OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 11 July 1989 *

Mr President,
Members of the Court,

1. The litigation before the Court relating to commercial protective measures against dumped imports is augmented by three new actions seeking, on the one hand (Case C-121/86 *Anonymos Etaireia Epicheiriseon and Others* v *Council*, and Case C-129/86 *Hellenic Republic* v *Council*), the annulment of Decision 86/59/EEC [1] whereby the Council terminated an anti-dumping proceeding without adopting any protective measures and, on the other (Case C-122/86 *Anonymos Etaireia Epicheiriseon and Others* v *Commission and Council*), the restitution of damage occasioned by the Commission and the Council as a result of the adoption of the abovementioned decision, of the Council's failure to adopt Proposal COM(83) 341 for a regulation on the imposition of a definitive anti-dumping duty, and of any other connected act.

The three actions relate to a single anti-dumping proceeding and the arguments put forward by the applicants are to a large extent analogous. Reasons of economy prompt me, however, to deliver a single opinion in the three cases. First, I will consider together the two actions for a declaration that Decision 86/59/EEC is void, and then I will deal with the action for damages.

The legislative background

2. In a case which raises questions of principle relating to the interpretation of the Community anti-dumping rules, it is probably useful to give a preliminary account of the provisions contained in the basic Community legislation relevant to this case.

The subject-matter in question is in fact both delicate and complex, because it is not always easy to ensure that the utilization of commercial protective measures does not result in an unjustified hindrance to international trade.

The interests at stake in such a procedure are diverse and often opposing but nevertheless are worthy of protection.

The basic regulation which is, as has been noted, Regulation (EEC) No 2176/84 on protection against dumped or subsidized imports from countries not members of the European Community (hereinafter referred to as the 'basic regulation') [2] reconciles those interests by means of a series of provisions, both procedural and substantive, which together are intended to ensure that the procedure resulting in the imposition of

* Original language: Italian.

1 — OJ 1986, L 70, p. 41.

2 — OJ 1984, L 201, p. 1. This instrument, which, with effect from 1 August 1984, superseded the earlier analogous Regulation (EEC) No 3017/79, is, however, applicable in accordance with Article 19 to proceedings already initiated on the date of its entry into force.

anti-dumping duties is conducted swiftly, equitably and efficiently, in accordance with the international obligations imposed on the Community by Article VI of the GATT (General Agreement on Tariffs and Trade) and by the provisions implementing those rules (i.e. the Anti-dumping Code).

3. The keystone in the system is the principle laid down in Article 2(1) of the basic regulation that an anti-dumping duty may be imposed on any dumped product whose release for free circulation in the Community causes injury. The following paragraph of that article then stipulates that a product is to be considered to have been dumped if its export price to the Community is less than the normal value of a like product.

After giving a definition and setting out the method of calculating the normal value and the export price, as well as the manner in which those two items should be compared, the regulation stipulates in paragraph (12) of Article 2 that 'like product' means a product which is identical, i.e. alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration.

Article 4(1) then provides that a determination of injury is to be made only if the dumped imports are causing injury through the effects of dumping. On the other hand, injury caused, whether wholly or in part, by other economic or commercial factors is irrelevant.

In paragraph (2) of that article the Community legislature goes on to explain that an examination of injury is to involve certain factors no one or several of which can necessarily give decisive guidance.

The factors to be taken into consideration are the volume and the prices of the dumped imports, together with the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as: production, utilization of capacity, stocks, sales, market share, prices, profits, return on investment, cash flow and employment (Article 4(2)(c)).

The following provisions relate to the detailed rules for conducting the investigation, for terminating the proceeding, and determine the competences of the Commission and the Council respectively.

The investigation is conducted by the Commission in cooperation with the Member States: it must cover both dumping and the injury resulting therefrom. The investigation of dumping is normally to cover a period of not less than six months immediately prior to the initiation of the proceeding (Article 7(4)(c)). During the course of the investigation the Commission is obliged to afford to the complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, the possibility of inspecting all information made available to the Commission by the parties involved in the investigation, except for internal documents prepared by the authorities of the Community or its Member States, provided that such information is relevant to

the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To that end interested parties must address a written request to the Commission indicating the information required (Article 7(4)(a)).

