OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 2 October 2008 [1]

Table of contents

I — Introduction . . . . . I - 7057

II — Legal framework . . . . . I - 7057

III — Facts and procedure . . . . . I - 7061

A — Background to the case . . . . . I - 7061

B — Proceedings before the Court of First Instance and the judgment under appeal I - 7062

C — The proceedings before the Court of Justice and the forms of order sought by the parties . . . . . I - 7063

D — The partial repeal of the contested regulation with retroactive effect . . . . . I - 7063

IV — Introductory observations . . . . . I - 7064

A — Review of the contested regulation by the Court of First Instance . . . . . I - 7064

B — Review of the judgment under appeal by the Court of Justice . . . . . I - 7065

V — Admissibility of the appeal . . . . . I - 7066

A — Submissions of the parties . . . . . I - 7066

B — Legal analysis . . . . . I - 7066

VI — First ground of appeal . . . . . I - 7068

A — The judgment under appeal . . . . . I - 7068

B — Submissions of the parties . . . . . I - 7068

C — Legal assessment . . . . . I - 7070

D — Conclusion . . . . . I - 7073

1 — Original language: German.

VII — Second ground of appeal . . . . . I - 7073

A — First limb of the second ground of appeal . . . . . I - 7074

1. Judgment under appeal . . . . . I - 7074

2. Submissions of the parties . . . . . I - 7074

3. Legal assessment . . . . . I - 7077

4. Conclusion . . . . . I - 7079

B — Second limb of the second ground of appeal . . . . . I - 7080

1. Judgment under appeal . . . . . I - 7080

2. Submissions of the parties . . . . . I - 7080

3. Legal assessment . . . . . I - 7082

4. Conclusion . . . . . I - 7084

VIII — Third ground of appeal . . . . . I - 7084

A — Jugdment under appeal . . . . . I - 7084

B — Submissions of the parties . . . . . I - 7085

C — Legal assessment . . . . . I - 7086

1. Effects of the royalties on the causal connection . . . . . I - 7087

2. Assessment of injury . . . . . I - 7089

D — Conclusion . . . . . I - 7092

IX — Conclusion of the legal assessment . . . . . I - 7092

X — Costs . . . . . I - 7092

XI — Conclusion . . . . . I - 7093

I — Introduction

1. In this case the Court of Justice of the European Communities ('the Court of Justice') has to rule on an appeal that Moser Baer India Ltd, an Indian company, has lodged against the judgment of the Court of First Instance delivered on 4 October 2006 in Case T-300/03 *Moser Baer India* v *The Council of the European Communities* [2] ('the judgment under appeal').

2. The appellant and applicant at first instance ('the appellant') seeks to have set aside the judgment under appeal, by which the Court of First Instance dismissed its action for annulment of Council Regulation (EC) No 960/2003 of 2 June 2003 imposing a definitive countervailing duty on imports of recordable compact discs originating in India [3] ('the contested regulation').

II — Legal framework

3. The legal basis for the adoption of the contested regulation is Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community [4] ('the basic regulation'). [5]

4. Article 5 of the basic regulation provides:

'Calculation of the amount of the countervailable subsidy

The amount of countervailable subsidies, for the purposes of this Regulation, shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidisation …'

5. Article 7(3) of the basic regulation, which contains general provisions on the calculation of subsidies, provides:

'Where the subsidy can be linked to the acquisition or future acquisition of fixed

2 — Case T-300/03 *Moser Baer India* v *Council* [2006] ECR II-3911
3 — OJ 2003 L 138, p. 1.
4 — OJ 1997 L 288, p. 1.
5 — Countervailing duties on subsidised imports are imposed in the form of regulations. As the legal basis for the adoption of countervailing duties is also a regulation, the regulation that forms the legal basis and framework for the adoption of an anti-subsidisation regulation is referred to as 'the basic regulation'.

assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned.'

6. Article 8 of the basic regulation provides:

'Determination of injury

…

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

(a) the volume of the subsidised imports and the effect of the subsidised 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 subsidised imports, consideration shall be given to whether there has been a significant increase in subsidised imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the subsidised imports on prices, consideration shall be given to whether there has been significant price undercutting by the subsidised 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.

…

(5) The examination of the impact of the subsidised imports on the Community industry concerned shall include an evalu-

ation 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 subsidisation or dumping, the magnitude of the amount of countervailable subsidies, 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 and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

(6) It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the subsidised imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

(7) Known factors other than the subsidised imports which are injuring the Community industry at the same time shall also be examined to ensure that injury caused by these other factors is not attributed to the subsidised imports pursuant to paragraph 6. Factors which may be considered in this respect include the volume and prices of non-subsidised imports, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third-country and Community producers, developments in technology and the export performance and productivity of the Community industry.…'

7. Under the third sentence of Article 15(1) of the basic regulation, the amount of the countervailing duty may not exceed the amount of countervailable subsidies established, but should be less if such lesser duty were to be adequate to remove the injury to the Community industry.

8. Article 28 of the basic regulation provides:

'Non-cooperation

(1) In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the

time-limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

(4) If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time-limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.

Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available.

Interested parties should be made aware of the consequences of non-cooperation.

(5) If determinations, including those regarding the amount of countervailable subsidies, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time-limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.

…

(3) Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

(6) If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.'

III — Facts and procedure

A — *Background to the case*

9. The appellant is a company with its registered office in India, which manufactures various kinds of media storage devices and particularly recordable compact discs ('CD-Rs').

10. On 17 May 2002, the Commission initiated an investigation into imports of CD-Rs originating in India following a complaint lodged by the Committee of European CD-R Manufacturers ('CECMA'). [6] As a result of the proposal decided on by the Commission on 20 May 2003, the Council adopted the contested regulation. In the contested regulation it set a definitive countervailing duty of 7.3% on imports of CD-Rs originating in India.

11. In the contested regulation the Council established that the appellant was receiving subsidies in the form of an exemption from import duties on certain capital goods ('subsidised assets'). [7]

12. When calculating the benefit the Council took a depreciation period of six years as its starting point. [8] It gave as the reason for this the fact that the subsidised assets were moulds for the manufacture of CD-Rs rather than machines for their production. The appellant's claim that the assets should be classified as machines in accordance with its accounting documents, with the result that a depreciation period of 13 years should be taken as the starting point, was rejected by the Council on the grounds that the appellant had given conflicting details of the depreciation of the assets in question in its accounts and its tax returns. [9]

13. When establishing the injury to the Community industry the Council based its argument, in particular, on the fact that between 2000 and the investigation period (1 April 2001 to 31 March 2002) imports of CD-Rs from India to the Community had risen whilst sales prices for CD-Rs in the Community had declined over the same period by 59%, and that those imports had thus undercut the Community industry's loss-making sales prices by an average of 17.7% during the investigation period. The Council compared data compiled on the basis of Eurostat data with data produced by the

6 — OJ 2002 C 116, p. 4.

