Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

18 September 2012*

(Dumping — Imports of ironing boards originating in China — Proceeding initiated against a single company — Market economy treatment — Three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of Regulation (EC) No 1225/2009 — Burden of proof — Determination of injury)

In Case T-156/11,

Since Hardware (Guangzhou) Co., Ltd, established in Canton (China), represented by V. Akritidis and Y. Melin, lawyers,

applicant,

v

Council of the European Union, represented by B. Driessen, acting as Agent, B. O'Connor, Solicitor, and S. Gubel, lawyer,

defendant,

supported by

European Commission, represented by S. Thomas and H. van Vliet, acting as Agents,

and by

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

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

represented by G. Berrisch, lawyer, and N. Chesaites, Barrister,

interveners,

APPLICATION for annulment of Council Implementing Regulation (EU) No 1243/2010 of 20 December 2010 imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China produced by Since Hardware (Guangzhou) Co., Ltd (OJ 2010 L 338, p. 22),

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro (Rapporteur) and A. Popescu, Judges,

* Language of the case: French.

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2012,

gives the following

Judgment

Legal context

WTO Rules

1 Article VI.1 of the General Agreement on Tariffs and Trade 1994 (GATT) states that '[t]he contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.

2 The Agreement on Implementation of Article VI of GATT (OJ 1994 L 336, p. 103) ('the anti-dumping agreement') is contained in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 1).

3 Article 1 of the anti-dumping agreement provides as follows:

'An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT … and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. …'

4 Article 3.1 of the anti-dumping agreement provides that '[a] determination of injury for purposes of Article VI of GATT … shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products'.

5 Article 3.4 of the anti-dumping agreement provides that '[t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments[; t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance'.

6 Article 5.2 of the anti-dumping agreement is worded as follows:

'An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT … as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. … The application shall contain such information as is reasonably available to the applicant on the following:

..

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

...'

7 Article 5.8 of the anti-dumping agreement is worded as follows:

'An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. …'

8 Article 6.1.3 of the anti-dumping agreement provides as follows:

'As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.'

9 Article 6.7 of the anti-dumping agreement is worded as follows:

'In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.'

10 Article 6.10 of the anti-dumping agreement states that '[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation[; i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated'.

11 Article 9.2 of the anti-dumping agreement provides as follows:

'When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.'

European Union law

12 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') constitutes the basic anti-dumping legislation. It replaced 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.

13 Article 2(7)(b) of the basic regulation provides that '[i]n anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value shall 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 [; w]hen this is not the case, the rules set out under subparagraph (a) shall apply'.

14 Article 2(7)(c) of the basic regulation is worded as follows:

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

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

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

— ..

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.'

15 Article 3 of the basic regulation provides as follows:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:

(a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and

(b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

4. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports shall be cumulatively assessed only if it is determined that:

(a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in Article 9(3) and that the volume of imports from each country is not negligible; and

(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.'

16 Article 5 of the basic regulation, concerning the initiation of proceedings, is worded as follows:

'1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry. … ...

2. A complaint under paragraph 1 shall include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

...

(b) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(c) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export …;

...

7. The evidence of both dumping and injury shall be considered simultaneously in the decision on whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either dumping or of injury to justify proceeding with the case. Proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption.

...

9. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission shall do so within 45 days of the lodging of the complaint and shall publish a notice in the *Official Journal of the European Union*. Where insufficient evidence has been presented, the complainant shall, after consultation, be so informed within 45 days of the date on which the complaint is lodged with the Commission.'

17 Article 9(3) to (6) of the basic regulation provides as follows:

'3. For a proceeding initiated pursuant to Article 5(9), injury shall normally be regarded as negligible where the imports concerned represent less than the volumes set out in Article 5(7). For the same proceeding, there shall be immediate termination where it is determined that the margin of dumping is less than 2%, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2% for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11.

4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. Where provisional duties are in force, a proposal for definitive action shall be submitted no later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.

5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims, that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

6. When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and de minimis margins, and margins established in the circumstances referred to in Article 18. Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.'

18 Article 17 of the basic regulation, concerning sampling, is worded as follows:

'1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

...

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time-limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.

4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation, a new sample may be selected. However, if a material degree of non-cooperation persists or there is insufficient time to select a new sample, the relevant provisions of Article 18 shall apply.'

19 Article 1(1) of Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ 2001 L 201, p. 10) provides that '[w]henever the [Dispute Settlement Body] adopts a Report concerning a Community measure taken pursuant to … Regulation … No 384/96 [now the basic regulation], Regulation (EC) No 2026/97 or to this Regulation …, the Council may … take one or more of the following measures, whichever it considers appropriate: (a) repeal or amend the disputed measure or; (b) adopt any other special measures which are deemed to be appropriate in the circumstances'.

20 Article 2(1) of that regulation states that '[t]he Council may also take any of the measures mentioned in Article 1(1) in order to take into account the legal interpretations made in a report adopted by the [Dispute Settlement Body] with regard to a non-disputed measure, if it considers this appropriate'. Article 2(3) of the regulation provides that '[i]nsofar as it is appropriate to conduct a review before or at the same time as taking any measures under paragraph 1, such review shall be initiated by the Commission after consultation of the Advisory Committee'.

Background to the dispute

21 The applicant, Since Hardware (Guangzhou) Co., Ltd, is a company established in Canton (China), which manufactures and exports ironing boards.

22 On 23 April 2007, the Council of the European Union adopted Council 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). By that regulation, the Council imposed definitive anti-dumping measures on all producers of ironing boards originating, inter alia, in China, with the exception of the applicant, to which a zero rate of duty was applied (recitals 1 and 2 of the contested regulation).

23 On 20 August 2009, three Union producers, namely Colombo New Scal SpA, Pirolla SpA and Vale Mill (Rochdale) Ltd, which account for a substantial proportion of the total production of ironing boards in the European Union, lodged an anti-dumping complaint against the applicant (recital 4 of the contested regulation).

24 In accordance with Article 5 of Regulation No 384/96 (now Article 5 of the basic regulation), the Commission of the European Communities published, on 2 October 2009, a notice of initiation of an anti-dumping proceeding concerning imports of ironing boards originating in China, limited to one Chinese exporting producer, the applicant, and, in accordance with Article 2(3) of Regulation No 1515/2001, initiated a review of the anti-dumping measures on imports of ironing boards originating in China imposed by Regulation No 452/2007 (OJ 2009 C 237, p. 5) (recital 3 of the contested regulation).

25 First, the Commission stated in the notice of initiation that it had concluded, after consulting the Advisory Committee, that the complaint had been lodged by or on behalf of the Community industry and that there was sufficient evidence to justify the initiation of a proceeding under Article 5 of Regulation No 384/96 (paragraph 5 of the notice of initiation).

26 Second, referring to the fact that Regulation No 452/2007 had imposed a definitive anti-dumping duty on the imports of ironing boards to which that regulation applied and that the rate of duty applied to the applicant was 0% (paragraph 10 of the notice of initiation), the Commission stated that, in light of the report of the WTO Appellate Body of 29 November 2005 entitled 'Mexico – Definitive Anti-Dumping Measures on Beef and Rice' (AB-2005-6) (WT/DS295/AB/R) ('the WTO Appellate Body report'), the continued imposition of the measures adopted in respect of the applicant by Regulation No 452/2007 was no longer appropriate.

27 The Commission therefore initiated a review of Regulation No 452/2007, in accordance with Article 2(3) of Regulation No 1515/2001, in order to make any amendment necessary in the light of the WTO Appellate Body report (paragraph 10 of the notice of initiation).

28 On 26 October 2009, the applicant submitted a claim seeking market economy treatment ('MET') under Article 2(7)(b) of Regulation No 384/96 (now Article 2(7)(b) of the basic regulation) (recital 26 of the contested regulation).

29 On 19 November 2009, the applicant sent to the Commission its answers to the anti-dumping questionnaire. On 23 November 2009, it submitted comments on the lawfulness of the proceeding.

30 On 25 November 2009, the Commission sent the applicant a letter setting out observations on its MET claim with a view to it providing additional information. The applicant replied to that letter on 7 December 2009.

31 On 18 December 2009, the Union producers referred to at paragraph 23 above sent the Commission their answers to the anti-dumping questionnaire. The Commission requested additional information from those producers on 3 February 2010, which was provided by letters of 19 and 24 February 2010.

32 From 4 to 10 February 2010, the Commission conducted a verification inspection at the applicant's premises concerning the information provided by the applicant in its MET claim and in its reply to the anti-dumping questionnaire.

33 By letter of 2 March 2010, the applicant forwarded to the Commission statistical data relating to the prices of a range of steel products in China, stating that they were similar to the international prices. It also set out the reasons why, in its view, those prices were irrelevant for the purpose of determining whether it should be granted MET.

34 By letter of 26 March 2010, the Commission informed the applicant that it did not consider that it met the criterion laid down in the first and second indents of the first subparagraph of Article 2(7)(c) of the basic regulation and that it therefore intended to propose that its MET claim be dismissed.

