Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

8 May 2012 *

(Dumping — Imports of ethanolamines originating in the United States — Definitive anti-dumping duty — Expiry of anti-dumping measures — Review — Likelihood of a continuation or recurrence of dumping — Article 11(2) of Regulation (EC) No 1225/2009)

In Case T-158/10,

The Dow Chemical Company, established in Midland, Michigan (United States), represented initially by J.-F. Bellis, R. Luff and V. Hahn, and subsequently by Bellis and Luff, lawyers,

applicant,

v

Council of the European Union, represented by J.-P. Hix, R. Szostak and B. Driessen, acting as Agents, and by G. Berrisch, lawyer, and N. Chesaites, barrister,

defendant,

supported by

European Commission, represented initially by H. van Vliet and M. França, and subsequently by M. França and A. Stobiecka-Kuik, acting as Agents,

intervener,

APPLICATION for partial annulment of Council Implementing Regulation (EU) No 54/2010 of 19 January 2010 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America (OJ 2010 L 17, p. 1),

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2011,

gives the following

* Language of the case: English.

Judgment

Background to the proceedings

1 On 1 February 1994, the Council of the European Union adopted Regulation (EC) No 229/94 imposing definitive anti-dumping duties on imports into the Community of ethanolamine originating in the United States of America, and collecting definitively the provisional anti-dumping duties (OJ 1994 L 28, p. 40).

2 On 20 July 2000, following a review pursuant to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended (replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, corrigendum OJ 2010 L 7, p. 22), 'the basic regulation'), and in particular pursuant to Article 11(2) and (3) of Regulation No 384/96 (now Article 11(2) and (3) of the basic regulation), the Council adopted Regulation (EC) No 1603/2000 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America (OJ 2000 L 185, p. 1). The anti-dumping duty for imports originating from the applicant, The Dow Chemical Company, was fixed at EUR 69.40 per tonne.

3 On 23 October 2006, following a review pursuant to Article 11(2) and (3) of Regulation No 384/96, the Council adopted Regulation (EC) No 1583/2006 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America (OJ 2006 L 294, p. 2). Regulation No 1583/2006 was in force for a period of two years. It fixed the anti-dumping duty for imports originating from the applicant at EUR 59.25 per tonne.

4 On 18 March 2008, a notice of the impending expiry of the anti-dumping measures was published in the *Official Journal of the European Union* (OJ 2008 C 71, p. 13).

5 On 25 July 2008, producers representing more than 50% of total production of ethanolamines in the European Union ('the EU') submitted a request for a review of the anti-dumping measures in force pursuant to Article 11(2) of Regulation No 384/96.

6 On 25 October 2008, the Commission of the European Communities published a notice of initiation of an expiry review of the anti-dumping measures applicable to imports of ethanolamines originating in the United States of America in the *Official Journal of the European Union* (OJ 2008 C 270, p. 26).

7 On 22 October 2009, the Commission sent to the applicant a general disclosure document and a specific disclosure document. The Commission pointed out, among other things, that the imports originating from the applicant had not been dumped during the review investigation period ('the RIP'), which ran from 1 October 2007 to 30 September 2008. Furthermore, the Commission stated that the dumping margin for the second US producer, INEOS Oxide LLC ('INEOS'), which had cooperated in the anti-dumping proceeding, was 11.9%. The Commission imputed the same dumping margin to US producers which had not cooperated in the anti-dumping proceeding. The Commission concluded that there was a likelihood of recurrence of injury.

8 On 6 November 2009, the applicant submitted its comments on the disclosure documents which it had received from the Commission.

9 On 19 January 2010, the Council adopted Implementing Regulation (EU) No 54/2010 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America (OJ 2010 L 17, p. 1, 'the contested regulation'). The contested regulation is in force for a period of two years. It fixes the anti-dumping duty for imports originating from the applicant at EUR 59.25 per tonne. The Council points to the likelihood of a recurrence of injury in the event of repeal of the anti-dumping measures (recital 91 of

the contested regulation). In support of its conclusion, the Council invokes, inter alia, continuation of dumping during the RIP, US producers' spare capacity, anti-dumping duties imposed on the product concerned in China, demand for the product concerned in the United States and on US export markets, a shift from monoethylene glycol production to production of ethanolamines, and the fact that companies which did not cooperate with the proceeding continue to have an interest in staying in the EU market and enhancing their export activities (recital 81 of the contested regulation).