7 — Recitals 38 to 47 in the preamble to the contested regulation.

8 — The Council, however, reduced this to 4.2 years; see recitals 43 to 45 in the preamble to the contested regulation.

9 — See recitals 39 to 41 in the preamble to the contested regulation.

appellant and concluded that they led to similar results. [10] The Council established a negative trend in stock levels over the period considered (1 January 1998 up to the end of the investigation period). [11]

14. When determining the causation of injury the Council considered, inter alia, the appellant's argument that a patent owner had charged excessive anti-competitive royalties to the manufacturers of CD-Rs. However, the Council ruled out any effect on injury, in particular, because both the appellant and the Community industry producers had been obliged to pay those royalties even before the injury that it established had occurred. The injury established could not therefore have been caused by the payment of royalties. [12]

B — *Proceedings before the Court of First Instance and the judgment under appeal*

15. The appellant brought an action against the contested regulation. The Commission and the CECMA were granted leave to intervene in support of the form of order sought by the Council.

16. In its action the appellant particularly raised objection to: [13]

— classification of the subsidised assets as moulds and all of the subsidised assets being classified as moulds (second part of the second plea in the action);

— error in assessment of the facts on which the determination of injury to the Community industry was based, particularly in relation to price trends and stock levels (third plea in the action);

— infringement of Article 8(6) and (7) of the basic regulation as regards analysis of the impact of alleged anti-competitive royalties charged by a holder of CD-R patents (fifth plea in the action).

17. In the judgment under appeal the Court of First Instance dismissed the whole of the action brought by the present appellant against the contested regulation and ordered

10 — See recitals 58 to 64 in the preamble to the contested regulation.

11 — See, with regard to stocks, recitals 80 to 89 in the preamble to the contested regulation.

12 — See recitals 134 and 135 in the preamble to the contested regulation.

13 — Only the grounds of the action relevant to the appeal proceedings are stated here.

that it should bear its own costs and pay those incurred by the present respondent.

C — *The proceedings before the Court of Justice and the forms of order sought by the parties*

18. By application of 22 December 2006, lodged at the Registry of the Court of Justice on 28 December 2006, the appellant brought the present appeal. It claims that the Court should:

— set aside the judgment under appeal;

— grant the form of order sought by the appellant at first instance and, in particular, set aside the contested regulation in so far as it is directed against the appellant;

— order the Council to pay the costs of the proceedings at first instance and on the appeal.

19. The Council and the Commission claim that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs of the proceedings at both instances.

20. The appellant, the Council and the Commission submitted observations during the written procedure. The appellant, the Council and the Commission attended the hearing on 10 July 2008.

D — *The partial repeal of the contested regulation with retroactive effect*

21. The contested regulation was repealed by Council Regulation (EC) No 1293/2007 of 30 October 2007 repealing the anti-dumping duties imposed by Regulation (EC) No 1050/2002 on imports of recordable compact disks originating in Taiwan and allowing for their repayment or remission and repealing the countervailing duties imposed by Regulation (EC) No 960/2003 on imports of recordable compact disks originating in India, allowing for their repayment

or remission and terminating the proceeding in their respect [14] ('the repealing regulation') with effect from 5 November 2006. However, the application of the contested regulation from the date on which it came into force until that date is not affected by the repealing regulation.

IV — Introductory observations

22. Countervailing duties on subsidised imports under the basic regulation were imposed by the contested regulation. Before examining the admissibility and merits of the individual grounds of appeal I should like, first, to consider briefly the role of the Court of First Instance in the context of an action for annulment of such a regulation (A) and, second, to set out briefly the extent to which a judgment handed down by the Court of First Instance can be reviewed by the Court of Justice on appeal (B).

A — *Review of the contested regulation by the Court of First Instance*

23. The contested regulation imposes a measure to protect trade against subsidised imports. Since the determination, assessment and evaluation of commercial data required for the adoption of measures to protect trade are complex tasks, the Court has consistently held that the Community institutions enjoy a broad discretion in this field. [15] It is therefore for the interested parties to plead the facts favourable to them during the course of the administrative procedure. [16]

24. A regulation by which countervailing duties are imposed on subsidised imports can indeed be reviewed by the Court of First Instance in an action for annulment under Article 230 EC. However, it should be noted in this context that the discretion afforded to the Community institutions under the basic regulation is subject only to limited judicial review. [17] Judicial review by the Court of First Instance in this field is confined to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested regulation was based have been accurately stated, whether there has

14 — OJ 2007 L 288, p. 17.

15 — Case C-398/05 *AGST Draht- und Biegetechnik* [2008] ECR I-1057, paragraph 33, and Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40. In some instances the case-law and literature cited in this and following footnotes relate not only to subsidy cases but also to dumping cases. However, this case-law and literature can also apply, *mutatis mutandis*, to subsidies. No further reference will be made below to the *mutatis mutandis* application of such substantiating documents.

16 — See Article 28 of the basic regulation.

17 — Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51; Case T-155/94 *Climax Paper* v *Council* [1996] ECR II-873, paragraph 98; Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, paragraph 64; *AGST Draht-und Biegetechnik*, cited in footnote 15, paragraph 34; and *Ikea Wholesale*, cited in footnote 15, paragraph 41; Müller, W., Khan, N., Neumann, H.-A., *EC Anti-Dumping Law*, John Wiley & Sons, 1998, paragraph 26.2; Düker, K., *Rechtsschutz gegen Antidumpingmaßnahmen der Europäischen Gemeinschaft*, Tectum, 2007, p. 193.

been a manifest error of assessment of those facts and that there has been no misuse of powers. [18] As it is incumbent upon the interested parties to present the facts favourable to them at the time of the administrative procedure, judicial review by the Court of First Instance extends only to facts that were known to, or should have been solicited by, the Community institutions when the contested act was adopted. [19]

25. It should also be noted that it is not the function of the Court of First Instance to restart the administrative procedure. If an applicant should be of the opinion that the Community institutions have inaccurately stated the facts, the burden of proof in that regard will lie with the applicant. The applicant must therefore be able to substantiate its doubts as to the accuracy of the facts on which the Community institutions based their action. The mere contesting of the facts does not suffice for this purpose. [20]

B — *Review of the judgment under appeal by the Court of Justice*

26. It is a review of a contested judgment delivered by the Court of First Instance as to errors of law that forms the basis of an appeal to the Court of Justice. [21] An appeal cannot therefore directly address errors in the regulation contested before the Court of First Instance. It therefore follows that, in principle, an appeal will be inadmissible if it repeats the complaints lodged in the proceedings before the Court of First Instance without going into the judgment of that Court. [22] The appeal pleading must state clearly the element of the judgment of the Court of First Instance with which issue is taken and the legal arguments on which the appeal is based. [23]

27. As appeals are limited to errors of law, a reassessment of the facts is not permitted. [24] As far as the facts established by the Court of First Instance are concerned, the only ground on which an appeal may lie is therefore that the findings were not properly arrived at under procedural law. Where the Court of First Instance's appraisal of the evidence is to be called into question, the appellant must claim that, in its appraisal of the evidence, the Court of First Instance distorted the clear sense of that evidence. [25]

18 — Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraphs 48 and 49; *AGST Draht- und Biegetechnik*, cited in footnote 15, paragraph 34; and *Ikea Wholesale*, cited in footnote 15, paragraph 41; Müller, W., Khan, N., Neumann, H.-A., cited in footnote 17, paragraph 26.2.