35 The applicant submitted its comments in that regard by letter of 13 April 2010. In that letter, after claiming that the Commission had acted ultra vires in initiating a proceeding against a single company, the applicant alleged breach of the last subparagraph of Article 2(7)(c) of the basic regulation and of the first and second criteria set out in Article 2(7)(c) of that regulation.

36 A hearing was held before the Hearing Officer on 29 April 2010.

37 By letter of 30 April 2010, the Commission responded to the principal arguments in the applicant's letter of 13 April 2010 and confirmed the conclusions concerning the applicant's MET claim set out in its letter of 26 March 2010.

38 In the light of the matters which were discussed at the hearing on 29 April 2010, the applicant, by letter of 31 May 2010, submitted additional observations on the initiation of the proceeding, having regard in particular to the WTO Appellate Body report and the Commission's evaluation of its MET claim. The Commission replied by letter of 22 June 2010. The applicant submitted further observations to the Commission in that regard on 30 August 2010.

39 By letter of 21 September 2010, the Commission sent the applicant a final general disclosure document together with documents giving details of the method of calculating the dumping margin and the method of calculating the injury margin, as well as a specific disclosure document addressing the applicant's arguments concerning the initiation of the investigation. The applicant responded to that document by letter of 6 October 2010.

40 A further hearing took place before the Hearing Officer on 11 October 2010, following which a record of the hearing was sent to the applicant on 27 October 2010.

41 On 20 December 2010, the Council adopted Implementing Regulation (EU) No 1241/2010 amending Regulation No 452/2007 (OJ 2010 L 338, p.8). In that regulation, the Council decided to exclude the applicant from the definitive anti-dumping measure imposed by Regulation No 452/2007.

42 The Council also adopted on 20 December 2010 Implementing Regulation (EU) No 1243/2010 imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China produced by Since Hardware (Guangzhou) Co., Ltd (OJ 2010 L 338, p. 22) ('the contested regulation').

The contested regulation

43 In the contested regulation, first, the Council referred to the measures introduced by Regulation No 452/2007 and the circumstances surrounding the initiation of the proceeding in the present case.

44 Accordingly, the Council stated that, in the light of the WTO Appellate Body report , a new anti-dumping investigation under Article 5 of the basic regulation had been initiated in respect of the applicant, rather than an interim review pursuant to Article 11(3) of the basic regulation, since it was apparent from that report (paragraphs 305 and 306) that an exporting producer not found to be engaged in dumping in the original investigation must be excluded from the scope of the definitive measure imposed as a result of that investigation and cannot be the subject of administrative reviews or reviews on account of changed circumstances (recital 5 of the contested regulation).

45 The Council acknowledged that anti-dumping proceedings are normally initiated against imports from a country, not against imports from individual companies. However, the present case is an exception to that rule in view of: (i) the conclusions set out at paragraphs 216 to 218 and 305 of the WTO Appellate Body report; (ii) the fact that none of the provisions of the basic regulation precludes the opening of a new anti-dumping investigation in respect of a single company on the basis of Article 5 of that regulation; and (iii) the fact that EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where the provisions in question are intended to give effect to an international agreement concluded by the EU (recitals 7, 8 and 87 of the contested regulation).

46 Second, as regards a finding of dumping and, in particular, the determination of MET, the Council stated that the investigation had established that the applicant, which submitted a MET claim, could not be granted such status, since it did not meet the criteria set out in the first and second indents of Article 2(7)(c) of the basic regulation (recitals 26 and 27 of the contested regulation). With regard to the first criterion, namely the requirement that business decisions be made in response to market signals, without significant State interference, and that costs reflect market values, the Council stated that the applicant claimed to have started to purchase its main raw materials on the domestic Chinese market. However, the State continued to exercise significant influence on the domestic steel market and, accordingly, steel prices in China for these particular raw materials did not freely follow world market trends (recitals 28 to 33 of the contested regulation). With regard to the second criterion, the Council stated that the company had been unable to demonstrate that it had one clear set of basic accounting records which are independently audited in line with international accounting standards (IAS) and applied for all purposes, as the accounts, in particular the capital verification report, were silent on an important transaction that took place during the investigation period (recital 34 of the contested regulation).

47 Third, with regard to the determination of injury, the Council, first of all, set out the particular features of the investigation, including the fact that, during the investigation period, anti-dumping duties were applicable to all imports originating in China and Ukraine (with the exception of the applicant's imports). As the Union industry was already protected against the harmful effects of those imports during the investigation period, it was impossible to carry out a normal full injury analysis. Consequently, according to the Council, a specific approach was developed, adapted to the particular circumstances of the investigation, by which the institutions focused on certain injury indicators. Thus, the Commission examined: (i) the development of dumped imports of ironing boards produced by the applicant; (ii) whether those imports had been made at prices undercutting the sales prices of the Union industry and what the profitability of Union industry prices was; and (iii) any information provided by the Union industry indicating that the applicant's exports to the EU had caused it injury, for example information concerning the Union industry's losses of customers and orders to that company and the profitability of its EU sales during the investigation period (recitals 58 to 61 of the contested regulation).

48 With regard in particular to imports of ironing boards produced by the applicant, the Council pointed out that: (i) those imports had been dumped on the EU market (recital 66 of the contested regulation); (ii) over the period considered, the applicant's exports to the EU had increased significantly, that is by 64% (recital 67); (iii) the market share of imports of ironing boards produced by the applicant had increased significantly (recitals 68 and 69); (iv) the Union industry had lost numerous client orders to

the applicant in the past years (recitals 70 to 72 of the contested regulation); (v) the average undercutting margin established for the applicant, expressed as a percentage of the Union industry's price, was 16.1% (recitals 73 and 74); and (vi) the Union industry's prices were overall loss-making in the investigation period (recital 75).

Procedure and forms of order sought by the parties

49 By application lodged at the Registry of the General Court on 15 March 2011, the applicant brought the present action.

50 By separate document lodged at the Registry the same day, the applicant requested that the General Court adjudicate on the action under the expedited procedure, in accordance with Article 76a of its Rules of Procedure. For that purpose, it also lodged an abbreviated version of the application. By fax of 4 April 2011, the Council objected to that request. By decision of 19 April 2011, the General Court (Eighth Chamber) rejected the request.

51 By document lodged at the Court Registry on 3 May 2011, the Commission sought leave to intervene in the present case in support of the form of order sought by the Council. The main parties did not oppose that application.

52 By document lodged at the Court Registry on 27 May 2011, Vale Mill (Rochdale) and Colombo New Scal also sought leave to intervene in the present case in support of the form of order sought by the Council. The main parties did not oppose that application.

53 By document lodged at the Court Registry on 27 June 2011, the applicant requested confidential treatment vis-à-vis Vale Mill (Rochdale) and Colombo New Scal of certain documents annexed to the application. Those companies did not raise any objection to that request.

54 By order of 30 August 2011, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene.

55 On 5 October 2011, Vale Mill (Rochdale) and Colombo New Scal lodged their statements in intervention. On 11 October 2011, the Commission lodged its statement in intervention.

56 The applicant claims that the Court should:

— annul the contested regulation;

— order the Council to pay the costs.

57 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

58 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

59 Vale Mill (Rochdale) and Colombo New Scal contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including the costs incurred by them.

60 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure. At the hearing on 2 May 2012, the parties presented oral argument and gave their replies to oral questions put by the Court.

Law

61 The applicant relies on three pleas in law in support of its action. The first plea alleges breach of Article 5(9), Article 9(3) to (6) and Article 17 of the basic regulation, in so far as a proceeding cannot be initiated against an individual company but should be directed at one or more countries and all the producers established there. The second plea alleges breach of Article 3(2), (3) and (5) of the basic regulation, on the basis that anti-dumping duties were imposed on the applicant without it having been established that the Union industry suffered material injury during the investigation period. The third plea alleges breach of the second subparagraph of Article 2(7)(c) of the basic regulation, in that, first, the decision not to grant the applicant MET was taken in accordance with what the Commission knew of the effect of such a decision on its dumping margin and, second, the Commission imposed too onerous a burden of proof on the applicant in that regard. The applicant also claims as part of that plea breach of the principle of sound administration.

The first plea, alleging breach of Article 5(9), Article 9(3) to (6) and Article 17 of the basic regulation, in so far as a proceeding cannot be initiated against an individual company but should be directed at one or more countries and all the producers established there

62 The first plea comprises three parts. The first part alleges breach of Article 5(9) of the basic regulation, read in conjunction with Article 17 thereof and interpreted in a manner consistent with WTO rules. The second part alleges breach of Article 9(4) to (6) of the basic regulation, interpreted in a manner consistent with WTO rules. The third part alleges breach of Article 9(3) of the basic regulation.