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the General Court on 9 April 2010, the applicant brought the present action.

11 By document lodged at the Registry of the General Court on 21 May 2010, the Commission applied to intervene in support of the form of order sought by the Council. By Order of 23 August 2010, the President of the First Chamber of the General Court granted leave to intervene.

12 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Second Chamber, to which the present case was accordingly allocated.

13 On hearing the report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the General Court, requested the Council to reply to certain written questions. The Council replied to those questions by document lodged at the Registry of the General Court on 15 July 2011.

14 At the hearing on 20 September 2011, the parties submitted oral argument and answered questions put by the Court.

15 During the hearing, the Council indicated that it wished to make corrections to the written replies that it had lodged at the Registry of the General Court on 15 July 2011. The Council was requested to submit its corrections in writing, which it did within the prescribed time-limit. The applicant was requested to submit comments on the corrections lodged by the Council, which it did within the prescribed time-limit.

16 The oral procedure was closed on 31 October 2011.

17 The applicant claims that the Court should:

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

— order the Council to pay the costs.

18 The Council and the Commission contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

19 The action brought by the applicant is based on a single plea in law alleging infringement of Article 11(2) of the basic regulation. That plea can be broken down into seven limbs, which refer to manifest errors in the establishment and appraisal of the facts. The first limb relates to the

determination of dumping during the RIP. The second limb relates to the increase in dumping after the RIP. The third limb relates to the spare production capacity of ethanolamines in the United States. The fourth limb relates to the diversion of trade resulting from the anti-dumping measures in China. The fifth limb relates to the evolution of demand in the United States and in other markets. The sixth limb concerns the shift from monoethylene glycol to ethanolamines production. The seventh limb relates to the relationship between US and EU prices.

20 The Court considers it appropriate to rule on the first and third limbs of the single plea in law.

21 At the outset, it must first be noted that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40, and Case C-373/08 *Hoesch Metals and Alloys* [2010] ECR I-951, paragraph 61). In that respect it must be held that the examination of the likelihood of a continuation or recurrence of dumping and of injury involves the assessment of complex economic matters and that the judicial review of such an appraisal 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 have been manifest errors in the assessment of those facts or a misuse of powers (see, to that effect, Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraphs 45 and 46).

22 Second, according to the first paragraph of Article 11(2) of the basic regulation an anti-dumping measure is to expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, 'unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury'. It is clear from that provision, first of all, that the expiry of a measure after five years is the rule, whilst retaining it constitutes an exception. It is also clear 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. Lastly, it is clear from that provision that the mere possibility that dumping and injury might continue or recur is insufficient to justify retaining a measure; the latter is dependent on the likelihood of continuation or recurrence of dumping and of injury actually having been established by the competent authorities on the basis of an inquiry (*Euroalliages* v *Commission*, paragraph 21 above, paragraphs 41, 42 and 57, and Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359, paragraph 37).

The first limb of the single plea, relating to the determination of dumping during the review investigation period

Arguments of the parties

23 The applicant, referring to recital 80 of the contested regulation, states that a finding of dumping, in the amount of 11.9%, was positively made with respect to only one company, namely INEOS. However, imports originating from that company, which is related to one of the complainants, account for only a small proportion of total imports of ethanolamines from the United States. The overwhelming majority of such imports, namely more than 85%, originate from the applicant. However, the applicant's dumping margin was minus 7% (that is to say, no dumping). The finding of dumping made in relation to INEOS is not therefore representative.

24 Furthermore, the institutions also imputed INEOS' dumping margin to a very marginal third non-cooperating US producer. Contrary to the claims made by the Council in recital 116 of the contested regulation, there is no basis to assume that the producer in question would necessarily dump if it were to resume its export sales to the EU.