Article 8(2) of the basic regulation provides in its turn that the Community institutions are required not to divulge information for which confidential treatment has been requested, without the specific permission of the supplier.

Each request for confidential treatment must indicate why the information is confidential and must be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

The basic regulation also provides for the possibility of imposing provisional duties. Under the terms of Article 11, where preliminary examination shows that dumping exists and that there is sufficient evidence of injury and the interest of the Community requires action to be taken in order to prevent injury from being caused during the proceeding, the Commission, at the request of a Member State or on its own initiative, is to impose a provisional anti-dumping duty.

As to the details of the manner in which an anti-dumping proceeding may be terminated, various options are possible.

If at the end of the investigation the Commission considers that it is not necessary to adopt any protective measure and the Advisory Committee provided for by the basic regulation raises no objection, the Commission may terminate the proceeding. In any other case, the Commission is to submit to the Council a report on the outcome of consultations and is to propose that the proceeding should be terminated. In such a case the proceeding is to be considered terminated if within a period of one month the Council, taking its decision by qualified majority, has not decided otherwise (Article 9).

If, however, the Commission considers the adoption of a definitive anti-dumping duty to be necessary, it must submit a proposal to that effect to the Council. Article 12(1) provides that:

'Where the facts as finally established show that there is dumping or subsidization during the period under investigation and injury caused thereby, and the interests of the Community call for Community intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council, acting by qualified majority, on a proposal submitted by the Commission after consultation.'

No provision is made in the basic regulation for the case where the Council does not achieve the required majority for the approval of a Commission proposal for the adoption of a definitive anti-dumping duty.

Finally, as regards the period within which the investigation must be concluded, Article 7(9)(a) provides that it must normally come to an end within one year of the initiation of the proceeding.

The facts

4. In June 1982 Greek producers of natural dead-burned magnesite whose overall production represented at that time the entire Community production lodged a complaint with the Commission about the dumping of imports of that product originating from the People's Republic of China and North Korea.

After announcing in a notice published in the *Official Journal of the European Communities* of 29.6.1982 [3] the initiation of an anti-dumping proceeding relating to the imports mentioned in the complaint, the Commission set in motion the necessary investigation.

Having established the existence of dumping and the necessary causal link between the imports in question and the injury sustained by the Community industry, and in order to avoid further injury in the course of the investigation, the Commission issued on 22 December 1982 Regulation (EEC) No 3542/82 [4] imposing a provisional anti-dumping duty (four months) on imports of natural dead-burned magnesite having an MgO content of between 85 and 92% originating in the People's Republic of China and in North Korea.

The imposition of the duty was extended for two months by Council Regulation (EEC) No 991/83 of 25 April 1983. [5]

3 — OJ 1982, C 162, p 3
4 — OJ 1982, L 371, p. 25.
5 — OJ 1983, L 110, p. 27.

After imposing the provisional duty and in view of the divergent points of view of the parties as to the similarity of the product, the Commission appointed two experts for the purpose of assessing the comparability of the products in question originating in China, North Korea, Spain (the country of reference for the determination of the normal value) and Greece.

On the basis of all the information available and notwithstanding the divergent opinions of the experts, the Commission concluded that imports of natural dead-burned magnesite having an MgO content of between 85 and 92% originating in the four abovementioned countries were to be deemed to be 'like products' within the meaning of the basic regulation since their characteristics were so similar as to be capable of being used for all existing applications.

As to injury, the Commission found that between 1979 and 1980 there had been an increase of 15% in imports, a reduction of 3% in 1981 and a fresh increase of 17% in 1982, together with an increase in the market share held by the imported products from the two countries under investigation from 26% in 1979 to 37% in 1982, whilst at the same time the Community industry's market share went down from 48% in 1978 to 25% in 1982.

In the light of all these considerations, the Commission submitted a proposal on 9 June 1983 to the Council for the adoption of a regulation instituting a definitive anti-dumping duty on the imports in question.

The Council, however, after specifically examining the problem of the comparability of the products, did not adopt the

Commission's proposal and, consequently, the provisional duties expired on 30 June 1983.