The first part of the plea, alleging breach of Article 5(9) of the basic regulation, read in conjunction with Article 17 thereof and interpreted in a manner consistent with WTO rules

63 In the first part of the first plea, the applicant claims that the Commission's analysis at recitals 7, 8 and 87 of the contested regulation (see paragraph 45 above) is based on the incorrect premiss that none of the provisions of the basic regulation or the anti-dumping agreement prohibits the initiation of an anti-dumping proceeding against a single company. According to the applicant, it is clear from the overall scheme of the basic regulation and of the anti-dumping agreement that an anti-dumping proceeding relates to one or more countries and all the producers in the country or countries concerned. The applicant also submits that, in order to comply with the WTO Appellate Body report, which prohibits WTO members from reviewing companies whose dumping margin was found to be de minimis during the initial investigation, the institutions could simply have excluded it from the scope of Regulation No 452/2007 and not have required it to undergo a review.

64 At recital 7 of the contested regulation and in its written pleadings, the Council acknowledged that the present case is an exception to the kind of investigations usually carried out by the EU institutions. However, the basic regulation does not contain any provision prohibiting the institutions, in circumstances such as those of the present case, from initiating an investigation in respect of a single producer.

65 As a preliminary point, it should be noted that anti-dumping proceedings relate, in principle, to all imports of a certain category of products from a third country and not to products manufactured by specific undertakings (Case C-216/91 *Rima Eletrometalurgia* v *Council* [1993] ECR I-6303, paragraph 17).

66 However, it is necessary, first of all, to determine whether, as the applicant claims, Article 5(9) of the basic regulation and Article 5(1), (2)(b) and (c) and (7) of that regulation, also referred to by the applicant, read in conjunction with Article 17 thereof and in accordance with the general scheme of that regulation, Article VI.1 GATT and Articles 1, 5.2(ii), 6.1.3, 6.7, 6.10 and 9.2 of the anti-dumping agreement never permit the initiation of an anti-dumping proceeding against a single producer, identified by name to the exclusion of all others, and it was therefore not possible, in the circumstances, for Article 5(9) of the basic regulation to serve as the legal basis for a decision to initiate the proceeding in the present case.

67 According to established case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 22; Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 11; Case T-45/06 *Reliance Industries* v *Council and Commission* [2008] ECR II-2399, paragraph 101; and the judgment of 19 June 2009 in Case T-369/05 *Spain* v *Commission*, not published in the ECR, paragraph 50).

68 Contrary to what is submitted by the applicant, the wording of the provisions of the basic regulation on which it relies provides no support for the claim that an anti-dumping proceeding can never be initiated against a single producer.

69 It is apparent from Article 5(1) of the basic regulation that an investigation to determine the existence, degree and effect of any alleged dumping is, in principle, to be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry. According to Article 5(2) of the regulation, such a complaint must include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. Article 5(9) of the regulation provides that a proceeding may be initiated, after consultation, only where sufficient evidence has been presented.

70 It therefore follows from the wording of the relevant paragraphs of Article 5 of the basic regulation that they set out the requirements for submitting a complaint on behalf of the Union industry and for the evidence to be included in the complaint of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. Those provisions do not therefore support the conclusion, advocated by the applicant, that an anti-dumping proceeding can never be initiated against a single producer, especially in circumstances such as those of the present case, where it is alleged that such a producer — which, it was established, did not engage in dumping in an earlier proceeding in which anti-dumping duties were imposed and remain in force — engages in dumping causing injury to the Union industry. In particular, Article 5(2)(b) and (c) of the basic regulation, expressly invoked by the applicant, is irrelevant because it refers to the information which must be included in the complaint submitted by the Union industry, including the name of the country of origin or export. It is apparent from the case-file that the complaint which led to the initiation of the proceeding in the present case mentions the name of that country.

71 It should also be noted in that regard that, although the applicant alleges breach of Article 5 of the basic regulation, in particular Article 5(9), it has not put forward any argument in its written pleadings directed at establishing failure to comply with the requirements for the initiation of a proceeding expressly laid down in that provision. In particular, it does not dispute that a complaint was properly lodged by Union producers with the institutions containing evidence of dumping, injury and a causal link between its imports and the injury alleged.

72 The applicant's argument, based on Article 5(7) of the basic regulation, which requires the Commission to ascertain what the imports of the country against which a complaint has been lodged are and to reach the conclusion that they account for more than 1% of EU consumption, cannot be accepted either. That provision states that '[p]roceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption'. First, that provision does not impose any limitation on the number of producers against whom the Commission may initiate proceedings. Second, it is clear in any event that the applicant is not claiming that the imports of the product concerned, described in recital 20 of the contested regulation, do not account for more than 1% of EU consumption.

73 The applicant's argument to the effect that Article 17 of the basic regulation, read in a manner consistent with Article 6.10 of the anti-dumping agreement, permits recourse to sampling only where the number of producers is large and that, in all other cases, all the producers of the country concerned are to be afforded the opportunity of cooperating with the Commission and obtaining an individual dumping margin, cannot be accepted either, since that provision does not contain any reference whatsoever to the Commission initiating proceedings against a single producer. Moreover, the Commission was not required in the present case to rely on any form of sampling of the exporting producers concerned, since the proceeding was initiated only in respect of the applicant's imports.

74 Furthermore, it cannot be maintained that it is apparent from Article VI.1 GATT and Article 1 of the anti-dumping agreement that a proceeding can never be initiated against a single producer. Article VI.1 GATT does not concern the initiation of proceedings or the number of producers against whom such proceedings may be directed. Nor do Article 5.2(ii) or Articles 6.1.3, 6.7, 6.10 and 9.2 of the anti-dumping agreement impose any restriction on the number of producers that may be targeted when proceedings are initiated.

75 It is clear from the foregoing that, contrary to the applicant's submissions, it cannot be inferred from the wording of the provisions of the basic regulation or the anti-dumping agreement on which the applicant relies or Article IV.1 GATT that proceedings may never be initiated against a single producer.

76 As regards the overall context of Article 5(9) of the basic regulation and its objective, that provision forms part of the basic legislation on protection against dumped imports from countries not members of the EU, Article 5 laying down in particular the conditions under which proceedings may be initiated to protect the EU against such imports which result in injury to it. The objective of that provision is, inter alia, to require the Commission, where, after consultation, there is sufficient evidence to justify initiating a proceeding, to do so within 45 days of the lodging of the complaint and to publish a notice in the *Official Journal of the European Union*.

77 It follows that Article 5(9) of the basic regulation cannot be interpreted as prohibiting the EU institutions, where a complaint has been properly lodged with them containing evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury, from initiating a proceeding against a single producer, if, in circumstances such as those of the present case, it was established in an earlier investigation that the producer in question had a zero or de minimis dumping margin and anti-dumping measures are in force against all the other producers of the like product concerned.

78 Second, the applicant submits that the WTO Appellate Body report prohibits WTO Member States from reviewing companies whose dumping margin was de minimis in the initial investigation, which is the applicant's case. Therefore, according to the applicant, the EU institutions should have simply excluded it from the scope of Regulation No 452/2007 and not required it to undergo a review. The

applicant adds that a company which did not engage in dumping before the imposition of anti-dumping measures is unlikely to engage in dumping when it is the only company to be exempt from duty.

79 It should be pointed out at the outset that the applicant was not formally subject to a review.

80 As the Council observed at recital 7 of the contested regulation, it is stated, at paragraphs 216 to 218 of the WTO Appellate Body report, that Article 5.8 of the anti-dumping agreement requires an investigative authority to terminate the investigation in respect of an exporter found not to have a margin above de minimis in an original investigation and, at paragraph 305 of that report, that the exporter must consequently be excluded from definitive anti-dumping measures and cannot be subject to administrative reviews or reviews on account of changed circumstances.

81 Paragraph 305 of the WTO Appellate Body report stated in that regard that '[a]n investigating authority does not, of course, impose duties – including duties at zero per cent – on exporters excluded from the definitive anti-dumping measure' and that it 'therefore agree[d] with the Panel that the "logical consequence" of this approach is that such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the "duty paid" and "the need for the continued imposition of the duty"[; w]ere an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their de minimis margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8'.

82 It follows that it is on account of the fact that they are excluded from the anti-dumping measure and their exports are exempt from duty that the producers concerned cannot be subject to reviews, since such reviews examine duty paid and the need for continued imposition of duty and are not therefore applicable to producers with de minimis margins.

83 The foregoing considerations, which simply provide an explanation as to why the WTO Appellate Board rules out any possibility of review, cannot be interpreted as meaning that the EU institutions are prevented, as a result of the conclusions of that body's report, from initiating a fresh proceeding against a company if a complaint is properly lodged with them containing evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury.