25 In any event, the country-wide weighted average dumping margin for imports of ethanolamines from the US during the RIP was minus 4.5% (that is to say, no dumping). The applicant refers to another case in which the Commission based its findings on a weighted average country-wide dumping margin. The applicant explains that it is not arguing that Article 9(3) of the basic regulation must be applied in the context of Article 11(2) of that regulation. The point made by the applicant in mentioning that case is that a finding of dumping by one or two individual exporters should not obscure the fact that, on a country-wide basis, there was no dumping. The applicant also stresses that, in its written submissions before the Court, the Council recognised that, in a review, the institutions should conduct an analysis with regard to the relevant exporting country. This entails that dumping must be assessed with respect to imports from the United States as a whole. In the present case, the Council admitted that the institutions did not find that imports from the United States as a whole had actually been dumped. Furthermore, the Council also argued that it can base a finding of continuation of dumping on the existence of actual or imputed dumping by exporters representing no more than 10% of the relevant imports. The Council contradicts itself, however, in so far as, during the proceeding, the institutions took the view that an expiry review is not an investigation into the imports of one exporter. Lastly, the report of the Appellate Body of the World Trade Organisation (WTO) referred to by the Council confirmed that the institutions should conduct an evaluation of the dumping margin on a 'product-specific basis.' In the present case, that dumping margin was negative.

26 The Council states that the finding set out in recital 80 of the contested regulation does not reveal any fault. It is clear from the specific findings relating to dumping at recital 23 of the contested regulation that the institutions did not purport to establish the actual dumping margin for two US producers. Furthermore, as regards the applicant's argument that the finding of dumping in relation to INEOS is not representative, the Council states that the institutions do not have to establish dumping for each individual exporter because dumping margins and corresponding anti-dumping duties cannot be amended in an expiry review. It is important to determine whether there is still dumping from the exporting country concerned. This approach has been confirmed by the WTO Appellate Body. In this regard, the applicant's assertion that that report confirmed that the institutions should conduct an evaluation of the dumping margin on a 'product-specific basis' is incorrect. The findings made by the WTO Appellate Body concerned Article 9(2) of the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (GATT) (OJ 1994 L 336, p. 103) in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 3), which applies to initial investigations, and not Article 11(3) of the Agreement. Lastly, the applicant's allegation fails to take account of the fact that the dumping margin had to be imputed to the third US producer mentioned by the applicant in its written submissions.

27 As regards the third US producer mentioned by the applicant in its written submissions, the Council refers to recital 29 of the contested regulation and essentially takes the view that that producer is not very marginal.

28 With regard to the applicant's argument that the dumping margin for imports of the product concerned from the United States was minus 4.5%, the Council contends that the institutions did not find that imports from the US as a whole had been dumped, as the applicant points out. Furthermore, the Council claims that the institutions are not required to establish dumping for each and every exporter or to calculate a country-wide dumping margin. The case referred to by the applicant in its written submissions is not relevant because it related to an investigation under Article 5 of the basic regulation. However, the rules on the termination of investigations of this kind, set out in Article 9(3) of the basic regulation, are not applicable to review investigations under Article 11(2) of that regulation.

Findings of the Court

29 As a preliminary point, it should be noted that the contested regulation includes a section C entitled 'Likelihood of a continuation or recurrence of dumping'. In recital 17 of the contested regulation the Council states that 'it was examined whether dumping was currently taking place'.

30 In recital 23 of the contested regulation the Council stated that the comparison of the weighted average normal value with the weighted average export prices 'showed the existence of dumping'. In that regard, the Council found that the applicant's dumping margin was 0% (the actual margin

calculated was minus 7%) and that INEOS' dumping margin was 11.9%. The latter dumping margin was attributed also to those exporters that did not cooperate with the anti-dumping procedure.

31 In recital 24 of the contested regulation the Council stated that, further to the analysis of the 'existence of dumping', the likelihood of the 'continuation of dumping' was examined.

32 In recital 25 of the contested regulation, in the context of the analysis of the level of dumping should measures be repealed, the Council stated that '[i]f the export prices were reduced commensurate to the level of the anti-dumping duties, the dumping margins observed during the RIP would be 12% for [INEOS] and for the non-cooperating parties (in line with Article 18 of the basic Regulation) while there would be still no dumping for [the applicant]'.