On 19 April 1985, that is two years later, the applicant undertakings transmitted to the Commission fresh evidence of dumping and injury occasioned by Chinese imports of natural dead-burned magnesite. Accordingly, on 19 June 1985 the Commission published in the Official Journal a notice concerning the continuation of the investigation into Chinese and North Korean imports. [6]

Following the investigation conducted during the summer of 1985, the Commission, on the basis of information which it said had come to light during the investigation and which differed from the statistical data put forward by the complainants, found that imports into the Community from the countries in question had gone down from 82 500 tonnes in 1981 to 61 000 tonnes in 1984; that Community production had increased by 110% during the same period; and that the market share held by Community producers had gone up from 15.4% in 1981 to 19.4% in 1984, whereas the market share held by products originating in the People's Republic of China and North Korea had gone down from 30.4% in 1981 to 19.7% in 1984.

Those findings prompted the executive to take the view that the Community industry was no longer suffering serious injury and to submit to the Council a proposal for the termination of the anti-dumping proceeding relating to imports into the Community of natural dead-burned magnesite originating in the People's Republic of China and in North Korea.

The Council accepted that proposal and, on 6 March 1986, adopted Decision 86/59/EEC whereby the anti-dumping proceeding relating to the abovementioned imports was concluded. It is that decision which is contested.

A more detailed account of the facts mentioned above is given in the Report for the Hearing in the three cases to which reference is made.

The Court's review

5. Before examining the numerous submissions put forward by the applicants, I think it is necessary to make two observations on the nature and scope of the review which the Court is required to carry out.

As is made clear by the Court's case-law in this respect, [7] the basic regulation recognizes the existence of a legitimate interest on the part of the Community producers in the adoption of the measures provided for by it, and confers certain specific rights on producers. Accordingly, even though the Community institutions enjoy a wide discretionary power in the sector in question, the Court is required to verify whether the Commission has observed the procedural guarantees afforded to the complainants by the basic regulation and whether or not it has committed manifest errors in its

6 — OJ 1985, C 149, p. 2.

7 — See the judgment of the Court of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 25.

assessment of the facts, has omitted to take any essential matters into consideration or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority. [8]

It should then be stated that, contrary to the objection raised by the Council, the Court's review in Cases C-121/86 and C-129/86 must not necessarily be limited to the facts relating to the period of time running from 19 June 1985, which was the date of publication of the second notice concerning the investigation, to 6 March 1986, the date on which the contested decision was adopted.

In fact it is clear from the first four recitals in the preamble to the contested decision that the decision in question constitutes the culmination of a single, lengthy procedure started in June 1982.

The second notice of June 1985 itself refers to the continuation and not to the initiation of a new investigation.

There is therefore no sound reason for removing any specific facts from the Court's review.

On the contrary, the Court is required to have regard to any procedural flaw which is likely to have an effect on the validity of the decision.

6. The allegations made against the contested decision in Cases C-121/86 and C-129/86 may almost entirely be grouped together around five main problems:

(a) failure to assess the existence of dumping,

(b) excessive duration of the proceeding,

(c) the period of time taken into consideration for the purpose of ascertaining injury,

(d) the combined assessment of the data relating to Chinese and North Korean imports,

(e) the data relied on.

(a) *Failure to assess the existence of dumping*

7. In the applicant's view the decision in issue is based on an inadequate statement of reasons, since it merely notes the absence of injury without taking into consideration the possibility that dumping is taking place.

On that point it should be pointed out that the wording of Article 12 relating to the adoption of definitive measures and the very rationale of the basic regulation undeniably demonstrate that the Council is authorized to impose protective measures only when the three prerequisites — the existence of dumping, resultant injury and the Community interest in the adoption of such measures — are all fulfilled.

8 — See the judgment of 20 March 1985 in Case 264/82 *Timex v Council and Commission* [1985] ECR 849, paragraph 16

This general statement requires, however, to be qualified in certain respects.

Although it is indeed true that the three abovementioned conditions are undoubtedly cumulative it is nevertheless the case that there may be a logical link of supposition between them.

The Council would not in fact be able to make a correct assessment of the Community interest in the adoption of protective measures without first ascertaining the injury sustained by the Community industry.

Evidently, in such a case it is necessary to make a comparative assessment of the divergent interests such as for example those of the producers and the possible users of the imported product, which cannot be done correctly if the extent of the injury suffered by the industry concerned has not been assessed.

As regards, on the other hand, the two other relevant factors I consider that the Community institutions may legitimately limit their own investigations whenever they establish that one or other factor does not subsist.

