Court of the facts found and the conclusion which it drew from them.

71. It is clear from abundant and consistent case-law that this Court 'has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that that evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced before it.

30 — Recital 5 in the preamble to the basic regulation indicates that it is based on the WTO 1994 Anti-Dumping Agreement, Article 6(9) of which states: 'The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.'

31 — Article 6(9) imposes an overall 15-month limit on investigations, and Article 7(7) a 9-month limit on provisional duties, while Article 9(4) requires a proposal for definitive duties to be submitted one month before the expiry of provisional duties.

Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice'.³²

72. 'Distortion of the clear sense of the evidence' is a concept first used by the Court in *Hilti*.³³ It appears to be inspired by the French law concept of *dénaturation*, which constitutes a ground of appeal in cassation. *Dénaturation* occurs when a court dealing with the substance of a case exceeds its competence by interpreting a clearly and unambiguously worded document (such as an agreement, a will, a report, a judgment, or a foreign law) in a way incompatible with that wording. By contrast, the interpretation of an obscurely or ambiguously worded document is within the competence of the court and cannot be challenged in such an appeal.³⁴

73. In the present case, the Court of First Instance referred in its assessment to the recitals of the contested regulation, to the revised final general disclosure document and to the Commission's letter of 4 April 2007.

74. From the first two documents, the Court of First Instance found that the only reasons given for the final determination as to market economy treatment concerned the fact that Yongjian's accounting practices were not in line with the IAS.³⁵

75. That finding seems incontrovertible, and certainly not a distortion of the clear sense of the evidence. Nor, indeed, does Yongjian make any claim to that effect.

76. From the letter of 4 April 2007, the Court of First Instance found that, although the Commission stated: 'as you are well aware jurisprudence in the assessment of MET claims does not allow a reassessment of old facts', it in fact justified its refusal to grant market economy treatment on the ground that Yongjian's accounts were in breach of the IAS in that they disregarded the accrual basis of accounting, performed offsetting and grouped transactions together instead of representing them separately, points on which the auditors had not commented. The Court noted also the Commission's statement that the information on steel prices did not allow for a new assessment to be made of the shortcomings discovered in the applicant's accounts. It therefore concluded that the Commission's observation that it was not permissible to reassess old facts was incidental, as the refusal to grant market economy

32 — *British Aggregates*, cited in footnote 3, paragraph 97; see also the case-law cited at point 55 above.

33 — Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraph 42.

34 — See, for example, the definitions in Cornu, *Vocabulaire juridique*, Paris, 1987, or <http://www.dictionnaire-juridique.com>.

35 — Paragraphs 43 to 45 of the judgment under appeal.

treatment was based on an assessment of whether Yongjian complied with the relevant substantive criteria.³⁶

77. I cannot discern anything in those findings or conclusions which distorts the clear sense of the relevant passages of the letter of 4 April 2007,³⁷ within the meaning of the strict test applicable under the Court's case-law.

78. It is true that one might argue that it would also have been possible to conclude, from the letter of 4 April 2007, that the main reason for the Commission's unexpected change of position was indeed its view that it was precluded from going back on its original determination. I make no judgment on that hypothesis, other than to state that it is clearly not the only possible conclusion to be drawn from the wording of the letter. Consequently, the conclusion actually drawn by the Court of First Instance derives from an appraisal of the evidence which, in the absence of any distortion of the clear sense of that evidence, is not a point of law subject to review by the Court of Justice.

79. That cannot be affected by the content of the submissions at first instance of the Italian Government and the Council. Even if the

statements referred to³⁸ could be regarded as evidence, rather than argument, it is clear that neither party could have been privy to what actually caused the Commission's change of position between the final and revised final disclosure documents.

80. Indeed, in its own submissions at first instance, the Commission — which alone can have been able to inform the Court authoritatively of its motives — specifically stated that, faced with objections from several Member States, both the members and staff of the Commission had continued their reflection following the final disclosure documents and had come to the conclusion that the shortcomings in Yongjian's accounting were such that the criterion in the second indent of the first subparagraph of Article 2(7)(c) of the basic regulation could not be considered to be met. The reference to the *Nanjing Metalink* judgment in the letter of 4 April 2007 was merely intended to point out that no new facts had been adduced.³⁹

81. Consequently, the first ground of appeal must in my view be dismissed. The allegation of distortion of the evidence by the Court of First Instance cannot be upheld. If that Court's appraisal of the evidence stands, inasmuch as it concluded that the Commission had not based its change of position on the last

³⁶ — Paragraphs 46 to 49 of the judgment under appeal.