19 — Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 21 et seq.; Düker, K., cited in footnote 17, p. 197.

20 — Düker, K., cited in footnote 17, p. 196 et seq.

21 — Article 225 EC and Article 58(1) of the Statute of the Court of Justice.

22 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 51; Case C-352/98 P *Bergaderm und Goupil* v *Commission* [2000] ECR I-5291, paragraph 35; Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751, paragraph 38. For further references see Lenaerts, K., Arts, D., *Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, 2008, paragraphs 7-107 and 16-016.

23 — Article 225 EC and Article 112(1)(c) of the Rules of Procedure of the Court of Justice; see also, inter alia, *Bergadem and Goupil* v *Commission,* cited in footnote 22, paragraph 34, and Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 69.

24 — Order in Case C-115/90 P *Turner* v *Commission* [1991] ECR I-1423, paragraphs 13 to 14; Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraphs 11 to 13; and Case C-1/98 P *British Steel* v *Commission* [2000] ECR I-10349, paragraph 53. Lenaerts, K., Arts, D., cited in footnote 22, paragraph 16-016.

25 — Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541, paragraph 45, and Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 43. Rengeling, H.-W., Middecke, A., Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, 2nd edition, C. H. Beck, 2003, § 28, paragraph 28.

28. Finally, judicial review by the Court of Justice extends in principle only to submissions already put forward in the proceedings before the Court of First Instance. Submissions which could have been pleaded in the proceedings before the latter Court but were not pleaded may not be raised in an appeal. [26]

V — Admissibility of the appeal

29. The Council considers that the whole appeal is inadmissible for lack of legal interest. I shall examine this argument later on. I shall consider the other objections raised as to the admissibility of individual grounds of appeal and individual objections in the context of my legal appraisal of the individual grounds of appeal and objections.

A — *Submissions of the parties*

30. The *Council* takes the view that the appeal is inadmissible because the contested regulation was repealed by the repealing regulation. It argues that an action for annulment is admissible only where a person has a legal interest in having a legal instrument set aside. Whilst the appellant originally had an interest in having the contested regulation set aside because its imports were subject to the countervailing duties, that interest ceased when the contested regulation was repealed.

31. It argues that the appellant could demand reimbursement of duties only if it had itself paid the countervailing duties. The appeal was inadmissible unless the appellant could prove that it had paid the duties itself.

32. The *appellant* submits here that it did pay the duties itself.

B — *Legal analysis*

33. It should be stated, firstly, that the Council could not have raised the admissibility objections in the Court of First Instance proceedings because the repealing regulation was not adopted until after the judgment under appeal had been delivered. [27]

26 — Case C-18/91 P *V* v *Parliament* [1992] ECR I-3997, paragraph 21, and *British Steel* v *Commission,* cited in footnote 24, paragraph 47; Rengeling, H.-W., Middecke, A., Gellermann, M., cited in footnote 25, § 28, paragraph 23; Lenaerts, K., Arts, D., cited in footnote 22, paragraph 16-018.

27 — The judgment under appeal was delivered on 4 October 2006. The repealing regulation was adopted on 30 October 2007.

34. It should be pointed out, in that regard, that an appeal may become inadmissible where an event subsequent to the judgment under appeal removes the prejudicial effect thereof for the prospective appellant. The fact that the appellant has an interest in bringing the proceedings presupposes that the appeal is likely, if successful, to procure an advantage to the party bringing it. [28]

35. The fact that the regulation contested before the Court of First Instance will no longer be of any consequence in the future does not in itself mean that the legal interest ceases. [29]

36. The appellant might indeed continue to have an interest in the setting aside of the judgment under appeal and (indirectly) of the contested regulation. The Court of Justice, in *AKZO Chemie* v *Commission,* [30] thus considered it sufficient for the Community institutions concerned to refrain from repeating the practice complained of in the future. [31] In my opinion, this must apply in particular in a case such as the present, in which the Council decides to repeal the contested regulation. [32]

37. It should also be noted that the repealing regulation did not set aside the contested regulation in its entirety; the contested regulation continued to apply to countervailing duties levied up to 4 November 2006. It constitutes justification for the countervailing duties levied up to that date. The contested regulation therefore continues to have legal consequences. The possibility that a challenge to the contested regulation might procure advantages for the appellant, even if it did not itself pay the countervailing duties, would not seem to be precluded.

38. Furthermore, the appellant stated in the oral procedure that it had paid the countervailing duties itself, and the Council did not dispute that assertion.

39. In these circumstances the Court of Justice cannot, in my opinion, reach the conclusion advocated by the Council, namely that the appellant does not have any legal interest in bringing the present appeal.

28 — See orders in Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 18, and in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 47; Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13.

29 — The Court of Justice thus ruled in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, at paragraph 21, that the legal interest in bringing an annulment action does not lapse merely because the legal instrument concerned has already been implemented.

30 — Cited in footnote 29, paragraph 21.

31 — What is more, a finding of unlawful practice on the part of Community institutions can also play a role in a possible claim in damages against the Community institutions. In this connection, the five-year limitation period under Article 46 of the Statute of the Court of Justice, in particular, should be taken into account.

32 — The Council would otherwise be able to render an appeal inadmissible by repealing the contested regulation.

VI — First ground of appeal

40. In its first ground of appeal the appellant submits that the Court of First Instance infringed the principles of coherence and diligent investigation in paragraphs 73 to 79 of the judgment under appeal.

A — *The judgment under appeal*

41. In paragraphs 57 to 80 the Court of First Instance addressed the first and second complaints in the second part of the first plea in law.

42. In the proceedings at first instance the appellant's first complaint related *in principle* to the classification of the subsidised assets by the Community institutions concerned as moulds for the production of CD-Rs rather than as machines for their production. The Court of First Instance dismissed that complaint. On appeal the appellant is no longer objecting to the classification in principle of the subsidised assets as moulds.

43. In its second complaint the appellant had criticised the Council for classifying *all* of the subsidised assets as moulds rather than merely a proportion of them. The Court of First Instance also dismissed that complaint. In paragraphs 73 to 79 of the judgment under appeal the Court of First Instance found, first, that the value of the subsidised assets shown in the appellant's tax return did not correspond to the value used to calculate the subsidy. The appellant did, admittedly, plead that only a proportion of the subsidised assets had been reclassified as moulds. However, as the appellant had not explained the classification criteria and had not provided a complete and verifiable list of those assets, the Community institutions had not been able to verify the figures submitted by the appellant. The appellant had not therefore put forward any evidence to enable the Community institutions to verify the accuracy of its contention and, if necessary, to take account of the proportion of the assets in question which had not been classified as moulds.