If in fact it appears that certain imports do not occasion significant injury to the Community industry, there is no ground for verifying whether the imports themselves are taking place at a price lower than the normal value of a like product, since even a finding that dumping is taking place would not alter the final result and the Council would not in any event be entitled to adopt protective measures.

Furthermore, an examination of the relevant provisions of the basic regulation does not point to the existence of any logical or practical impossibility of verifying one condition independently from another.

The finding of dumping and injury are in fact based on different factors which are not necessarily linked.

Similarly, Article 7(1)(c) has a scope different from that contended for by the applicants.

In order to ensure that the procedure is conducted in a swift and efficient manner and in view of the fact that, since the adoption of protective measures is involved, a finding is necessary with regard both to dumping and the injury resulting therefrom, the abovementioned provision provides that the investigation must be conducted into both aspects.

It is nevertheless a provision intended to enable an investigation to be conducted rapidly and it in no way implies, contrary to the applicants' assertions, an obligation on the Community institutions, once they have found that one of the two prerequisites is not fulfilled, to continue the investigation and to reach a definite conclusion with regard to the other prerequisite since a subsequent investigation of that kind could not serve any useful purpose.

Examined from that point of view, the contested decision does not appear to me to be based on an inadequate statement of reasons or to have been adopted in breach of the basic regulation.

(b) *Excessive duration of the proceeding*

8. In the same way, the Greek producers of magnesite maintain that, by allowing the proceeding in question to be pending for approximately four years, the Council infringed not only Article 7(9)(a) of the basic regulation, according to which the proceeding should normally be concluded within a year of its being initiated, but also the principles of legal certainty, the protection of legitimate expectations (that aspect is emphasized by the Greek Government in Case 129/86) and the resolution of disputes within a reasonable period.

In view of the affirmation by the Court that the Council may refrain from taking any decision when it is in disagreement with the Commission,[9] the applicants sought at the hearing to place this allegation on a different footing by maintaining that the Council could refrain from approving the Commission proposal but not on the ground invoked (that the products were not similar) since that assessment falls within the sole competence of the Commission.

In actual fact, the applicants are thereby raising a fresh submission of a misuse of powers by the Council, which, they say, exceeded the limits of its discretionary power by intervening in June 1983 in the examination of the comparability of the products, in breach of the objective pursued by the Community provisions. That allegation had been raised by the applicants during the written procedure. However, it does not appear to have been made in the application, but only in the reply, and it is not based on fresh elements of law or fact which came to light in the course of the procedure itself. Accordingly, the Council was right to object that it could not be taken into consideration since Article 42(2) of the Rules of Procedure precludes the raising of fresh issues in the course of the proceedings.

9. With regard, on the other hand, to the specific problem of the failure to adhere to the deadline laid down in Article 7(9)(a) of the basic regulation and whilst I would stress that it is in my opinion very doubtful whether an infringement of this kind can be alleged in the context of an application for a declaration that a decision terminating an anti-dumping proceeding is void, I would recall that the Court has recently held that:

'It should be observed that the period mentioned in Article 7(9) of the basic regulation is a guide rather than a mandatory period. This is clear both from the wording of the provision in question which uses the word "normally", and from the nature of the anti-dumping proceeding itself whose progress does not depend solely on the efforts of the Community authorities. However, it follows from Article 7(9) that the anti-dumping proceeding must not be extended beyond a reasonable period to be assessed according to the particular circumstances of each case'.[10]

The proceeding under review by the Court was in fact laborious and its duration of approximately four years constitutes a record which one may hope will remain unbroken in the history of Community anti-dumping proceedings. That excessive

9 — See the order of 15 October 1986 in Case 299/85 *Tokyo Juki Industrial* v *Council and Commission* [1986] ECR 2965

10 — See the judgment of 12 May 1989 in Case 246/87 *Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co.* v *Hauptzollamt München-West* [1989] ECR 1151, paragraph 8.

duration may, however, be explained by the particular circumstances an account of which is given in the statement of reasons contained in the decision.

The Commission had in fact considered that it would be able to conclude the proceeding by the end of June 1983 and to that end had submitted to the Council a proposal for the imposition of a definitive anti-dumping duty on the imports in question.