33 The examination carried out by the Council led it to conclude that there is a likelihood of 'continuation of dumping' (recital 51 of the contested regulation).

34 In recital 74 of the contested regulation, in the context of the analysis of the situation of the Community industry, the Council pointed out that 'dumping continued during the RIP'.

35 In recital 80 of the contested regulation, in the context of the analysis of the likelihood of a recurrence of injury, the Council stated that 'continuation of dumping during the RIP [had been] established for two US exporting producers'.

36 Finally, in recitals 113 and 114 of the contested regulation, the Council concluded by stating that '[t]he investigation show[s] that there was a likelihood of continuation of dumping (including a likely increase of the volume of dumped exports) as well as a likelihood of recurrence of injury' and that '[e]ven taking into account that one of the two cooperating exporting producers was not dumping and (therefore) assuming for the future that its part of imports from the USA [are not] dumped, nevertheless the conditions for continuing duties on the basis of 11(2) are complied with'.

37 It follows from the foregoing that the Council relied exclusively on the likelihood of continuation of dumping to conclude that the anti-dumping measures should be maintained in force. The Council did not rely on the likelihood of recurrence of dumping. In addition, the Council relied, in particular, on the continuation of dumping during the RIP to conclude that there was a likelihood of continuation of dumping. Finally, the Council's conclusion that the dumping had continued during the RIP is based on the fact that two exporting producers had dumped. The Council did not show that the applicant had continued dumping, or that the dumping was likely to recur. It follows, implicitly but necessarily, that the Council established a link between the dumping by two exporting producers during the RIP and the likelihood of continuation of dumping if the measures were to be repealed.

38 The applicant submits, in essence, that the Council cannot ignore the fact that it had not dumped during the RIP.

39 In the first place, it must be stressed that the Council relied, in the present case, on a likelihood of continuation of dumping, by finding, inter alia, that the dumping had continued during the RIP.

40 Secondly, it must be recalled that the term 'dumping', as set out in Article 11(2) of the basic regulation, is not defined. However, having regard to the scheme of the basic regulation, and in the absence of any indication to the contrary, it must be held that the term 'dumping' set out in Article 11(2) of the basic regulation has the same meaning as the term 'dumping' defined in Article 1 of the regulation which concerns the 'principles'.

41 Thirdly, within the meaning of Article 1 of the basic regulation, and in particular paragraphs 1 and 2 thereof, dumping refers to a product which is put into free circulation in the European Union. It is when that product is dumped and it causes injury that the institutions may, subject to other conditions, impose anti-dumping measures.

42 Fourthly, anti-dumping proceedings relate in principle to all imports of a certain category of products from a third country and not to imports of products manufactured by specific undertakings (Case C-216/91 *Rima Eletrometalurgia* v *Council* [1993] ECR I-6303, paragraph 17). Furthermore, under Article 9(5) of the basic regulation, an anti-dumping duty shall be imposed in the appropriate amount in each case, on a non-discriminatory basis on imports of a product.

43 Fifthly, under Article 11(2) of the basic regulation, the institutions may either maintain the measures in force or let them expire. They may not change those measures to take into account, inter alia, the fact that certain undertakings did not dump.

44 It follows from the foregoing that the notion of continuation of dumping in Article 11(2) of the basic regulation covers dumping of the product concerned from a third country and not merely dumping by certain undertakings, as moreover the Council acknowledged in its written submissions.

45 In the present case, it is apparent, on the one hand, from the evidence submitted that imports from the applicant represented the great majority of imports from the United States during the RIP, namely more than 85%, which the Council does not dispute. Furthermore, if imports from the applicant had been duly taken into account in the institutions' analysis they could not have come to the conclusion that the dumping, in relation to the product concerned originating from the United States, had continued during the RIP. In those circumstances the institutions should have found that the great majority of imports from the United States, namely more than 85%, had been effected without dumping. That situation should have resulted, moreover, in a finding that the weighted average margin for imports of the product at issue originating in the United States was negative (that is to say, no dumping), as appears from the applicant's calculations which have not been invalidated by the Council. In those circumstances, the Council could not have come to the conclusion that dumping had continued during the RIP, nor that there was a likelihood of continuation of dumping. The Council was therefore obliged to demonstrate that there was a likelihood of a recurrence of dumping.