84 That conclusion is not invalidated by the applicant's argument that the only action required of the institutions by the WTO Appellate Body report is to exclude it from the scope of Regulation No 452/2007. Indeed, such an approach would be tantamount to requiring the institutions to abstain from investigating allegations of dumping causing injury to the Union industry, even though a complaint had been properly lodged with the EU institutions in that regard, on the sole ground that it had been established in an earlier investigation that the exporting producer concerned did not have a dumping margin greater than de minimis. As the Council correctly pointed out at recital 8 of the contested regulation (see also paragraph 45 above), since the anti-dumping agreement on the one hand allows WTO members to impose duties to counteract harmful dumping, but on the other hand has been interpreted in the WTO Appellate Body report as not allowing reviews of companies found not to be dumping during the original investigation, the basic Regulation must be interpreted in such a way as to allow the EU institutions to initiate a proceeding on the basis of Article 5 of the basic regulation in a case like the present one.

85 In that context, the applicant's claim that a company which did not engage in dumping before the imposition of anti-dumping measures is unlikely to engage in dumping if it is the only company to be exempt from duty cannot be accepted, since it is based on the erroneous premiss that a company to which a de minimis rate of duty was applied could never engage in dumping after being given a zero rate of duty.

86 Such a claim is, moreover, contradicted by the fact that, in the present case, even though, in the investigation which concluded in the adoption of Regulation No 452/2007 ('the first investigation'), the institutions did not find that the applicant had engaged in dumping, it became apparent in the present investigation that the applicant's exports had been dumped, a fact which is not disputed by the applicant in these proceedings.

87 It follows from all the foregoing that the first part of the first plea must be rejected.

The second part of the first plea, alleging breach of Article 9(4) to (6) of the basic regulation, interpreted in a manner consistent with WTO rules

88 The applicant submits that Article 9(4) to (6) of the basic regulation, read in a manner that is consistent with WTO rules, does not permit the imposition of anti-dumping duties on imports from a single company but requires duty to be imposed on the imports of all the companies in the territory of one or more countries.

89 When questioned at the hearing on the scope of the second part of the first plea, the applicant confirmed, with regard to the alleged breach of Article 9(5) of the basic regulation, that breach is alleged only in respect of the second sentence of the first subparagraph of that provision.

90 As a preliminary point, it should be noted that, in its written pleadings, the applicant simply stated that, since the contested regulation imposed anti-dumping duty on imports of ironing boards which it produces and not an individual duty in respect of each Chinese manufacturer of ironing boards, or a residual duty in respect of some of them, that regulation is contrary to Article 9(4) to (6) of the basic regulation.

91 Contrary to what is claimed by the applicant and in the light of the case-law cited at paragraph 67 above, the Court finds that it is not apparent from the provisions relied on by the applicant that the Council cannot impose anti-dumping duty on imports of products of a single company.

92 First of all, as Article 9(4) of the basic regulation simply provides that anti-dumping duty is to be imposed where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention, it does not impose any requirement as to the number of companies for which such facts must be established and on which it should be possible to impose anti-dumping duty.

93 Next, with regard to the requirement imposed in the second sentence of the first subparagraph of Article 9(5) of the basic regulation, to the effect that the regulation imposing the duty is to specify the duty for each supplier or, if that is impracticable, the supplying country concerned, the words 'each supplier' must be interpreted as referring to each supplier affected by the proceeding. That provision does not therefore require, contrary to what the applicant claims, duty to be imposed on all the producers of the third country concerned. It should be noted in that regard that support for that interpretation is also to be found in the wording of Article 9.2 of the anti-dumping agreement, which expressly refers to the fact that '[t]he authorities shall name the supplier or suppliers of the product concerned'.

94 Lastly, Article 9(6) of the basic regulation provides that when the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination must not exceed the average dumping margin established for the parties in the sample. It is, however, clear that that provision was not applied in the present case and is, therefore, irrelevant, since the proceeding initiated by the Commission concerned only the applicant's

exports and no residual duty was imposed. In any event, that provision does not require the EU institutions to impose anti-dumping duty only on imports of goods manufactured by all the producers of a country.

95 It follows that no breach of Article 9(4) to (6) of the basic regulation can be established and the second part of the first plea must therefore be rejected.

The third part of the first plea, alleging breach of Article 9(3) of the basic regulation

– Preliminary observations

96 In the third part of the second plea, the applicant refers to settled case-law of the EU judicature to the effect that, in view of their nature and structure, the WTO agreements do not in principle form part the rules in the light of which the EU judicature is required to review the legality of measures adopted by the EU institutions. It is only where the European Union has intended to implement a particular obligation assumed in the context of the WTO, or where the EU measure refers expressly to specific provisions of the WTO agreements, that the EU judicature is required to review the legality of the measure in question in the light of the WTO rules (see, to that effect, Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraphs 52 and 53; Case C-377/02 *Van Parys* [2005] ECR I-1465, paragraphs 39 and 40; and Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraphs 29 and 30).

97 In what was put forward as a principle argument, the applicant submits that it is not the purpose of Article 9(3) of the basic regulation to transpose a provision of the anti-dumping agreement into EU law. Therefore, the WTO Appellate Body report has no direct effect and cannot justify the Commission's refraining from applying Article 9(3) of the basic regulation, on the basis that it would be incompatible with that report, and declining to review a zero rate of duty, as required under that provision, where an admissible complaint has been lodged by the Union industry.

98 By proceeding in that manner, the EU institutions failed to have regard to the case-law of the Court of Justice, which would appear to suggest 'that the direct effect of international agreements to which the EU is a party precludes the possibility of disregarding a provision of EU secondary law where that provision cannot be read in a manner that is consistent with the provisions of the agreement'.

99 In an argument put forward in the alternative, the applicant also maintains that the last sentence of Article 9(3) of the basic regulation does not implement a particular obligation assumed in the context of the WTO or refer to a specific provision of the WTO agreements and does not therefore have direct effect in EU law.

100 Questioned at the hearing on the relevance in the present case of the case-law cited at paragraph 96 above, the applicant stated that it had referred to that case-law in support of its argument that the EU judicature is required to verify whether an interpretation by the institutions of the basic regulation is consistent with EU obligations arising under WTO rules.

101 Thus, the applicant clarified that, in the context of the part of the plea under consideration, it was relying on the case-law of the EU judicature to the effect that the primacy of international agreements concluded by the Community over provisions of secondary EU legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements.

102 In any event, it should be noted that, in the present case, the institutions did not act on the basis of any direct effect the WTO rules or even the WTO Appellate Body report may have for the purpose of deciding, in the circumstances, not to subject the applicant to a review under Article 9(3) of the basic regulation. Accordingly, it is apparent from paragraph 10 of the notice of initiation, the legal bases

cited in Regulation No 1241/2010 and recitals 3 and 7 of the contested regulation that, in the light of the WTO Appellate Board report, the institutions made the necessary modifications to Regulation No 452/2007 on the basis of Regulation No 1515/2001.

103 It is in the light of the considerations set out at paragraphs 96 to 102 above that it is appropriate to respond to the arguments formulated by the applicant in connection with the part of the plea under consideration.

– The argument put forward as a principal argument, to the effect that Article 9(3) of the basic regulation requires the institutions to review the zero-rated duty of producers whose dumping margin is de minimis, in accordance with Article 11(3) of that regulation

104 The applicant submits that Article 9(3) of the basic regulation 'requires' the institutions to review the zero-rated duty of producers whose dumping margin is de minimis, in accordance with Article 11(3) of that regulation.

105 First, it should be noted that, as expressly stated in the notice of initiation, the Commission initiated the proceeding in the present case in accordance with Article 5 of the basic regulation, having concluded, after consulting the Advisory Committee, that the complaint lodged on 20 August 2009 by three EU producers had been lodged by the Community industry or on its behalf and that there was sufficient evidence to justify the initiation of a proceeding (recitals 1 and 5 of the notice of initiation).

106 Furthermore, it is pursuant to Article 2(3) of Regulation No 1515/2001 that the Commission decided to initiate a review of Regulation No 452/2007, in the light of the WTO Appellate Body report (paragraph 10 of the notice of initiation), and that the Council adopted Regulation No 1241/2010, which excluded the applicant from the scope of Regulation No 452/2007.

107 It should be recalled in that regard that, under Article 2(1) of Regulation No 1515/2001, where the Dispute Settlement Body adopts a report with regard to a non-disputed measure, the Council may, as it deems appropriate, repeal or adopt the disputed measure, or adopt any other special measure which its deems appropriate in order to take account of the legal interpretations made in the report. Accordingly, recital 5 of that regulation states that the EU institutions may consider it appropriate to repeal, amend or adopt any other special measures with respect to measures taken under the basic regulation, including measures which have not been the subject of dispute settlement under the Understanding on Rules and Procedures Governing the Settlement of Disputes, in order to take account of the legal interpretations made in a report adopted by the Dispute Settlement Body.

108 Second, as correctly pointed out by the applicant, EU legislation must be interpreted, so far as possible, in the light of international law, in particular where such legislation is specifically intended to implement an international agreement concluded by the Community, as is the case with the basic regulation, which was adopted to meet international obligations arising under the anti-dumping agreement (see recital 3 of the basic regulation).