B — *Submissions of the parties*

44. The appellant alleges that the Court of First Instance did not fulfil its obligation to establish the facts diligently and without bias. This obligation includes examining the information provided by the parties concerned for accuracy.

45. It argues that the Council knew, or could have known, that the reclassification as moulds affected only a proportion of the subsidised assets. It should therefore have applied the depreciation period for moulds

only to that proportion of subsidised assets. The Court of First Instance took no account of the appellant's evidence that it had not classified at least 23% of the subsidised assets as moulds.

46. The Council's conduct, it continues, was contradictory. On the one hand, as far as reclassification of the subsidised assets was concerned, it principally relied on the details in the appellant's tax return. On the other hand, it disregarded the details in the tax return where these showed that only a proportion of the subsidised assets had been reclassified as moulds.

47. In its concluding appraisal in paragraph 79 of the judgment under appeal the Court of First Instance referred only to the assets in question, which had been classified as moulds for taxation purposes. It did not therefore provide any grounds for classifying *all* subsidised assets as moulds. What is more, the Court of First Instance failed to cite any rules which would have justified the Community institutions in classifying all subsidised assets as moulds.

48. The Court of First Instance failed to take account of the fact that the Council had failed to comply with Article 28 of the basic regulation. The Council, the appellant continues, should have taken that provision as its basis for disregarding the information provided by the appellant. Even if the Council had relied on Article 28 of the basic regulation, it could not have made any determination that manifestly conflicted with the information provided by the appellant.

49. The *Council* considers the appellant's complaint to be inadmissible on the ground that the appellant is making new submissions. Infringement of the principles of coherence and diligent investigation was, it claims, not a plea raised by the appellant in the proceedings at first instance.

50. The Council also refers to the determination by the Court of First Instance in paragraph 78 of the judgment under appeal. The appellant did, admittedly, plead during the administrative procedure that only a proportion of the subsidised assets had been reclassified as moulds. It is, in the view of the Council, apparent from paragraph 78 of the judgment under appeal, however, that the appellant did not put forward any evidence to enable the Council to verify the accuracy of its contention.

51. It was on that finding of fact that the Court of First Instance based its legal assessment that the appellant could not call into question the corresponding determination in the contested regulation. The appellant has not pleaded the extent to which the Court of First Instance distorted the evidence when determining that fact. The complaint is therefore, it argues, directed at an appraisal of facts in respect of which there is no right of appeal.

52. The Court of First Instance's conclusion in paragraph 79 was merely a concluding determination on the second part of the first plea, that is to say, on the first and second complaints. It could not be concluded from this that the Court of First Instance found that the reclassification did not affect all of the subsidised assets.

53. What is more, the Council continues, the Community institutions concerned had not in fact been in possession of the necessary information.

54. In the alternative, it should be noted that a possible error on the part of the Council cannot lead to the contested regulation being repealed in its entirety but simply to a partial repeal in the form of an adjustment in the amount of the countervailing duty.

55. The *Commission* points out that the first ground of appeal is based on an inadmissible assessment of fact. The Court of First Instance based its legal reasoning on the finding of fact that the Council had been unable to ascertain which assets had been reclassified as moulds from the evidence provided to it by the appellant. The appellant has not indicated to what extent the Court of First Instance distorted the evidence when arriving at that determination of the facts.

56. The Commission claims that the appeal is also unfounded. The appellant had been afforded adequate opportunity to produce the necessary evidence during the course of the administration procedure but had not done so.

C — *Legal assessment*

57. The Council considers this ground of appeal to be *inadmissible* on the ground that the appellant did not bring its complaint of infringement of the duty to establish the facts diligently and without bias before the Court of First Instance and because, in making that complaint, the appellant is taking issue with errors in the contested regulation and not with errors in the judgment under appeal.

58. However, it is apparent from the appellant's submission that, in alleging infringement of the principle that the facts must be established diligently and without bias, it is, at least in part, substantially alleging that the Court of First Instance erred in law when reviewing the Council regulation by allowing the Council too broad a discretion.

59. The ground of appeal cannot therefore be rejected *ab initio* as being inadmissible.

60. The appellant is complaining in substance, *firstly,* that the Court of First Instance took no account of the fact that it had tendered evidence to show that the Community institutions concerned had been aware, or should have been aware, that only a proportion of the subsidised assets had been reclassified.

61. This, it contends, is inconsistent with the Court of First Instance's finding in paragraph 78 of the judgment under appeal. The Court of First Instance stated there that the appellant had not put forward that evidence. In its submission the appellant is therefore seeking a new assessment of the facts, which is inadmissible on appeal. As already stated, [33] it is permissible to complain on appeal that the Court of First Instance distorted the clear sense of the evidence. The appellant, however, is not making any such submission. This complaint must therefore be rejected as being inadmissible.

62. Consequently, the appellant's complaints based on its assertion that it had produced such evidence must also be rejected as being inadmissible.

63. *Secondly,* the appellant alleges that the Court of First Instance did not establish any rule by which the Community institutions concerned were entitled to take all subsidised assets into account.

64. As already mentioned, [34] the investigation and assessment of a subsidy is a complex task in which the Community institutions enjoy a broad discretion. It is not for the Court of First Instance, in the context of an action for annulment, to exercise that discretion in the Community institutions' place. Although it is for the Court of First Instance to review the exercise of discretion on the part of the Community institutions, it must not substitute the exercise of its powers for the Community institutions' exercise of powers. In this respect the Court of First Instance cannot be criticised for not having itself established criteria for determining the facts.

65. In so far as the appellant's complaint is to be understood as meaning that the Court of First Instance was wrong not to take issue with a manifestly erroneous assessment of the facts by the Council, the appellant should state to what extent the Court of First Instance erred in law. To the extent to which the error complained of consists of the Court of First Instance's failing to take into account the fact that the Council's conduct when appraising the content of its tax return and its accounts was inconsistent, this complaint must fail. As already mentioned, [35] the Court of First Instance found that it could not be concluded from the appellant's tax return that only a proportion of the subsidised assets had been

33 — Point 27 of this Opinion.

34 — Point 23 of this Opinion.

35 — Points 60 to 62 of this Opinion.

reclassified and that the appellant had not put forward any evidence to support its assertion that reclassification had affected only a proportion of the subsidised assets. [36]

66. This complaint must therefore also be dismissed.

67. *Thirdly,* the appellant claims that the Council ought to have invoked Article 28 of the basic regulation.