The proposal was not, however, adopted by the Council, which is why the executive seems in fact to have continued and broadened the investigation, as is demonstrated by the chronological table supplied by the Commission relating to the period between June 1983 and June 1985 (see Annex 3 to the Council's rejoinder in Case C-121/86). The Commission subsequently received from the applicants fresh evidence pointing to the prima-facie existence of dumping and resultant injury caused by Chinese imports. It therefore published on 19 June 1985 a notice concerning the continuation of the proceeding which was terminated in March 1986 by the adoption of the decision which is challenged in these proceedings.

In sum, during the investigation there was a divergent assessment by the two institutions concerned of the results and the conclusions to be drawn, which may occur in a system such as that instituted by the basic regulation, which leaves the power of initiative with the Commission but, except in specific cases, reserves the decision-making power to the Council as the body responsible for the common commercial policy.

I do not therefore consider that the failure to adhere to the period of time stipulated by the basic regulation may be held to be totally unjustified in this case or that the applicants had cause during the procedure to complain of its excessive duration.

(c) *Period of time taken into consideration for the purpose of ascertaining injury*

10. The applicants maintain that the contested decision provides inadequate reasoning for the absence of injury since it merely finds that there was an improvement in the situation of the Community industry in the reference period running from 1981 to 1984.

The Greek Government emphasizes in particular that the failure to take into consideration the data relating to the years prior to 1981, which were however available to the Community institutions, infringed the very spirit of the basic regulation according to which the Community industry should be placed in a position to regain the competitive position which it held before dumping began. In 1981, in the applicants' view, the Community industry had already suffered damage and that year was not capable of constituting a valid point of departure in order to demonstrate, in the light of the subsequent improvement, that the Community industry had not suffered considerable injury.

The argument maintained is in principle correct but is not decisive in this case.

Community practice for ascertaining injury appears in fact to be to take into consideration a period of time of about four

years prior to the initiation of the proceeding.

A certain perplexity may be caused in this case by the fact that the proceeding lasted about four years and that, in the context of the adoption of the contested decision the period taken into consideration was not however the four-year period preceding the original notice initiating the preceding in June 1982 but the four-year period preceding the notice concerning the continuation of the investigation published in June 1985.

It should however be borne in mind that the Community institutions enjoy in this respect a certain discretionary power and that the existence of considerable injury must necessarily be ascertained by reference to the moment in time when any decision introducing protective measures is adopted.

Certainly, a more thorough statement of reasons which would also have referred to the situation of the Community industry in 1979 and 1980, in respect of which data had already been gathered by the Commission in connection with the termination of the 'first stage' of the proceeding and accordingly did not require much research, would have been more illuminating and would have given a better account of the development of the Greek magnesite industry and consequently would not have given rise to the doubts expressed by the applicants that the choice may have been arbitrary. However, the improvement noted during the 1981-84 time-span and the simultaneous reduction in imports — as evidenced by the data used by the Commission and subject to subsequent confirmation of their correctness — are such that the omission does not appear in this case to amount as such to a failure to give reasons in the proper sense of the term.

11. With reference also to the time-span used by the Community institutions for the purpose of determining the absence of injury, the applicants allege that the contested decision was adopted in breach of Article 7(1)(c) of the basic regulation pursuant to which the investigation into dumping is to cover a period of not less than six months immediately prior to the initiation of the proceeding. They point out that the Commission initiated the proceeding on 19 June 1985 but in no way took into consideration the data for 1985 which, in their view, are decisive inasmuch as they demonstrate the extent of the injury. The Commission refutes that argument by claiming that the appraisal of the last six months is only for the purpose of ascertaining the existence of dumping, and not of injury as well.

I think it is necessary at this point to clarify the scope of the provision to which the applicants are referring.

Although appearing only to apply to the investigation into dumping, the obligation also extends, as the applicants have argued, to the determination of injury.

Two considerations lead me to opt for an extensive interpretation of the provision in question.

First there is a textual point. One affirmation immediately follows another, according to which the investigation must relate both to dumping and to injury. But that is not all: the very rationale of the regulation, according to which protective measures are to be adopted not by way of reprisal but in order to protect the

Community industry from unfair competition, requires the injury to be actually occurring and it is therefore necessary for it to be established in regard to the period immediately preceding the initiation of the proceeding and, in the present case, in regard to the period immediately preceding the notice concerning the continuation of the proceeding.