109 The primacy of international agreements concluded by the Community over provisions of secondary EU legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements (see, to that effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 49; Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraphs 56 and 57; and Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 138).

110 In the present case, it is clear that the institutions' interpretation of Article 9(3) of the basic regulation was, in the circumstances, consistent with the conclusions of the WTO Appellate Body report. It should be observed in that regard that Article 9(3) of the basic regulation simply provides that the institutions may carry out a review, but are not obliged to do so, if it has been established that an exporter has a de minimis margin.

111 It is apparent from the wording of that provision that proceedings are to be terminated immediately in respect of individual exporters where it is found in the investigation that their dumping margin is de minimis and 'it is only the investigation that shall be terminated … and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out'.

112 It is apparent from the use of the modal verb 'may' that the institutions have the power, but are not under any obligation, during a review to reinvestigate a producer whose dumping margin was de minimis. That provision must therefore be regarded as conferring on the institutions a discretion as to whether to reinvestigate individual exporters whose dumping margin was less than 2% in any subsequent review. The applicant cannot therefore claim that the institutions 'deliberately ignored' the last sentence of Article 9(3) of the basic regulation, since that provision does not oblige the institutions to carry out a review where an exporter has been given a de minimis margin.

113 In the light of the foregoing and the conclusion of the Appellate Body set out at paragraph 305 of the WTO Appellate Body report that exporters whose dumping margin is no more than de minimis cannot be subject to administrative reviews or reviews on account of changed circumstances, it must be held that the institutions did not, in the circumstance of the present case, infringe the basic regulation by availing themselves of the option open to them in the second sentence of Article 9(3) of that regulation not to subject the applicant to the review procedure provided for in Article 11 of the regulation and reinvestigating the applicant in accordance with Article 5 thereof.

114 The Court therefore finds that the institutions had the power, under Article 9(3) of the basic regulation, not to subject the applicant to the review procedure.

115 Third, with regard to the applicant's claim that recourse to a new proceeding rather than a review had important consequences for it, it is sufficient to note that, even if that were proved, the fact remains that the applicant has failed to establish that the institutions acted in any way unlawfully, and that argument cannot therefore succeed.

116 It follows from the foregoing that the applicant's principal argument must be rejected.

– The argument put forward in the alternative, to the effect that the Commission carried out a de facto review of the applicant's zero rate of duty, in breach of Article 9(3) of the basic regulation, interpreted in a manner consistent with the WTO Appellate Body report

117 The applicant submits that the Commission carried out a de facto review of its zero rate of duty, in breach of Article 9(3) of the basic regulation, interpreted in a manner consistent with the WTO Appellate Body report. Thus, the applicant argues that, in actual fact, the EU institutions sought to negate the effects of that report.

118 With a view to demonstrating that the Commission carried out a de facto review, first, the applicant maintains, by reference to its second plea, that even though the Commission stated at paragraph 5.1 of the notice of initiation that the investigation would determine whether the product concerned, originating in China and produced by the applicant, was being dumped and whether that dumping had contributed to injury, it did not carry out any such analysis. In fact, although the investigation period lasted from 1 July 2008 to 30 June 2009, the Commission did not analyse the injury suffered by

the Union industry during that period and simply reproduced the conclusions of its first investigation, in which it was established that injury occurred in 2007, and considered whether imports of the product concerned manufactured by the applicant could have contributed to the injury.

119 It should be recalled that, for the purpose of determining injury, following the opening of a proceeding, it must be demonstrated, in accordance with Article 3(1) of the basic regulation, that there is 'material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry', while Article 11(3) of the basic regulation, relating to interim reviews, provides that, in the course of such a review, 'the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established'.

120 In the present case, at recitals 58 to 61 of the contested regulation, the Council set out the particular circumstances of the present investigation, which explain why it was not possible to carry out the usual full analysis of material injury. The Council thus pointed out, first, that a full injury analysis had been carried out in the framework of the first investigation. Second, the Council stated that, in that investigation, the Commission established that dumped imports of ironing boards originating, inter alia, in China, with the sole exception of imports of ironing boards produced by the applicant, had caused material injury to the Union industry. Third, the Council pointed out that, during the investigation period, anti-dumping duties were applicable to those imports (with the exception of the applicant's imports) and that the Union industry was therefore protected against the harmful effects of those imports. The Council therefore claimed that a specific approach was developed, adapted to the particular circumstances of the investigation, by which the institutions relied on certain injury indicators.

121 Those injury indicators included the status of the applicant's imports, the volume of dumped imports, the market share of dumped imports, price undercutting, the fact that the Union industry's prices were found to be overall loss-making during the investigation period and any information provided by the Union industry indicating that the applicant's exports to the EU had caused it injury (recitals 71 to 76 of the contested regulation).

122 Without there being any need, in the context of the part of the plea under consideration, to rule on the relevance of the injury indicators used by the institutions, it must be found, in the light of the considerations set out at paragraphs 120 and 121 above, that, contrary to what is submitted by the applicant, the Commission did not confine itself to considering, in the present investigation, whether the circumstances with regard to dumping and injury had changed significantly, or whether existing measures were achieving the intended results in removing the injury previously established. On the contrary, it is apparent from recital 76 of the contested regulation that the Council in fact concluded that the Union industry suffered injury due to the dumped products sold by the applicant on the EU market.

123 Accordingly, the Council was entitled to state, at recital 90 of the contested regulation, that the injury analysis carried out was not limited to confirming that there was a finding of injury during the first investigation. On the contrary, the injury analysis focused on the actual detrimental effects for the Union industry of the applicant's imports at dumped prices after that investigation, bearing in mind that a normal injury analysis was not possible in that case.

124 Second, the applicant submits that the duty imposed by the contested regulation expires at the same time as the duties imposed by Regulation No 452/2007 on the other Chinese producers, even though the five-year period laid down in Article 11(2) of the basic regulation would appear to be a mandatory period. That argument must, however, also be rejected.

125 Under Article 11(1) of the basic regulation, an anti-dumping measure is to remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury. Article 11(2) of that regulation provides that '[a] definitive anti-dumping measure shall expire five years from its imposition'. It must be concluded that the Council has a discretionary power to fix at less than five years the period of application of definitive anti-dumping duties if, owing to special circumstances, such a limitation best serves to protect the differing interests of the parties to the procedure and maintain the equilibrium between those interests which the basic regulation seeks to establish (see, by analogy, Case T-232/95 *Cecom* v *Council* [1998] ECR II-2679, paragraph 46).

126 The institutions were therefore entitled to take the view, at recital 90 of the contested regulation, that whilst, on the one hand, the applicant should not derive any benefits from having started dumping after the first investigation, it should not, on the other, suffer any unjustified negative effects. Thus, according to the Council, should no expiry review be requested for Regulation No 452/2007, it would appear discriminatory to continue to impose duty on the applicant after the expiry of that regulation.

127 In the light of the particular circumstances of the present case, connected in particular with the fact that the Union industry was already partially protected by the imposition of anti-dumping duty under Regulation No 452/2007 and that it was appropriate to confine the duration of the measures imposed by the contested regulation to the expiry of the anti-dumping measures imposed by Regulation No 452/2007, in order to avoid any discriminatory treatment as between the applicant and the producers subject to that regulation and to enable, if necessary, a simultaneous review to be conducted of the measures imposed by Regulation No 452/2007 and the contested regulation, it must be concluded that the argument based on the duration of the anti-dumping measures introduced by the contested regulation does not establish that, in the present case, there was a de facto review of the applicant's zero rated anti-dumping duty.

128 Third, the applicant claims that it was 'doggedly' pursued by the institutions, whose clear objective was to bring to an end the zero rate of duty enjoyed by it on the basis of information submitted in the first investigation, which was never challenged.

129 The applicant's argument must be construed as an allegation of misuse of powers on the part of the institutions.

130 That argument must, however, be rejected. It is established case-law that a European Union decision or measure is vitiated by a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been adopted in order to achieve purposes other than those for which it was intended (Case C-323/88 *Sermes* [1990] ECR I-3027, paragraph 33; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 66; and T-2/95 *Industrie des poudres sphériques* v *Council* [1998] ECR II-3939, paragraph 376). The applicant has failed to provide any such evidence.

131 In the light of the foregoing, the third part of the first plea must be rejected, as must the plea in its entirety.

The second plea, alleging breach of Article 3(2), (3) and (5) of the basic regulation, on the basis that the anti dumping duties were imposed on the applicant without it having been established that the Union industry suffered material injury during the investigation period

132 By its second plea, the applicant submits that anti-dumping duties were imposed in the present case without it having been established that the Union industry suffered material injury during the investigation period, in breach of Article 3(2), (3) and (5) of the basic regulation.