46 In any event, even if the term 'continuation of dumping' in Article 11(2) of the basic regulation can be interpreted as referring, in fact, to dumping by individual undertakings or some of them, it should be noted that the institutions could not find continued dumping in relation to the applicant, which they indeed have not done. Furthermore, in recital 25 of the contested regulation, the Council states that, in the event of the removal of measures 'there would be still no dumping for [the applicant]'. In those circumstances, it would have been necessary for the institutions to show, as well as showing the likelihood of continuation of dumping (for the other two exporting producers), a likelihood, as regards the applicant, of a recurrence of dumping. However, the contested regulation does not contain any finding in that regard.

47 For all of these reasons, it must be held that the Council committed a manifest error of assessment in finding continued dumping during the RIP and, therefore, on that basis, in finding a likelihood of continuation of dumping. The first limb of the single plea in law must therefore be upheld and, accordingly, the contested regulation must be annulled in so far as it concerns the applicant.

The third limb of the single plea, relating to spare production capacity of ethanolamines in the United States

Arguments of the parties

48 The applicant considers that the Council's allegation, set out in recital 28 of the contested regulation, that there is spare production capacity in the US is unfounded. This was an essential component in the institutions' determination that the anti-dumping measures should continue for an additional period of two years, as is clear from recital 117 of the contested regulation. The applicant pointed out, during the administrative procedure, that the estimate put forward by the institutions (70 000 tonnes) was based on an incorrect calculation, since it compared maximum possible production (that is to say, the industry's effective

capacity) with total US consumption rather than with total US production. Following comments by the applicant, the institutions stated that they had modified the way in which this figure is calculated. However, in recital 26 of the contested regulation, the Council referred to the data supporting the original calculation of spare capacity. In reality, the economic report mentioned in recital 26 of the contested regulation showed that there was no unused production capacity in the United States if production capacity is compared with real US production. US industry was operating at full production capacity. The applicant adds that, in its written submissions before the Court, the Council continues to confuse spare capacity with oversupply on the US market. Furthermore, with regard to the Council's argument that the applicant operated at only 80% of nameplate capacity during the RIP, account should be taken of the hurricanes which struck the States of Louisiana and Texas (United States) during the RIP and which resulted in the closure of plants, as is confirmed by a publication cited by the contested regulation. Against this background, the effective production capacity fell and the production capacity utilisation rate of the applicant was 98.7%.

49 The Council points out that the institutions actually modified their initial formula for calculating spare production capacity in the course of the procedure (to obtain a final calculation of 60 000 tonnes of spare production capacity). However, contrary to what the applicant's written submissions might suggest, the calculation method used in the contested regulation was the method following the modification and not the method which, according to the applicant, initially contained an error. This is apparent from the wording used in recital 26 of the contested regulation and the information provided to the applicant during the procedure. The Council states in this respect that spare capacity was calculated by deducting the actual production volume from the effective production capacity. The institutions estimated the level of effective production capacity at 90% of nameplate capacity. In order to determine the actual production volume, the institutions relied on information according to which the applicant was operating at 80% of full nameplate capacity. According to the Council, that rate was also applied to the non-cooperating exporting producers. The fact that, in the same recital, the Council also referred to the substantial difference between total nameplate capacity in the US and US demand in no way shows that it based its spare production capacity calculation on a comparison between those two elements.

50 As to the applicant's argument that the US industry had been operating at full capacity, this was contradicted by the evidence submitted during the procedure regarding the use of its own production capacity (that is to say, 80% during the RIP). Moreover, the information referred to by the applicant in its written submissions, placed in context, did not support its finding. In addition, the arguments put forward by the applicant regarding the hurricanes which struck the States of Louisiana and Texas during the RIP were not made during the administrative procedure. The applicant cannot therefore rely on those arguments in order to establish a manifest error of assessment on the part of the institutions. The applicant's allegations were not, moreover, substantiated by evidence. In any event, recital 26 of the contested regulation shows that the institutions did take account of the impact of the hurricanes which struck the States of Louisiana and Texas during the RIP. The applicant did not contest this point.