68. In that regard, it should be noted at the outset that, in the proceedings before the Court of First Instance, the appellant had complained of an infringement of Article 28 of the basic regulation only with regard to failure to take account of the details in its accounts. [37] The appellant had complained in that context that the evidence from its accounts had been disregarded in that the conclusion could have been drawn from them that the subsidised assets had been classified as machines rather than moulds. The appellant is now complaining in the appeal proceedings that Article 28 of the basic regulation has been infringed on the ground that, because of the finding that not all subsidised assets had been reclassified as moulds, the evidence from its tax return had not been adequately taken into account. In my view, this is to be regarded as a new submission, [38] which is inadmissible in the appeal proceedings.

69. Furthermore, there were grounds under Article 28 of the basic regulation for disregarding the appellant's assertion here. The appellant did not complain in the Court of First Instance proceedings that the Community institutions had failed to indicate to it that its submission was not sufficiently substantiated, or that it had not had an opportunity to provide further explanation.

70. It therefore appears to be complaining principally that the Council did not expressly invoke Article 28 of the basic regulation and that the grounds for dismissing its submission were not stated in the Council's published findings. In my view, this constitutes an objection to an irregularity of form. Irregularities of form, however, can invalidate a legal instrument only if the infringement is substantial. The Court has consistently held that there is no substantial infringement of an essential procedural requirement if the objective pursued by the procedural requirement has been achieved despite failure to comply with that requirement. [39]

36 — It should be pointed out in this context that, unlike the position in competition proceedings, for example, the Community institutions concerned do not have any powers under the basic regulation to compel the undertakings affected to participate. It is therefore for the parties to plead and substantiate evidence favourable to them; see Article 28 of the basic regulation.

37 — See paragraph 53 of the appellant's application.

38 — See point 28 of this Opinion.

39 — Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, paragraph 22, and Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359, paragraph 19.

71. The purpose of stating the grounds for rejecting a submission by an interested party under Article 28(4) of the basic regulation is primarily to inform that interested party that insufficiently substantiated submissions can be rejected and to give it an opportunity to supplement its submissions. As stated above,[40] the appellant does not deny that this purpose was achieved. No material irregularity of form can therefore be assumed.

72. This complaint must therefore also be rejected.

73. *Fourthly*, the appellant is complaining that the Court of First Instance, in paragraph 79 of the judgment under appeal, failed to have regard to all of the subsidised assets, but solely to the assets in question, which were indicated as being moulds for tax purposes. The thrust of its complaint thus appears to be that the reasoning of the Court of First Instance was incomplete inasmuch as that reasoning covered only a proportion of the subsidised assets.

74. This complaint must also be rejected. In paragraph 78 of the judgment under appeal, the Court of First Instance found that the Council had not made a manifest error of assessment of the facts in classifying all of the subsidised assets as moulds. In the light of this, the wording of the Court of First Instance judgment cannot be construed as meaning that in paragraph 78 of the judgment under appeal it was intending to refer to only a proportion of the subsidised assets.

D — *Conclusion*

75. The first ground of appeal must therefore be dismissed in its entirety.

VII — Second ground of appeal

76. The second ground of appeal consists of two limbs: in the first limb the appellant accuses the Court of First Instance of failing to appraise correctly the conflicting evidence in the file and in the contested regulation regarding a key element in the determination of injury, namely the price trend in Indian CD-R imports, and of therefore having wrongly upheld the Council's findings in the contested regulation (A). In the second limb of the second ground of appeal, the appellant complains that the Court of First Instance upheld the findings arrived at by the Council in the contested regulation relating to stock levels in the Community CD-R industry (B).

40 — See point 69 of this Opinion.

A — *First limb of the second ground of appeal*

1. Judgment under appeal

77. Before the Court of First Instance the appellant had complained of the finding by the Council that prices of CD-Rs in the Community had dropped. It claimed that the Council had based its finding on data that were neither relevant nor reliable.

78. The Court of First Instance rejected that complaint. In paragraphs 201 to 206 of the judgment under appeal it initially observed that the Community institutions had analysed the price trends in recitals 58 to 64 in the preamble to the contested regulation on the basis of both Eurostat data and data produced by the appellant. It found that the Community institutions had established from the Eurostat data that there had been a significant price fall — 59% — between 1 January 2000 and the end of the investigation period. On the basis of the data provided by the appellant, there had been a price fall of 54% between 1 April 1999 and the end of the investigation period. The results were comparable despite the differing commencement dates for the data records. The appellant, the Court of First Instance concluded, had not shown that the taking into account of a different starting date for the data produced by it could have led to different conclusions.

2. Submissions of the parties

79. The *appellant* alleges that the Court of First Instance erred in its review as to whether the Community institutions had correctly established the facts. It argues that the Court of First Instance upheld the Community institutions' finding even though the Community institutions had made the following errors when establishing the facts.

80. *Firstly*, the formula that was used to determine the quantity of CD-Rs imported from India was unreliable for small quantities.

81. Basic Eurostat data were taken first of all, derived from a category in the Combined Customs Nomenclature ('the CCN'), which included a large number of similar products in addition to CD-Rs. To those basic data the Council then applied a formula that had been developed by the Community industry. The Council based its regulation on the data obtained in this way ('the processed Eurostat data'). The Court of First Instance (the appellant continues) assumed that the processed Eurostat data were data from Eurostat. It therefore fundamentally misconstrued the source and nature of the data on which the Council had based its regulation.

82. Furthermore, the appellant had raised objections to the use of the formula developed by the Community industry on several occasions during the course of the administrative procedure.

83. Finally, the appellant was the only Indian exporter of CD-Rs to the Community. Hence, its information constituted the only reasonable and reliable data. Its information alone ought therefore to have been used to determine the volume and value of imports.

84. *Secondly,* the appellant criticises the Court of First Instance finding that the processed Eurostat data and the data produced by it (the appellant) had led to very similar results. That finding amounts to a manifestly erroneous appraisal of the facts. It is not supported by the findings of fact in the contested regulation.

85. First, the data produced by it would not lead to comparable results if they were to be considered per calendar year rather than per financial year. If 1999 were to be chosen as the base year, the price would be seen to fall in 2000 by 62%. If 2000 were to be chosen as the base year, the price would be seen to rise consistently up to the end of the investigation period.

86. What is more, if the base year taken for the purposes of determining the price trend were to be any year other than 2000, the result would be quite different. If 1998 were to be taken as the base year, prices in the period between 1998 and the investigation period would be seen to rise by 165%.

87. *Thirdly,* the Court of First Instance finding in paragraph 205 of the judgment under appeal is wrong. According to that paragraph, the appellant had not shown that the taking into account of another starting date for the data produced by it could have resulted in different conclusions regarding import prices. That finding by the Court of First Instance is incompatible with the appellant's submission in the proceedings before that Court. In paragraph 101 of its application it had stated both expressly and implicitly that, if a different starting date had been taken for the data provided by it, this would have led to a different conclusion with regard to the prices of imports from India.