133 The applicant maintains in that regard that Article 3 of the basic regulation, read in conformity with Articles 3.1 and 3.4 of the anti-dumping agreement and interpreted in this way by the WTO Dispute Settlement Body and the Court of Justice, requires an assessment to be carried out in each investigation of all relevant economic factors and indices. Accordingly, that provision requires the institutions at the very least to carry out an analysis of the 16 factors and indices set out in Article 3.4 of the WTO anti-dumping agreement, to which must be added the specific factor referred to in Article 3(5) of the basic regulation. However, in the present case, the injury analysis was limited to certain indices, relating solely to the applicant's product development, in terms of market share and price, without any analysis of factors or indices pertaining to the state of the Union industry, for which the Council fully relied on the conclusions of the first investigation.

134 It is established case-law that in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (see, to that effect, Case 198/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 26; *Ikea Wholesale*, paragraph 96 above, paragraph 40; and Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 85).

135 It is also well-established case-law that determination of injury involves the assessment of complex economic matters. In that respect, the EU institutions enjoy a wide discretion (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86; Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131; and Case T-107/04 *Aluminium Silicon Mill Products* v *Council* [2007] ECR II-669, paragraph 43).

136 The European Union judicature must therefore restrict its review to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based are accurate or whether there has been a manifest error of assessment or a misuse of powers (*Ferchimex* v *Council*, paragraph 135 above, paragraph 67; Case T-210/95 *EFMA* v *Council* [1999] ECR II-3291, paragraph 57; and *Aluminium Silicon Mill Products* v *Council*, paragraph 135 above, paragraph 43).

137 In addition, it is for the applicant to adduce evidence enabling the Court to find that the Council made a manifest error of assessment when determining injury (see *Shanghai Teraoka Electronic* v *Council*, paragraph 109 above, paragraph 119, and Case T-300/03 *Moser Baer India* v *Council* [2006] ECR II-3911, paragraph 140 and the case-law cited).

138 As the Court of Justice observed in *Ikea Wholesale*, paragraph 96 above (paragraphs 61 and 62), Article 3(5) of the basic regulation gives the EU authorities discretion in the examination and evaluation of the various items of evidence referred to in that provision. Moreover, that provision merely requires an evaluation of the 'relevant economic factors and indices having a bearing on the state of the [Union industry]'.

139 It is therefore in the exercise of their discretion that the institutions are called upon to analyse those factors and to use such of the assessment factors listed for that purpose in Article 3(5) as they deem relevant in each particular case (Case C-179/87 *Sharp Corporation* v *Council* [1992] ECR I-1635, paragraph 46).

140 Since it is common ground that, in the contested regulation, the institutions did not consider all the factors identified in Article 3(5) of the basic regulation, it is necessary to determine whether, in the particular circumstances of the present case, as argued by the applicant, the institutions made a manifest error of assessment by considering only the economic factors and indices having a bearing on the state of the Union industry which they deemed relevant in the present case.

141 As a preliminary point, it should be noted that, in the second plea, the applicant does not dispute the relevance of the economic factors and indices used by the institutions in assessing the injury suffered by the Union industry or the analysis carried out by the Commission set out at recitals 58 to 75 of the contested regulation. Nor does it challenge the institutions' conclusion at recital 76 of the contested regulation that the Union industry suffered injury due to the dumped quantities sold by the applicant on the EU market which might otherwise have been supplied by the Union industry.

142 The applicant simply argues, first, that the EU institutions failed to analyse all the factors and indices set out at Article 3.4 of the anti-dumping agreement and Article 3.5 of the basic regulation and, second, that the Council referred to the conclusions of the first investigation in full in its examination of the factors and indices pertaining to the state of the Union industry, even though, in that investigation, it found that the applicant had not engaged in dumping.

143 While it is common ground that, in the present investigation, the Commission did not undertake, as it did in the first investigation, an examination of all the factors and indices pertaining to the state of the Union industry (recitals 94 to 107 of Commission Regulation (EC) No 1620/2006 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) and recitals 44 to 47 of Regulation No 452/2007), it does not follow that, in the present case, the institutions failed to examine all the relevant factors within the meaning of the case-law cited at paragraphs 138 and 139 above.

144 As indicated at recital 61 of the contested regulation, in the present case the Commission examined: (i) the development of dumped imports of ironing boards produced by the applicant; (ii) whether those imports had been made at prices undercutting the sales prices of the Union industry and what the profitability of the Union industry prices was; and (iii) any information provided by the Union industry indicating that the applicant's exports to the EU had caused it injury, for example concerning the Union industry's losses of customers and orders to the applicant and the profitability of its EU sales during the investigation period.

145 With regard, in particular, to the Commission's analysis of the state of the Union industry, the Council stated at recitals 70 to 72 of the contested regulation, first, that the Union industry lost numerous client orders to the applicant and, second, that, by comparison with the period covered by the first investigation, the sales of a number of Union producers to EU customers fell considerably, whereas the applicant's sales to those customers increased considerably during the period covered by the present investigation. The applicant does not dispute the relevance of those injury factors and indicators.

146 Contrary to what is claimed by the applicant, the institutions did not ignore the fact that they did not find that the applicant had engaged in dumping in the first investigation. On the contrary, they took due account of the conclusions and effects of Regulation No 452/2007 in order to examine only the relevant injury indicators in the present case.

147 It should be recalled that, as already observed in connection with the first plea (see paragraph 120 above), it is apparent from recitals 58 to 61 of the contested regulation that the Council referred to the conclusions of the first investigation in order to explain that, as the Union industry was already protected against the harmful effects of all imports of ironing boards from China and Ukraine, with the exception of the applicant's imports, during the investigation period it was impossible, in such circumstances, to carry out a normal full injury analysis, so that a specific approach was developed, adapted to the particular circumstances of the investigation, by which the institutions focused on certain injury indicators. Furthermore, the Council relied on certain data gathered during the first investigation in order to establish that certain important customers of the Union industry had changed suppliers, sourcing more products from the applicant and fewer from the Union industry than before (recitals 70 to 72 of the contested regulation).

148 The Council did not therefore make any error of assessment in stating, at recital 96 of the contested regulation, that a further examination of all those injury factors would have served no purpose, since, even assuming that all those factors would now have become positive, that would be due (at least in part) to the fact that the Union industry is now protected against all dumped exports from China and Ukraine (except those of the applicant).

149 Since it follows from the foregoing that the Council was entitled to examine only the relevant factors within the meaning of the case-law cited at paragraphs 138 and 139 above, the applicant's argument that the assertion at recital 96 of the contested regulation (see paragraph 148 above) was 'an admission of the fact that, if the Commission had analysed all factors and indices, all those factors would have been positive since the Union industry was already protected by the duties in force', must be rejected as ineffective.

150 In the light of the foregoing, the second plea must be rejected.

The third plea, alleging breach of the second subparagraph of Article 2(7)(c) of the basic regulation, in that the decision not to grant the applicant MET was taken in accordance with what the Commission knew of the effect of such a decision on its dumping margin, and breach of the principles governing the burden of proof and the principle of sound administration

151 In its third plea, the applicant submits that the decision not to grant it MET status is contrary to EU law. In the first part of the plea, the applicant argues that the decision to reject its MET claim was taken in accordance with what the Commission knew of the effect of such a decision on its dumping margin. In the second part of the plea, the applicant claims that the burden of proof imposed on it is excessive and infringes the general principles of EU law.

The first part of the third plea, alleging that the decision not to grant the applicant MET was taken in accordance with what the Commission knew of the effect of such a decision on the applicant's dumping margin, in breach of the second subparagraph of Article 2(7)(c) of the basic regulation

152 The applicant submits that the Commission's decision not to grant it MET was taken in accordance with what the Commission knew of the effect of such a decision on the applicant's dumping margin, in breach of the second subparagraph of Article 2(7)(c) of the basic regulation, as interpreted by the General Court in Case T-138/02 *Nanjing Metalink* v *Council* [2006] ECR II-4347, paragraphs 43 and 44, and Case T-299/05 *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council* [2009] ECR II-565, paragraphs 128 and 138. The applicant also claims that the institutions infringed 'more generally, its rights of defence'.

153 As a preliminary point, with regard to the alleged breach of the applicant's rights of defence, it should be borne in mind that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1) of the Rules of Procedure of the General Court, an application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333; and Case T-224/10 *Association belge des consommateurs test-achats* v *Commission* [2011] ECR II-7177, paragraph 71). Since the applicant has not in any way specified the nature of its plea alleging breach of its rights of defence, it must be rejected as inadmissible.

154 As regards the alleged breach of the second subparagraph of Article 2(7)(c) of the basic regulation, the applicant claims that it is apparent from *Nanjing Metalink* v *Council* and *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above, that a breach of the time-limit laid down in that provision occurs every time the Commission takes a decision refusing MET when it is already in possession of information enabling it to calculate the dumping margin of the producer concerned, both where MET is granted and where it is not.

155 Questioned on the scope of its argument at the hearing, the applicant stated that the second subparagraph of Article 2(7)(c) of the basic regulation, as interpreted by the General Court in the judgments cited at paragraph 152 above and the judgment of 8 November 2011 in Case T-274/07 *Zhejiang Harmonic Hardware Products* v *Council*, not published in the ECR, paragraph 37, offers protection against arbitrary conduct on the part of the Commission, which is not entitled to take a decision on a company's MET claim in accordance with what it knows of the effect of such a decision on that company's dumping margin.