The Commission's practice of taking account, with regard to injury, of a period of about four years does not conflict with the wording of the provision and is certainly useful for assessing the injury better, provided, obviously, that the period of time used also covers the six months immediately prior to the initiation of the proceeding.

What occurred in this case? The Commission seems in fact to have taken into consideration data relating to the first months of 1985 (see the working document of the Commission of 11 November 1985, Annex 1 to the applicants' reply in Case C-121/86), which it communicated to the applicants (see Annex 1 to the Council's defence in Case C-121/86). However, the contested decision omits any reference to these data inasmuch as they are considered not to be decisive.

It certainly follows from the interpretation given of Article 7(1)(c) that it would have been appropriate for the reasoning on which the contested decision was based to have expressly referred to the data relating to the first quarter of 1985. Nevertheless, in view of the fact, that as far as may be seen, the data in question were taken into consideration and the applicant was informed thereof, it does not seem to me that, in the present case and subject to verification of the reliability of those data, their omission in itself amounts to a flaw capable of affecting the validity of the decision.

(d) *Combined assessment of the data relating to Chinese and North Korean imports*

12. The applicants also claim that in determining the injury suffered by Greek producers the Commission took into consideration and calculated jointly both imports originating in China and those originating in North Korea, although it was aware that the latter country had in the meantime increased its prices.

The Council's reply that, since the investigation had at the outset covered both countries, it had to be pursued with regard to both of them appears to be formal and unconvincing in the face of the repeated requests throughout the procedure by the Greek producers for the data relating to the two countries to be considered separately, and in view of the evidence supplied by the producers in support of their request showing the increase in prices and the reduction in market share held by imports originating in North Korea.

The other objection raised by the defendant seems to me, on the other hand, to be more pertinent and decisive, namely the finding of a yet greater diminution in Chinese imports during the reference period in relation to the global reduction in imports originating in the two countries.

An examination of the data taken separately, for example on the basis of the Commission's working document of 11 November 1985 (see Annex 1 to the Greek producers' reply in Case C-121/86), in fact shows that, even if the data in question had been examined separately, the result would not have been different. Therefore, the failure to separate the data relating to the countries in the statement of reasons contained in the contested decision does not, on the basis of the data supplied by the Commission, in itself amount to a flaw capable of affecting the decision's validity.

Nevertheless, to give a definitive reply to that question it is essential to ascertain whether, and to what extent, the information provided by the Commission can be regarded as reliable for reference purposes.

(e) *The data used*

13. The applicants maintain that the data on which the decision's reasoning is based do not accord with reality and are thus unproven.

In their view, the data relied on are inaccurate and conflict both with the official statistics on which the applicants' arguments are based and with the Commission's earlier decisions, proposals and findings.

14. The reasons for the contradiction between the data used in the reasoning of the decision in question in relation to the data derived from official statistics had already been explained to the Greek producers of magnesite in a communication from the Commission of 4 February 1986 (see Annex 1 to the Council's defence in Case C-121/86).

During the investigation it appeared in fact that the classification of the product under one or other of the four existing headings of the Nimexe code was not always straightforward and that the same product was sometimes classified under different headings. Moreover, the official statistics do not include imports into Ireland and make no distinction for products whose MgO content is between 85 and 92% which are the only ones affected by the anti-dumping proceeding.

For those reasons the Commission was prompted not to use the data derived from statistics but rather those that it said it had obtained from its own specific investigation.

That reasoning is formally correct. It does, however, require a qualification. If in fact the Community institutions consider that they cannot rely on official statistics they must in the first place state their reasons, which was done in the present case; and secondly, and above all, they must clearly indicate the sources from which they obtain the data used. That is primarily in order to ensure that the rights conferred on the applicant by Article 7(4)(a) of the basic regulation may be exercised and secondly, to facilitate if necessary, the review of legality by the Court.

15. In the reply submitted in Case C-121/86 the Greek producers of magnesite state that following a specific request they received from the Commission at the end of December 1986 certain documents relating to the anti-dumping proceeding which, they

say, confirm their submissions and in particular the unreliability of the data relied on. In that connection, they observe in particular that those documents do not contain the data relating to imports from 1982 of natural magnesite originating in North Korea and to imports from the second quarter of 1983 of the same product originating in China, or at any rate that the Commission's non-confidential files do not contain the questionnaires on those aspects or any non-confidential summaries, as provided for by Article 8(2)(b) of the basic regulation.