88. The *Council* considers the first limb of the second ground of appeal to be inadmissible. Only errors of law, it argues, may be challenged on appeal. The appellant has not stated in its submissions what errors of law were made by the Court of First Instance. The Court of First Instance itself did not establish that there was any injury; it merely examined whether the Community institutions had established the facts correctly. The appellant should therefore have proved that the Court of

First Instance erred in law in finding that the appellant had adduced insufficient evidence. However, the appellant has not done so, confining itself to criticising the Court of First Instance's findings of fact.

89. The complaints, the Council submits, are also unfounded.

90. *Firstly,* the data used by the Community institutions were sufficiently reliable.

91. First, the appellant's submission that the formula had been worked out by the Community industry is an inadmissible new submission because it was not put forward in the proceedings before the Court of First Instance. Nor has the appellant submitted or proved that the basic Eurostat data or the formula developed by the Community industry were unreliable. Furthermore, the Court of First Instance correctly found that these led to results comparable to those from the data produced by the appellant.

92. Furthermore, although the Community institutions had been in a position to establish that the appellant had been the only Indian exporter, they could not have excluded the possibility of other unknown Indian producers manufacturing CD-Rs and exporting them to the Community during the investigation period.

93. *Secondly,* the Court of First Instance did not make any error in establishing the comparability of both sets of data.

94. First, both the Eurostat data and the data produced by the appellant show that the price level of CD-Rs did not fall in a straight line in the period between the year 2000 and the end of the investigation period. Rather, the figures show that there was a slight increase in the period from 2001 up to the investigation period. The appellant, the Council argues, is attempting to shorten the period taken into account so as to give the impression that prices rose during the period which, in its view, ought to have been taken into account.

95. Furthermore, both sets of data show that, even though they do not cover precisely the same period, the price level fell by more than 50% between 2000 and the end of the investigation period. The volume of imports rose significantly during that same period.

96. Finally, the Council claims, the appellant's suggestion that the Community institutions ought to have taken 1998 as the base year is misleading. The Council formed the view that the data during that period were not representative because the appellant had exported only small quantities during that period, with the result that it did not take that year for the purposes of assessing injury. According to both sets of data, imports from 2000 onwards grew significantly in market share and volume starting from a minimal level. For that reason it was reasonable for the Community institutions to have taken 2000 as the base year.

97. *Thirdly,* the Council points out that the appellant's statements in paragraph 101 of its application did not relate to the analysis of the appellant's data but to the analysis of the processed Eurostat data. The Court of First Instance was therefore correct in concluding that the appellant had not pleaded in the proceedings before it that the taking into account of a different starting date would have led to different results.

98. The *Commission* takes the view that the appellant is primarily attempting to call findings of fact into question but has not shown to what extent the Court of First Instance distorted the clear sense of the evidence.

3. Legal assessment

99. *Firstly,* the appellant criticises the unreliability of the processed Eurostat data.

100. Although the appellant pleads in this context that the Court of First Instance fundamentally misconstrued the nature and source of the data on which the Council had based its decision on injury, it does not explain the basis of that assertion. Although the appellant bases the Court of First Instance's alleged misunderstanding on the mention of 'Eurostat data' made by the Court of First Instance in paragraph 202 of the judgment under appeal, for example, it is still impossible to construe any misunderstanding of the nature and source of the data from that wording. It is much more likely that the Court of First Instance simply intended to draw a distinction in that paragraph between the processed Eurostat data and the data produced by the appellant. It should be pointed out in this connection that the term 'Eurostat figures' [41] [42] was also used in the contested regulation to mean not the basic Eurostat data but the processed Eurostat data.

101. Even if that wording were to be construed not merely as 'linguistic shorthand' but as a misunderstanding by the Court of

41 — See recital 55 in the preamble to the contested regulation.

42 — See recital 60 in the preamble to the contested regulation [Unlike the German version, the English version of recitals 55 and 60 uses the same expression].

First Instance as to the nature and source of the data, it is not apparent to what extent that error might have affected the Court of First Instance's appraisal. The Court of First Instance essentially based its reasoning in paragraph 204 of the judgment under appeal on the fact that the appellant had not substantively demonstrated the extent to which the data ought to be regarded as unreliable. [43]

102. The appellant also complains that the formula used was unreliable. This constitutes, firstly, an appraisal of fact that is inadmissible on appeal [44] and, secondly, an inadmissible repetition of the submission that the appellant has already put forward in the proceedings before the Court of First Instance. [45] It should also be pointed out that, as the Court of First Instance found in paragraphs 202 and 171 of the judgment under appeal, the appellant did not adduce any evidence in the proceedings before that Court to show that the formula was unreliable. The Court of First Instance cannot therefore be accused of having failed to criticise the Council's use of the formula. [46]

103. In so far as the appellant complains that it was the only Indian exporter of CD-Rs to the Community and that therefore only its data should have been taken into account for the purpose of establishing the volume and value of imports, that complaint is inadmissible simply because the appellant is merely repeating its submission from the proceedings before the Court of First Instance without taking issue with the Court of First Instance's reasoning on this point in paragraphs 167 to 169 of the judgment under appeal. [47] Furthermore, the Court of First Instance correctly stated in paragraphs 167 to 169 of the judgment under appeal that the existence of injury must be assessed as a whole and it is not necessary to define separately the effect of the imports carried out by each of the companies responsible. [48] Nor can any criticism be levelled at its finding that no manifest error of assessment of the facts can be imputed to the Council where it bases its findings on the information reasonably available to it. [49]

104. This complaint must therefore be rejected.

105. *Secondly,* the appellant complains that the Court of First Instance should not have confirmed that the two sets of data were comparable. That finding, it submits, is not

43 — As stated above in point 25 of this Opinion, in the absence of a substantiated submission by the appellant in the proceedings before the Court of First Instance, the Court of First Instance cannot be blamed for failing to criticise the Council's finding.

44 — See point 27 of this Opinion.

45 — See point 26 of this Opinion.

46 — See point 25 of this Opinion.

47 — See point 26 of this Opinion.

48 — See, in particular, Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3363, paragraph 163; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 46; and Case T-171/97 *Swedish Match Philippines* v *Council* [1999] ECR II-3241, paragraph 66.

49 — It should again be mentioned in this context that the ascertainment of economic data in the context of measures to protect trade is a complex task and the Community institutions enjoy a broad discretion in this area which is subject only to a reduced level of judicial review; see point 23 et seq. of this Opinion. What is more, official import statistics are expressly mentioned as a possible source of information in Article 28(5) of the basic regulation. See also *Shanghai Teraoka Electronic* v *Council*, cited in footnote 48, paragraph 230, according to which the Community institutions do not commit a manifest error of assessment where they base their findings on the information reasonably available to them.

supported by the findings of fact in the contested regulation.

106. It must first be stated in relation to this head of criticism that the Court of First Instance's conclusion was certainly based on the Council's findings in recitals 58 to 64 in the preamble to the contested regulation. However, the appellant's criticism must be that the Court of First Instance should not have upheld the Council's findings and should not therefore have concluded that both sets of data were comparable on the basis of the Council's findings. In this respect the appellant is alleging errors in the assessment of the data which it has produced.