156 Those conditions were, in practice, satisfied when the Commission requested and received from the producer concerned the answers to the sections of the anti-dumping questionnaire concerning its domestic sales and costs and also received that information from the company or companies in the analogue country, or when the Commission became aware by any other means that the normal value on the analogue market was higher than in China.

157 In the present case the Commission could have calculated the applicant's dumping margin on 18 December 2009, when it received the answers to the anti-dumping questionnaire from the Union producers and, accordingly, the contested regulation should be annulled, since the decision as to whether the applicant was entitled to MET might have been different if the Commission had not had that information available to it.

158 It should be recalled that Article 2(7)(b) of the basic regulation provides that, in anti-dumping investigations concerning imports from China, normal value is to 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 that producer or producers in respect of the manufacture and sale of the like product concerned.

159 The second subparagraph of Article 2(7)(c) of the basic regulation states that '[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[; t]his determination shall remain in force throughout the investigation'.

160 In the light of the case-law relied on by the applicant cited at paragraphs 152 and 155 above, first, there is no ground for holding that any failure to comply with the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation must automatically entail the annulment of the Council's regulation imposing definitive anti-dumping duty that is to be adopted within that period. Indeed, as stated by the Court in *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above (paragraphs 138 and 139), failure to comply with the time-limit laid down in Article 2(7)(c) of the basic regulation can entail such annulment only if the applicant shows that, in the absence of such failure, the Council might have adopted a different regulation more favourable to its interests than the contested regulation.

161 Second, the applicant cannot rely on the legal rationale of Article 2(7)(c) of the basic regulation, as identified by the Court in the judgments cited at paragraphs 152 and 155 above, in support of its submission that breach of the time-limit laid down by that provision occurs every time the Commission takes a decision refusing MET when it is already in possession of information enabling it

to calculate the dumping margin of the producer concerned and, as a consequence, disregards the very wording of that provision, which states that the Commission has three months within which to give a decision on MET claims submitted to it.

162 It should be noted in that regard, first, that it is in the response to the specific argument of the applicant in the case in question that the last sentence of Article 2(7)(c) of the basic regulation provides, without exception, that the decision reached concerning MET is to remain valid throughout the investigation, that the Court stated, in *Nanjing Metalink* v *Council*, paragraph 152 above (paragraph 44), that Article 2(7)(c) of the basic regulation prohibits the institutions from re-evaluating the information which was already available to them when the initial MET decision was made and that that provision is intended, in particular, to ensure that the question whether the producer concerned operates under market economy conditions is not decided on the basis of its effect on the calculation of the dumping margin. The applicant's argument, was, nevertheless rejected, since the overriding factor in the Court's reasoning was that a decision conferring MET which no longer reflects the situation of the producer concerned cannot be maintained (*Nanjing Metalink* v *Council*, paragraph 152 above, paragraphs 45 to 47).

163 Next, in *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above (paragraph 128), the Court referred to the legal rationale of the provision referred to above solely for the purpose of establishing that the practical effect of that time-limit is not called in question if, in the period between the expiry of the three-month time-limit and the MET decision and having regard to the circumstances of the case, it had to be concluded that the undertakings seeking MET status had made it impossible for the Commission to know what effect its MET decision might have on the calculation of the dumping margin.

164 Lastly, in *Zhejiang Harmonic Hardware Products* v *Council*, paragraph 155 above (paragraph 37), the Court referred to the legal rationale of the second subparagraph of Article 2(7)(c) of the basic regulation while at the same time pointing out that that provision does not preclude MET status being relinquished where it is no longer possible, as a result of a change in the factual situation on the basis of which that status was conferred, to regard the producer concerned as operating under market economy conditions, or where the Commission is led to propose to the Council definitive measures perpetuating, to the detriment of the undertaking concerned, an error made in the initial assessment of the substantive criteria set out in the first subparagraph of Article 2(7)(c) of that regulation.

165 It follows that, contrary to the applicant's submission, in *Nanjing Metalink* v *Council*, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above, and *Zhejiang Harmonic Hardware Products* v *Council*, paragraph 155 above, the Court did not find that the legal rationale of the second subparagraph of Article 2(7)(c) of the basic regulation justified the annulment of a regulation imposing definitive anti-dumping duties on an undertaking every time the Commission was in a position to know the effect of a MET decision on the calculation of that undertaking's dumping margin simply because it was in possession of such knowledge at the time the MET decision was taken. It should be noted, as observed by the Council, that there is no immediate link between the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation and any knowledge on the part of the Commission of the effect of a MET decision on an undertaking's dumping margin. Moreover, the basic regulation does not require that the MET decision should be adopted at a time when the Commission does not possess information enabling it to ascertain the effect of a MET decision on an undertaking's dumping margin. Even where the time-limit has not in any way been exceeded at the time the MET decision is adopted, the Commission might take such a decision, notwithstanding the fact that it is already in possession of information enabling it to calculate its effect on the dumping margin of the undertaking concerned.

166 In any event, it is clear from Case 141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-9147 that, on the basis of the principles of compliance with the law and sound administration and provided that the procedural safeguards provided for in the basic regulation are observed, the Court of Justice favours the correct application of the substantive criteria laid down in Article 2(7)(c) of the basic regulation over any requirement for an unalterable MET decision or for absence of knowledge of the effect of a MET decision on an undertaking's dumping margin at the time when such a decision is adopted. As the Court observed in *Zhejiang Harmonic Hardware Products* v *Council*, paragraph 155 above (paragraph 39), the Court of Justice considered in the judgment cited above that, in the light of the principles of compliance with the law and sound administration, Article 2(7)(c) of the basic regulation cannot be interpreted in such a manner as to oblige the Commission to propose to the Council definitive measures which would perpetuate an error made in the assessment of the substantive criteria established by that provision, to the detriment of the undertaking concerned. Accordingly, if the Commission realises in the course of the investigation that, contrary to its original assessment, an undertaking meets the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation, it must take appropriate action, while at the same time ensuring that the procedural safeguards provided for in the basic regulation are observed (*Foshan Shunde Yongjian Housewares & Hardware* v *Council*, paragraphs 111 and 112).

167 In the light of the foregoing, it must be concluded that, while, as a rule, any MET decision should, in accordance with the wording of the second subparagraph of Article 2(7)(c) of the basic regulation, be taken within three months of the initiation of the investigation and that determination should remain in force throughout the investigation, the fact nevertheless remains that, under EU law as it currently stands and according to the EU judicature's interpretation of that provision referred to at paragraphs 152 and 155 above, first, the adoption of a decision outside that period does not, by virtue of that fact alone, lead to the annulment of the regulation imposing anti-dumping duty and, second, such a decision may be amended in the course of the proceeding if it proves to be incorrect.

168 In the present case, it is common ground that the final decision rejecting the applicant's MET request was not adopted within the three-month period laid down in the second subparagraph of Article 2(7)(c) of the basic regulation. The notice of initiation of the investigation procedure was published in the *Official Journal of the European Union* on 2 October 2009. However, the final decision refusing MET was proposed on 26 March 2010 and confirmed on 30 April 2010.

169 Moreover, the Commission received the applicant's answers to the anti-dumping questionnaire on 19 November 2009, including the sections of the questionnaire on domestic sales and the related costs (see paragraph 29 above). According to the applicant, that information enabled the Commission to calculate what its dumping margin would be if MET was granted. Furthermore, on 18 December 2009 the Commission received the answers to the anti-dumping questionnaires of the Union producers referred to at paragraph 23 above and was in a position as of that date, as pointed out by the applicant, to calculate the effect of a decision rejecting the applicant's MET claim on its dumping margin.

170 However, in the light of the foregoing considerations, even though it may be relevant that, as a result of its disregarding the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation, the Commission might have known the effect of the decision concerning the applicant's MET status on its dumping margin, since it may be argued that the Commission could have been influenced by that knowledge in adopting such a decision, it must be held that the applicant has failed to show that the contested regulation might have been substantively different but for the purported irregularity affecting the procedure for the adoption of the MET decision.

171 First, the applicant's argument that the Commission's decision rejecting its MET claim was taken 'in accordance with what it knew of the impact of that decision on [its] dumping margin and that decision might have been different if the Commission had not had such information available to it' cannot be accepted. Mere knowledge of the effect of a MET decision on an undertaking's dumping

margin does not necessarily mean that such a decision — and, consequently, the contested regulation — might have been substantively different if the decision had been adopted within the three-month time-limit laid down in Article 2(7)(c) of the basic regulation. First, according to the applicant itself, the Commission was already in a position on 18 December 2009, that is, before the expiry of the time-limit, to know the effect of a decision rejecting the MET claim on its dumping margin. Second, even if the Commission had information enabling it to calculate a producer's dumping margin at the time when the decision on that producer's MET status was taken, it is still possible that that decision — and the regulation imposing definitive anti-dumping duties — might not have been any different. That might be the case where it is clear that such a producer could not be granted MET because the Commission correctly concluded that the producer concerned did not meet the criteria for granting MET laid down in Article 2(7)(c) of the basic regulation and the requirements necessary for imposing anti-dumping duties were satisfied.