It should also be pointed out that in the memorandum submitted on 22 November 1985 to the Commission (see Annex 4 to the applicants' reply in Case C-121/86), the applicants had complained of the fact that the questionnaires in question were incomplete.

In its rejoinder, the Council argues that it must confine itself to replying to the specific factual and legal arguments relating to it and expresses no opinion on this point.

If the Council, rather than referring by implication to the defence pleadings submitted by the Commission in Case C-122/86, was simply seeking to prevent the defects in the reliability of the data relied on from being imputed to it, I would say straightaway that the argument is unfounded inasmuch as, let me reiterate, the Council in adopting the Commission's proposal is expressing its view of the decision as a whole and is clearly also liable in regard to the reliability of the data used. I therefore refer to the defence pleadings submitted by the Commission in Case C-122/86.

16. In the face of the objections raised by the executive, which considers those questionnaires to be confidential and as such not capable of being included in the files transmitted to the applicants, in the absence of any justification as to the lack of non-confidential summaries of those questionnaires and also in view of the fact that the Commission asserted that it had supplied the applicants during the course of two meetings held on 14 November and 22 December 1985 with all the necessary information, the Court requested the Commission to provide it with the questionnaires at issue.

The reply was frankly entirely unsatisfactory. The Commission in fact merely transmitted, without giving any explanations, copies of the non-confidential summaries of the questionnaires compiled by the Chinese exporters for the period of time between 1978 and the first quarter of 1983 and certain copies of communications sent by importers of North Korean magnesite containing certain data on imports of that product up to June 1985.

In other words, the data made available by the Commission on imports from China are none other than the data which were covered by the first part of the investigation and which form the basis for the proposal for definitive anti-dumping measures submitted in June 1983.

Irrespective of any assessment of the value and completeness of the information relating to North Korean imports referred

to above, the fact remains that after a procedure which lasted for about four years and subsequent proceedings before the Court, it has still not been explained where the institutions in question obtained the figures relating to the second quarter of 1983, 1984 and to the first five months of 1985, which are to be found in the preparatory documents and which underlay the contested decision.

I do not here wish to pass judgment on the reasons which led the Commission to decide not to communicate to the Court the questionnaires requested or, at any rate, a non-confidential summary of them. Nor do I wish to cast doubt on its assertion, which in fact is a little tautological, contained in the Commission's rejoinder in Case C-122/86 in which it said that those questionnaires exist but are contained in confidential files . . . since they are confidential.

I would recall, however, that under the case-law of the Court the obligation of confidentiality by which the Community institutions are bound must be interpreted in such a way that the rights conferred by the basic regulation are not deprived of their substance. [11]

The principle affirmed in the *Timex* judgment applies *a fortiori* in the context of the review of legality which the Court is called upon to carry out and which would otherwise be rendered ineffective.

In the absence of any evidence enabling the validity of the data relied on in the reasoning of the decision to be tested, at least as regards imports originating in China in the second quarter of 1983, 1984 and the first five months of 1985, despite formal, specific and repeated objections and the existence of official data supplied by the applicant, I am led to the inescapable conclusion that the decision in issue is not based on an adequate statement of reasons since the factual circumstances underlying it are not satisfactorily proven. It is scarcely necessary to emphasize that the volume of imports from the countries covered by the investigation constitutes an essential and unavoidable element in the context of any proposal to the Council in the field of dumping.

The remaining allegations

17. I consider that the conclusion which I have just reached on the unreliability, or rather the impossibility, of verifying certain essential data relied on in the contested decision and the consequences flowing therefrom relieve me of the duty of examining certain other allegations made by the applicants.

Nevertheless, in order to bring out more clearly the general context in which the procedure took place, I would mention a further submission made by the Greek producers of magnesite in Case C-121/86. They say that the Commission, by not accepting the undertakings offered by the Chinese exporters in December 1973 since it did not consider that the offer was satisfactory, clearly acknowledged that until 1984 injury of major significance was being suffered.