107. It must be held with regard to this head of criticism, however, that in the proceedings before the Court of First Instance the appellant did not substantiate its criticism that the data produced by it had been inaccurately presented. As already mentioned, [50] failure to take such a submission into account cannot therefore be imputed to the Court of First Instance. What is more, this submission also constitutes a new submission of fact, which is inadmissible on appeal. [51]

108. *Thirdly,* the appellant alleges that the finding by the Court of First Instance in paragraph 205 of the judgment under appeal is inaccurate. The Court of First Instance there found that the appellant had not shown to what extent the taking into account of a different starting date for the data produced by it could have resulted in different conclusions regarding import prices.

109. The appellant is relying upon the fact that it complained of this in paragraph 101 of its application. However, the Council rightly points out that the appellant stated in paragraph 101 of its application merely that the level of prices in the processed Eurostat data for the years 1998 and from 1999 to 2001 was irrelevant. No reference to the data produced by the appellant is apparent there.

110. This complaint must therefore also be rejected as the appellant did not put forward this criticism in the proceedings before the Court of First Instance.

4. Conclusion

111. In conclusion, therefore, the first limb of the second ground of appeal must be dismissed in its entirety.

50 — Point 28 of this Opinion.
51 — See point 27 of this Opinion.

B — *Second limb of the second ground of appeal*

1. Judgment under appeal

112. The second limb of the second ground of appeal takes issue with paragraphs 193 to 196 of the judgment under appeal. In those paragraphs the Court of First Instance dismissed the appellant's allegation that the Council's assessment of stock levels was incorrect.

113. The Court of First Instance stated that the period considered ran from 1998 to 31 March 2002 and that during the whole of that period the stocks of the Community industry increased significantly. It found that the appellant had not shown that the improvement in stocks from 2000 was such as to reverse the negative trend over the period considered. The Court of First Instance based its decision in this connection on the fact that 'stocks remained at high levels through the whole of the period considered, increasing in absolute terms towards the end of 2001, which therefore coincided with the increase in the volume of imports, and representing, in relative terms, a high level of production — 15% — during the investigation period'. [52]

52 — See paragraph 195 of the judgment under appeal.

2. Submissions of the parties

114. The *appellant* complains that the Court of First Instance erred in confirming the Council's finding in recital 103 in the preamble to the contested regulation that stock levels had worsened dramatically.

115. *Firstly,* it argues that the Court of First Instance found that stock levels had increased in absolute terms towards the end of 2001. The Court of First Instance had not taken into consideration the fact that Community industry production had also increased sharply and had therefore failed to consider the increase in stock levels in absolute terms relative to the absolute increase in production.

116. *Secondly,* the Court of First Instance's finding that stock levels during the investigation period represented, in relative terms, a high level of production of 15% is not supported by the contested regulation.

117. To determine injury it is necessary to have regard to the trend in a particular factor. The Court of First Instance should have taken into consideration the fact that between 2000 and the investigation period, that is to say, during the same period as that in which the

Indian importers entered the Community market, there was a slight improvement in stock levels. Because of that slight improvement no dramatic worsening could have been established.

118. The *Council* considers this complaint to be inadmissible. In the first place, it is directed at findings of fact. In the second place, the appellant has not specified which legal rule the Court of First Instance infringed.

119. Moreover, the complaint is also unfounded.

120. *Firstly,* the finding by the Court of First Instance with regard to the absolute figures is correct in a factual respect. The increase in stock levels was so high that, despite the exceptional increase in Community industry production, it had also led, in relative terms, to an increase of almost 60% (from 9.2% to 14.6%) from 1998 to the end of the investigation period.

121. *Secondly,* the appellant's 15% share was well known. Moreover, the relative figures — that is to say, the percentage of total production represented by stocks — are apparent from the tables in recitals 75 and 80 in the preamble to the contested regulation.

122. The complaint is ultimately irrelevant. It is apparent from recital 103 in the preamble to the contested regulation that stocks were just one of several indicators taken into account in the establishment of injury. It is also clear from recitals 104 and 105 in the preamble to the contested regulation that stocks did not constitute a significant element in establishing injury. Stocks are not mentioned there. Even the appellant has conceded this, pointing out that it was price evolution that was significant.

123. The *Commission* considers this complaint to be inadmissible on the ground that it takes issue with a finding of fact and because the appellant has not shown that the Court of First Instance distorted the clear sense of the evidence.

124. Furthermore, the Commission points out that the increase in stock levels set out in recital 80 in the preamble to the contested regulation was a very significant indication of injury. This was brought about by the artificially low prices. Furthermore, the rise in stock levels was just one indication of injury.

3. Legal assessment

125. *Firstly,* in the appellant's opinion the Court of First Instance distorted the clear sense of the evidence by making reference to the stock levels in absolute terms.

126. The appellant is admittedly correct in saying that it is not possible to reach any conclusion as to the state of the Community industry solely on the basis of the increase in stocks in absolute terms. Rather, rising absolute figures have to be considered relative to the trend in other factors such as the development of production.

127. It does not amount to a distortion of the clear sense of evidence, however, if the Court of First Instance makes mention of absolute figures in its reasoning. That could only be the case if the Court of First Instance had based its decision solely on absolute figures without considering them relative to other factors. When arriving at its assessment, however, the Court of First Instance also took into account the fact that the Council had looked into how stocks in absolute terms behaved relative to total production.

128. This complaint must therefore be rejected.

129. *Secondly,* the appellant complains that the Court of First Instance's finding that during the investigation period stock levels represented, in relative terms, a high level of production of 15% was not supported by the regulation. The Court of First Instance had substituted its reasoning for the reasoning of the Council.

130. As correctly observed by the Council, the negative trend over the period considered is apparent from recitals 75 and 80 in the preamble to the contested regulation, in which details of total production and stock levels are given. The Court of First Instance was therefore in a position to construe the negative trend directly from the reasoning in the contested regulation. Furthermore, the Council had substantiated the negative trend by referring to recital 80 in the preamble to the contested regulation, which stated that stocks had increased significantly towards the end of 1999 and towards the end of 2001 and had therefore been as high as 15%.

131. This complaint must therefore be rejected.

132. *Thirdly,* the appellant complains that the Court of First Instance disregarded the slight improvement in stocks between 2000 and the investigation period. Because of that improvement no dramatic worsening of this factor could be assumed.

133. It must first be pointed out in this connection that the Court of First Instance correctly stated in paragraph 194 that the period considered ran from 1998 to 31 March 2002. It must also be noted that the Community institutions enjoy a broad discretion when determining the period to be taken into account for the purpose of verifying injury. [53] The Court of First Instance properly held that Community institutions may determine injury over a period longer than that covered by the investigation because the study of economic trends must be carried out over a sufficiently long period. [54] The Court of First Instance cannot therefore be accused of having failed to criticise the approach taken by the Council in observing the economic trend over a longer period.