172 Moreover, the applicant's argument is not in any way substantiated. First, the applicant simply claims, without providing the least evidence in support of that claim, that 'the Commission's objective was to put an end to the zero rate of duty which [it] enjoyed … by whatever means available for attaining that objective'. In that context, even if, by argument, the applicant intended to allege misuse of powers on the part of the Commission, it must be rejected on the grounds set out at paragraph 130 above.

173 Second, the applicant does not indicate which aspects of the MET decision could have been assessed differently if the Commission's decision had been taken within the three-month time-limit or in the absence of any purported knowledge of the effect of that decision on its dumping margin.

174 It is true that the applicant formulates, indirectly, certain observations on the price paid for its major inputs on the domestic market. Thus, the applicant states that the Commission found no evidence that the Chinese State influenced its decision concerning the purchase of raw materials. In that regard, the only influence alleged was of a macro-economic order and related to the purported interference by the Chinese authorities to regulate the market price as a whole. Such interference is not liable to amount to significant State interference in the decisions of firms regarding prices, costs and inputs such as to prevent such decisions taking account of market signals reflecting supply and demand.

175 However, the purpose of those observations is to dispute the application of the criterion laid down in the first indent of Article 2(7)(c) of the basic regulation rather than to establish that the decision rejecting the MET claim was taken on the basis of the Commission's knowledge of the effect of that decision on the applicant's dumping margin, which nevertheless remains the objection on which the third plea is based.

176 In any event, even if, by disputing the Commission's application of that criterion, the applicant was seeking to establish that, irrespective of any failure to comply with the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation, the MET decision was incorrect, it would be necessary to point out that, as is apparent from recitals 27 to 34 of the contested regulation, the investigation established that the applicant did not satisfy either the criterion set out in the first indent of Article 2(7)(c) of the basic regulation, relating to the cost of raw materials, or the criterion set out in the second indent of that provision, relating to the keeping of accounting records.

177 Since the producer concerned must fulfil all the criteria laid down in Article 2(7)(c) of the basic regulation in order to be granted market economy status and, should it fail to fulfil one of those criteria, its claim must be rejected (*Shanghai Teraoka Electronic* v *Council*, paragraph 109 above, paragraph 54), the applicant's argument cannot invalidate the Commission's assessment of its MET claim, since the applicant does not dispute that it did not satisfy the requirement laid down the second indent of Article 2(7)(c) of the basic regulation.

178 It follows that the applicant has failed to show that the contested regulation could have been substantially different if the Commission's decision on its MET claim had been adopted within the three-month period laid down in Article 2(7)(c) of the basic regulation or in the absence of any knowledge on the part of the Commission enabling it to calculate its dumping margin.

179 The first part of the third plea must therefore be rejected.

The second part of the third plea, alleging that the burden of proof imposed by the Commission on the applicant for the purpose of showing that it operates in a market economy is excessive and infringes the general principles of EU law

180 In the second part of the third plea, the applicant submits that the burden of proof imposed on it by the Commission for the purpose of showing that it operates in a market economy is excessive and infringes the general principles of EU law, in particular the principle of sound administration. According to the case-law of the General Court, the institutions cannot require a Chinese exporter to furnish proof of a fact which it is impossible for him to demonstrate in order to enjoy a right conferred on it by the basic regulation.

181 In the present case, the Commission required the applicant to show that the Chinese steel market was not subject to any significant interference by the Chinese authorities — evidence that it is impossible for the applicant to furnish. The Commission should state clearly the information that it wishes to receive from Chinese producers and ensure that the information sought is not excessive in the light of the subject-matter of the request and the capacity of the exporters concerned.

182 As observed at paragraph 134 above, it is settled case-law of the Court of Justice that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. 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 has been a manifest error in the appraisal of those facts or a misuse of powers (*Ikea Wholesale*, paragraph 96 above, paragraphs 40 and 41, and Joined Cases C-191/09 P and C-200/09 P *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* [2012] ECR, paragraph 63).

183 The same applies to factual situations of a legal and political nature in the country concerned which the EU institutions must assess in order to determine whether an exporter operates under market conditions without significant State interference and may, accordingly, be granted market economy status (see, to that effect, Case T-155/94 *Climax Paper* v *Council* [1996] ECR II-873, paragraph 98; *Shanghai Teraoka Electronics* v *Council*, paragraph 109 above, paragraph 49; and *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above, paragraph 81).

184 However, whilst, in the sphere of measures to protect trade, in particular anti-dumping measures, the EU judicature cannot interfere in the assessment reserved to the EU authorities, its task is nevertheless to satisfy itself that the institutions have taken account of all the relevant circumstances and appraised the facts of the matter with all due care (see, to that effect, Case T-413/03 *Shandong Reipu Biochemicals* v *Council* [2006] ECR II-2243, paragraph 64 and the case-law cited).

185 Moreover, it is apparent from Article 2(7)(c) of the basic regulation that the burden of proof lies with the producer wishing to claim market economy status. Article 2(7)(c) provides that a claim submitted under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions. Accordingly, it is not incumbent on the EU institutions to prove that the producer does not satisfy the conditions laid down for recognition of such status. On the contrary, the task of those institutions is to assess whether the evidence supplied by the

producer is sufficient to show that the requirements laid down in Article 2(7)(c) of the basic regulation are fulfilled and that of the EU judicature to examine whether that assessment is vitiated by a manifest error (Case C-249/10 P *Brosmann Footwear (HK) and Others* v *Council* [2012] ECR, paragraph 32; see also, to that effect, *Shanghai Teraoka Electronic* v *Council*, paragraph 109 above, paragraph 53, *and Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, paragraph 152 above, paragraph 83).

186 Contrary to what is claimed by the applicant, the institutions did not fail to have regard to the burden of proof in the present case.

187 It should be noted as a preliminary point that, in the application and at the hearing, the applicant referred to the case-law cited at paragraph 184 above but did not dispute the substance of the institutions' assessment of its MET claim set out at recitals 28 to 33 of the contested regulation. Nor did the applicant challenge the Commission's evaluation, at recitals 37 to 44 of the contested regulation, of the information submitted by it, in particular in its letters of 2 March 2010 and 13 April 2010, to demonstrate that it fulfilled the requirements laid down in Article 2(7)(c) of the basic regulation, or claim that the Commission made a manifest error of assessment in that regard.

188 First, the applicant states, in reliance on Case T-498/04 *Zhejiang Xinan Chemical Industrial Group* v *Council* [2009] ECR II-1969, paragraphs 99 and 100, that the burden of proof on the exporting producer claiming MET is satisfied when it has provided the Commission with various items of documentary evidence whose purpose is to show that it meets the requirement set out in Article 2(7)(c) of the basic regulation, which was requested by the Commission in its questionnaire to producers claiming MET and verified by the Commission without calling into question its authenticity.

189 However, as observed at paragraph 187 above, the applicant does not claim that the evidence produced by it in support of its MET claim during the administrative procedure demonstrated that it fulfilled the requirement in the first indent of Article 2(7)(c) of the basic regulation and does not dispute the substance of the institutions' assessment in that regard. The applicant's argument cannot, therefore, succeed.

190 Second, the applicant states that the Commission required it 'to show that the Chinese steel market was not subject to any significant interference by the Chinese authorities' — evidence that it is impossible for the applicant to furnish. However, the applicant has failed to provide any evidence of any such requirement on the part of the institutions, a requirement which was also disputed by the Council in its defence.

191 As the Council correctly points out, it is for the applicant to demonstrate, by means of sufficient evidence, that it operates under market conditions and, in particular, that the cost of its inputs reflect market value.

192 Since the Commission concluded that the applicant purchased its raw materials during the investigation period on the domestic Chinese market and was thus benefiting from artificially low and distorted steel prices during that period (recitals 32 and 33 of the contested regulation) and the cost of inputs did not reflect market values, it was for the applicant to submit to the Commission evidence capable of refuting those conclusions. It follows that the applicant's objection cannot be accepted.

193 As the plea alleging breach of the principle of sound administration is based solely on the purported infringement of the principles governing the burden of proof, it must also be rejected.

194 It follows that the third plea must be rejected, as must the application in its entirety.

Costs

195 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs.

196 Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the Council, Vale Mill (Rochdale) and Colombo New Scal.

197 The Commission is to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Since Hardware (Guangzhou) Co., Ltd to bear its own costs and to pay the costs incurred by the Council of the European Union, Vale Mill (Rochdale) Ltd and Colombo New Scal SpA;**

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

Truchot Martins Ribeiro Popescu

Delivered in open court in Luxembourg on 18 September 2012.

[Signatures]

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