51 As regards the economic report mentioned by the applicant in its written submissions and referred to in recital 26 of the contested regulation, it confirmed the existence of potential unused production capacity in the US. In particular, that report showed that there is oversupply on the US market. That oversupply, in addition to the unused capacity, confirmed that there is unused production capacity in the US market compared with domestic consumption. Lastly, the Council stresses that the statement made in recital 117 of the contested regulation referred to the justification for 'limiting' the maintenance of anti-dumping measures for two, as opposed to five, years.

Findings of the Court

52 The Council stated, at recital 26 of the contested regulation, that the spare production capacity of ethanolamines in the United States was 60 000 tonnes during the RIP.

53 First, it must be pointed out that recital 26 of the contested regulation shows an inconsistency as regards the relevant factors taken into account for the purposes of establishing the spare production capacity in the United States. Whereas the Council states in that recital that its calculation was 'on the basis of volumes produced from the two cooperating exporting producers, the fact that normally expected production rates are around 90% of nameplate capacity [of production], the assumption that the actual production yields of non-cooperating US producers would have not run at actual production rates lower than 80% of name plate capacity [of production], as well as information from leading market journals', the Council also refers, on two occasions, to an assessment based on domestic consumption in the United States. More specifically, the Council states that '[c]ompared to an estimated nameplate total capacity in the USA of 732 000 tonnes, total estimated demand including captive consumption amounted to 588 000 tonnes' and that '[t]he relatively low capacity utilisation rate was a consequence of a number of incidents'. Next, the Council states that '[t]he existence of potential unused production capacities in the USA during 2007 and 2008, i.e. during a period covered by the RIP, is also confirmed by a leading yearly publication which reviews the ethanolamine market' and that '[t]his publication estimated for 2007 an oversupply of 65 000 tonnes in the US market'. However, as the Council acknowledges in essence in its written submissions, the calculation of the level of production capacity utilisation does not take domestic consumption into account. The Council indeed stated during the hearing that the wording of recital 26 of the contested regulation could appear confusing.

54 Second, it is apparent from the Council's written replies to the Court's questions that the way in which the spare production capacity in the United States was calculated is dubious, even inconsistent in relation to evidence relied on in the present case. First, although the Council initially confirmed that the applicant's and INEOS' actual production was subtracted from the actual production capacity in the United States, the Council stated eventually that INEOS' actual production was subtracted from the total nameplate production capacity in the United States before calculating the actual production capacity in that country. Next, although INEOS' actual production was subtracted from the total nameplate production capacity in the United States, the actual production of the applicant and of other producers which had not cooperated in the investigation were subtracted, according to the Council, from the actual production capacity in that country. However, no detailed evidence has been submitted to justify the fact that the actual production of the undertakings at issue was subtracted, for some producers, from the total nameplate production capacity in the United States and, for others, from the actual production capacity in that country.

55 Third, the 'leading yearly publication which reviews the ethanolamine market' (namely *Chemical Economics Handbook Product Review*, 'Ethanolamines', SRI Consulting, 'the SRI report'), relied on by the Council in recital 26 of the contested regulation, refutes the existence of spare production capacity in the United States of 60 000 tonnes. In the light of the SRI report's data and the way in which the Council determined the actual production capacity of ethanolamines in the United States (that is to say the nameplate capacity multiplied by a rate of 90%), the spare production capacity in that country was 8 000 tonnes in November 2008 (a month after the end of the RIP), as the applicant rightly claimed in its written submissions without being contradicted by the Council. Even taking into account a rate of 95% to calculate the actual production capacity — and even if such a substitution is possible —, the result would be 45 400 tonnes, a figure less than half of the 85 000 tonnes mentioned in recital 26 of the contested regulation and corresponding to a calculation made using 'more ambitious production rates', that is to say a rate of 95% as the Council confirmed in its written submissions. Furthermore, as regards the year 2007 (the RIP included the months of October, November and December 2007), the data in the SRI report allow the finding of a maximum spare production capacity of 5 650 tonnes.