³⁷ — Set out verbatim at point 32 above.

³⁸ — Quoted above at points 26 and 33, respectively.

³⁹ — See in particular points 10 and 11 of the Commission's statement in intervention at first instance.

sentence of Article 2(7)(c) of the basic regulation as interpreted in *Nanjing Metalink*, then clearly the argument relating to the interpretation of that legislation and case-law, whether at first instance or on appeal, is not relevant.

Yongjian could have had a plausible case for seeking judicial review of the determination of market economy treatment in the contested regulation.

82. That said, I take this opportunity to state that the Court of First Instance's approach in paragraphs 44 and 47 of *Nanjing Metalink*, as set out in point 15 above, seems to me to be correct in all points on which it is explicit.

Second ground of appeal: erroneous conclusion regarding the effect of the breach of Article 20(5) of the basic regulation

85. My conclusion that Yongjian's first ground of appeal should be dismissed implies that the second ground should also be dismissed.

83. It rightly, in my view, distinguishes between re-evaluating evidence previously assessed (which is prohibited) and reaching a changed conclusion on the basis of a change in the relevant factual situation (which is permitted). I would add that — as the Commission accepted in its written submissions and confirmed at the hearing — the possibility of reaching such a changed conclusion must apply both ways: it must allow a change in determination whether it is favourable or (as in *Nanjing Metalink*) unfavourable to the exporter.

86. The Court of First Instance decided, on the facts, that the Commission's change of position between the final and the revised final disclosure documents was based wholly on matters on which Yongjian had already had an opportunity to comment, and was not affected by the Commission's interpretation of the last sentence of Article 2(7)(c) of the basic regulation.

84. Consequently, if Yongjian had established changed factual circumstances but the Commission, relying on the last sentence of Article 2(7)(c) of the basic regulation, had refused to take them into account, then

87. If that finding stands — as in my view it must — then Yongjian was not denied a hearing on any aspect which could have affected the outcome. The Court of First

Instance's conclusion that, although there was an infringement of Article 20(5) of the basic regulation, it did not affect the content of the contested regulation or, thus, the applicant's rights of defence, so that the irregularity could not result in unlawfulness and annulment of the contested regulation, is in complete accordance with the case-law on which it relied.⁴⁰

88. Nor has Yongjian produced any argument which does not rely on the assumption that the Commission's change of position was indeed based on the view that the last sentence of Article 2(7)(c) of the basic regulation precluded it from revising its initial assessment as to market economy treatment, so that Yongjian could have submitted observations challenging that view. It seeks to argue from *Alrosa*⁴¹ that an infringement of the right to be heard can be disregarded as purely formal only if there is no possibility whatever that the outcome could have been different; but that it is a substantive flaw going to the validity of the measure adopted if it is merely impossible to determine the precise extent of the possible effect on the outcome. However, that argument can have no relevance where the only observations which the party concerned claims to have been prevented from making relate to matters which have been found to be incapable of affecting the outcome.

Interpretation of Article 20(4) and (5) of the basic regulation

89. There remains the issue raised by the Council, the Commission and the complainants, whether the Court of First Instance was correct to consider that Article 20(5) of the basic regulation requires the Commission to allow 10 days for parties to react to *any* new disclosure of facts or considerations before it submits its proposal to the Council.

90. That issue has not been raised as a cross-appeal,⁴² nor is it relevant to determining the appeal. If submissions on the interpretation of the last sentence of Article 2(7)(c) of the basic regulation could have had no effect on the outcome of the Commission's assessment of market economy treatment, and thus on the content of the contested regulation, then the fact that Yongjian had no opportunity to make such submissions is irrelevant — whether that lack of opportunity was formally in breach of Article 20(5) of the basic regulation or not.

91. None the less, it is an issue of obvious importance for the institutions and all parties

40 — See point 51 and footnote 22 above.

41 — See point 61 and footnote 29 above.