11 — See the judgment of 20 March 1985 in Case 264/82 *Timex v Council and Commission* [1985] ECR 849, paragraph 29

In that connection it should be stated that the offering of price undertakings does not necessarily amount to a recognition that dumping is taking place the ascertainment of which remains at all events within the competence of the Community institutions.

And it is certainly true that the offer of undertakings dates back to a period preceding the conclusions to which the Council came when adopting the contested decision.

Nevertheless, even if, for the reasons indicated above, that method of proceeding cannot be described as manifestly contradictory, it undoubtedly represents further evidence of the rather convoluted procedure which led to the adoption of the contested decision.

Application of C-122/86 on the restitution of damage

18. The allegations made by the Greek producers of magnesite in the application for damages, which seeks to prove the unlawful conduct of the Community institutions, are to a large extent analogous with those put forward in Case C-121/86 which I have already examined.

I shall confine myself at this stage to a consideration of the submissions which have not already been examined.

19. The applicants argue that, by embarking in 1983 on an examination of the similarity of the products in question and on that ground refraining from adopting the proposal made by the executive, the Council infringed specific provisions adopted for the exclusive protection of individuals relating to the competence of the Commission. According to that reasoning, that institution is alone empowered to assess the similarity of the products, inasmuch as the investigation into dumping, which presupposes an assessment of the similarity of products, falls within the competence of the executive by virtue of Article 7(1)(c) of the basic regulation.

That allegation appears to me to be unfounded.

Under Article 12 of the basic regulation the Council is to adopt, on a proposal submitted by the Commission, definitive protective measures.

Clearly it must base its decision on the investigation conducted by the Commission and must assess the conclusions which the executive arrived at.

However, as the Court has had occasion to state, [12] the Council may refrain from taking any decision if it is in disagreement with the Commission.

There is, moreover, no provision in the basic regulation which warrants the view that there are areas of competence in which the Council has no discretionary power but which are reserved to the exclusive competence of the executive.

Similarly, the objection that the Council, regard being had to its composition, is not in a position to express a view on a highly technical argument is without foundation, inasmuch as that institution, if it deems

12 — See the order of 15 October 1986, already cited.

appropriate, may call upon experts in the field, which happens particularly when questions of that kind are dealt with at the level of Coreper.

20. Next, as regards the accusation that the Commission 'bargained' with the parties concerned about the termination of the proceeding, I will merely say that that allegation is not supported by any evidence.

21. Those matters having been clarified, it is now a question of verifying whether the conduct of the Community institutions was such as to give rise to a right to damages in favour of the applicants.

As is clear from my arguments so far, there was, during the course of the proceeding, an infringement by the executive which I will not hesitate to describe as serious, of a superior rule of law intended to protect individuals, that is to say in this case the right of the applicants to be informed of data emerging during the course of the investigation, so that their interests might be properly protected.

In the opinion of the applicant undertakings, injury has also occurred in this case which they equate with the difference between the sale price applied in the Community and the cost of production of the product in question together with the loss of market share.

What, however, seems to be absent from the case before the Court is a direct causal link between the infringement of the aforementioned provision and the damage which is said to have flowed from it.

All in all, the consequence of the illegality of the conduct of the Community institutions was not in fact the injury but rather the adoption of an unlawful decision.

In other words, the right infringed was the right to a correct and transparent procedure and not a right to secure the imposition of anti-dumping duties. From that point of view, therefore, a declaration that the decision in question is void constitutes in itself adequate reparation.

The arguments of the applicants are based rather on the erroneous assumption that they have a specific right to the adoption of protective measures and that their right was infringed as a result of the decision to terminate the proceeding.

It should, however, be pointed out with regard to such measures, which are imposed in the interest of the Community (see Article 12 of the basic regulation), that the applicants can only claim a legitimate interest.

The declaration that the decision in question is void which the Court may possibly be prompted to adopt, far from requiring the institutions concerned to impose an anti-dumping duty, could only be confined to finding unlawful a decision terminating the proceeding and the institutions in question could perfectly well, with due regard for procedural rules, adopt a similar decision.

I am therefore of the opinion that the claim for damages cannot be upheld.

Conclusion

22. In the light of the foregoing considerations I propose that the Court should:

(a) declare void Decision 86/59/EEC and order the Council to pay the costs in Cases C-121/86 and C-129/86,

(b) dismiss the application as regards the claim for damages and order the applicants to pay the costs in Case C-122/86.