56 Fourth, it must be pointed out that the SRI report refers, on a number of occasions, to the fact that the production capacity utilisation rate is very high in the United States.

57 Fifth, it must be stressed that the level of production during the RIP was affected by hurricanes Gustav and Ike (September 2008), which the Council expressly acknowledged in recital 26 of the contested regulation. More specifically the Council states that the relatively low production capacity utilisation rate was a consequence of a number of incidents that took place during the recent years, particularly 'the

impact of hurricanes Gustav and Ike on certain production facilities or some raw materials production facilities respectively'. It states that '[a]s far as the hurricanes Ike and Gustav are concerned, they still had a certain impact during the RIP but their impact was removed post RIP'. The Council goes on to say, referring to a professional publication, that '[the impact of hurricanes Ike and Gustav] according to the 2008 estimations by the PCI Consulting Group (PCI) is 39 000 tonnes of lost production'. However, it is not apparent from the contested regulation, and in particular from recital 26, that the Council took account, in its assessment of spare production capacity, of short-term phenomena, in particular the effect of hurricanes Ike and Gustav. The Council claims however, in its rejoinder, that 'the institutions took account of the impact of hurricanes Gustav and Ike on US production as a whole when calculating US spare capacity, and [that they] relied on a reported estimate of 39 000 tonnes of lost US production'. However, no detailed evidence was adduced before the Court that would allow it to hold that the volume of 39 000 tonnes, referred to in recital 26 of the contested regulation, was in fact included in the calculation of spare production capacity in the US. In reply to a question put by the Court in that regard, the Council first stated that the institutions used the nameplate production capacity (that is to say 732 000 tonnes) figuring in the SRI report in their calculation, which already took account of the impact of hurricanes Gustav and Ike. The Council subsequently stated that its response was incorrect and that only the information in the SRI report on actual production capacity (and not on nameplate production capacity) took account of the disruption caused by hurricanes Gustav and Ike. However, the Council also stated, in the context of written questions put by the Court, that the institutions did not use the SRI report's data, with the exception of the data relating to nameplate production capacity. It is therefore established that the Council did not use the SRI report's data concerning actual production capacity. Consequently, contrary to what the Council's first reply, which it subsequently corrected, might imply, there is nothing to suggest that the institutions used data which already took into account the impact of hurricanes Gustav and Ike on the production of ethanolamines in the US or that that impact had been included in the calculation of the spare production capacity of the US.

58 Sixth, no other detailed evidence was adduced before the Court which would justify the volume of 60 000 tonnes of spare production capacity of ethanolamines in the United States put forward by the Council in the contested regulation, having regard to, inter alia, the inconsistencies and contradictions that have been identified.

59 In the light of the foregoing, it must be held that the evidence put forward by the Council to conclude that there was 60 000 tonnes of spare production capacity of ethanolamines in the United States is either inconsistent, or in conflict with the relevant evidence to be taken into consideration. It follows that the Council committed, in the present case, a manifest error of assessment by fixing the spare production capacity of ethanolamines in the United States at 60 000 tonnes. It should be added that that error had an influence on the overall conclusion in recital 26 of the contested regulation, since, on that basis, the Council indicated that 'there is potential to increase exports from the USA and take over part of the Union market'.

60 The third limb of the single plea in law must therefore be upheld and, also on this basis, the contested regulation must be annulled in so far as it concerns the applicant.

Costs

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

62 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Consequently the Commission, which intervened in support of the Council, must bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Council Implementing Regulation (EU) No 54/2010 of 19 January 2010 imposing a definitive anti-dumping duty on imports of ethanolamines originating in the United States of America in so far as it concerns The Dow Chemical Company;**

2. **Orders the Council of the European Union to bear its own costs and to pay those of The Dow Chemical Company;**

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

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 8 May 2012.

[Signatures]