42 — At the hearing, the Council stated, if I understood correctly, that its objection was to the statement of principle made by the Court of First Instance, and not to the finding that the Commission had infringed Article 20(5) of the basic regulation.

concerned in anti-dumping procedures. I shall therefore comment briefly on it here.

92. First, I am not greatly impressed by the reliance placed by the institutions and the complainants on the rigorous overall time-limit applicable to anti-dumping investigations. The Community legislature has imposed that limit, together with certain shorter time-limits to be respected within the overall limit. It is for the institutions to take the proper steps to respect all of those constraints, and there is no reason for them to be excused from compliance with a partial time-limit on the ground that it makes compliance with the overall limit more difficult.

93. Second, I agree with the Court of First Instance's conclusion that representations from interested parties must be received before the Commission submits its proposal to the Council, and with the reasoning by which it reached that conclusion.⁴³ Representations concerning facts or considerations which are different from those contained in the final disclosure document, and on the basis of which a different conclusion is reached, are clearly at least as deserving of consideration as representations concerning the final disclosure itself. Their practical status would, however, clearly be undermined if they were received only after the Commission had finalised and submitted its proposal to the Council — there would be a significant risk that they would not be taken into consideration to the same extent.

43 — See point 48 above.

94. Third, I note that in the present case the Commission did set a period within which Yongjian could submit comments on the revised documents, so that it is irrelevant whether the basic regulation obliged it to do so or not. However, by setting such a period, the Commission necessarily subjected itself to the requirement in Article 20(5) that it be at least 10 days. Initially, it failed to comply with that requirement by setting a period of only six days. When it corrected that flaw by extending the period to 10 days, it was logically obliged to await the comments (and to take them into consideration) before submitting its proposal to the Council.

95. In that connection, I note that the proposal was submitted on 2 April 2007, just under 14 months from the initiation of the investigation on 4 February 2006, and that the contested regulation was adopted on 19 April 2007, 14 months and 9 days after that initiation. There was thus still room for manoeuvre before the 15-month period laid down in the basic regulation expired. In any event, it is quite clear that the Commission, which is aware of the time constraints imposed upon it, must take both those constraints and the need to respect the rights of the defence into account when conducting an anti-dumping investigation. Where necessary, it must calculate backwards from the deadlines imposed in order to allow parties to submit necessary observations.

96. Fourth, it seems to me that the Commission's conduct in the present case (bearing in mind particularly that the revised disclosure documents contained a radical and completely unannounced change of position which significantly affected Yongjian's interests, and were sent by fax after normal office hours on a Friday evening) can in any event be categorised as inconsistent with the principles of good administration. Whether there was a breach of Article 20(5) of the basic regulation or not, the Commission clearly acted with very little regard for a party whose interests it was adversely affecting and who was entitled to expect greater efficiency and consideration from a Community institution.

97. Finally, I can none the less agree with the institutions and the complainants that not every amendment to the facts or considerations on which the Commission's proposal to the Council is based will require a period to be set for making further representations. Some will be so minor that no comments are called for or could have any effect on the outcome. However, in the latter event, it becomes largely irrelevant whether there is deemed to be a formal breach of Article 20(5) of the basic regulation or not, since the absence of any possible effect on the outcome means that the validity of the final measure is unaffected.

98. In the present case, the change of position was sufficiently radical and unexpected, and

had a sufficient impact, to make it essential to allow further time for comments. Even if, in the event, Yongjian was unable to make any comments which could have affected the outcome, that could not be assumed from the outset.

Costs

99. Under Article 122 of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(4), Member States and institutions which intervene in the proceedings *must* bear their own costs, whereas the Court *may* order other interveners to bear their own costs.

100. In the present case, I consider that the appeal should be dismissed. The Council has applied for costs. The complainants have also applied for costs, and their participation in the appeal proceedings seems justified, as their interests are affected. Consequently, Yongjian should be ordered to pay the costs of the Council and the complainants, whereas the Italian Government and the Commission should bear their own costs.

Conclusion

101. Having regard to all the foregoing considerations, I am of the opinion that the Court should:

- dismiss the appeal;
- order Foshan Shunde Yongjian Housewares & Hardware Co. Ltd to pay the costs of the Council of the European Union and of Vale Mill (Rochdale) Ltd, Pirola SpA and Colombo New Scal SpA;
- order the Italian Republic and the Commission of the European Communities to bear their own costs.