134. The appellant's allegation that the temporary improvement in stocks coincided with the market entry of the Indian importers is a matter which it did not plead in the proceedings before the Court of First Instance. The appellant ought to have pleaded and substantiated this matter in those proceedings. The Court of First Instance cannot therefore be blamed for having failed to take it into account. [55] On appeal, this submission constitutes an improper extension of the ambit of the proceedings and a new submission of fact. [56]

135. Furthermore, the complaint would also be irrelevant. Complaints are irrelevant if they are directed only at the reasoning in the judgment without being capable of having an effect on the operative part of the judgment. [57] Even if the Court of First Instance had criticised the Council's finding in relation to stock levels, this would not have resulted in the repeal of the Council regulation.

136. It is, admittedly, apparent from recital 103 in the preamble to the contested regulation that the Council also mentioned the worsening of stocks in its conclusions with regard to injury. Reference should also be made in this connection, however, to Article 8(5) of the basic regulation. This provides that the impact of the subsidised imports on the Community industry concerned should be comprehensively examined for certain economic factors and indices, including stocks. [58] However, it is also stated clearly there that one or more of these factors cannot necessarily give decisive guidance on injury. It cannot therefore be concluded from the inclusion of stocks in recital 103 in the

53 — See point 23 of this Opinion.

54 — See paragraph 162 of the judgment under appeal and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 87, where it is stated that the injury suffered by the Community industry can also be determined over a period longer than that covered by the investigation into the existence of dumping practices.

55 — See point 28 of this Opinion.

56 — See point 27 of this Opinion.

57 — Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29; Lenaerts, K., Arts, D., cited in footnote 22, paragraph 16-019.

58 — Article 8(5) of the basic regulation mentions the fact that an industry might still be in the process of recovering from the effects of past subsidisation or dumping, the magnitude of the amount of countervailable subsidies, 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 and, in the case of agriculture, whether there has been an increased burden on government support programmes.

preamble to the contested regulation that the Council based its reasoning in the contested regulation essentially on its finding with regard to stock levels.

137. In recital 105 in the preamble to the contested regulation, moreover, the Council made it clear that it based the injury principally on the effects which the subsidised imports had on prices. [59] In this respect, in my opinion, it cannot be assumed that the finding in regard to stock levels was a 'supporting factor' in establishing injury and hence in the reasoning provided in the contested regulation, the removal of which should lead to repeal of the regulation.

138. This complaint must therefore also be rejected on that ground.

4. Conclusion

139. In conclusion, therefore, the second limb of the second ground of appeal must also be dismissed in its entirety.

59 — When considering the injury elimination level in recitals 166 to 169 in the preamble to the contested regulation, the Council also took into account prices rather than stock levels.

VIII — Third ground of appeal

140. In its third ground of appeal, the appellant contends that the Court of First Instance erred in dismissing the fifth plea in its application at first instance. It argues that the Court of First Instance did not take sufficient account of the fact that the injury was also attributable to another factor under Article 8(7) of the basic regulation, that is to say, the charging of excessively high — and therefore anti-competitive — royalties for CD-R patents.

A — *Jugdment under appeal*

141. In paragraphs 260 to 279 of the judgment under appeal, the Court of First Instance initially considered the complaint that the Council had failed to examine this factor. It found in this respect that the Council had examined the effects of the royalty payments in general in recitals 134 and 135 in the preamble to the contested regulation. [60]

142. The Court of First Instance then considered the complaint that the Council had failed adequately to examine whether payment of the allegedly anti-competitive royalties might have broken the causal link between the imports concerned and the injury. The

60 — See paragraphs 260 to 267 of the judgment under appeal.

Court of First Instance dismissed that complaint. It did not consider a determination of the precise effects of the factor at issue to be necessary. Indeed, it sufficed for the Community institutions to find that, despite such an external factor, the injury caused by the subsidised imports was material. The Court of First Instance considered the Council's reasoning — namely that the royalties had already been paid before the imports reached a significant level and that the negative development established in the situation of the Community producers could not therefore be attributable to payment of the royalties — to be adequate. The Court of First Instance also took into account that the anti-competitive practice alleged was not attributable to the behaviour of Community producers.

143. The Court of First Instance finally examined the complaint that the Council had not accurately assessed the injury. The Court of First Instance found in this connection that the royalties had to be paid by all producers, including the appellant. They could not therefore explain the difference between the Community prices and the prices of the subsidised imports and therefore had no bearing on the level of undercutting.

B — *Submissions of the parties*

144. At the hearing the *appellant* submitted that the third ground of appeal was admissible since the part of the judgment that it was challenging by means of that ground had been identified with sufficiently clarity in the heading thereof.

145. In the substance of its third ground of appeal the appellant complains that the Court of First Instance misconstrued the significance of Article 8(7) of the basic regulation in its review of the contested regulation. Under that provision, injury that is caused by other known factors must not be attributed to alleged subsidised imports. Where another factor is known it is necessary to examine whether the injury would have arisen even without that factor and how great it would then have been. Whether such a factor is attributable to the behaviour of the Community industry is immaterial, however.

146. In the opinion of the *Council*, this ground of appeal is inadmissible from the outset because the appellant has not made it clear which finding in the judgment under appeal it is challenging and simply refers only to individual paragraph numbers in that judgment. Nor does it indicate to what extent the Court of First Instance contravened the law.

147. This ground of appeal is also unfounded. The Court of First Instance correctly applied Article 8(7) of the basic regulation. It followed the established case-law of the Community Courts, which provides that causation between subsidised imports and injury has to be verified in the following stages.

148. A positive test first has to be carried out to determine whether the subsidised imports caused the injury. Causation can be assumed even if the injury was attributable not just to the subsidised imports but to other factors as well.

149. A negative test is then carried out to determine whether other known factors might have broken the causal link between the subsidised imports and the injury. A break may be assumed, however, only if the effect of the subsidised imports on the injury, compared with the effects of the other factors, is so slight that, compared with the effect of other factors, it can no longer be deemed material.

150. The Court of First Instance, in the Council's view, correctly examined whether the Community industry had itself contributed to the injury. Finally, the appellant has failed to indicate what effects the allegedly anti-competitive royalties had on the injury. It has not shown to what extent the Court of First Instance incorrectly appraised certain evidence.

151. The *Commission* also considers the third ground of appeal to be inadmissible. The appellant, it submits, is taking issue only with paragraph 272 of the judgment under appeal. This was not a conclusive element in the totality of the Court of First Instance's line of argument.

152. It also points out that the appellant has not called into question the Court of First Instance's finding in paragraph 272 of the judgment under appeal that the allegedly anti-competitive behaviour was not attributable to the Community producers and that the Community institutions were therefore not obliged to take this into account.

C — *Legal assessment*

153. As already stated,[61] the parts being challenged of a judgment that an appellant asks to be set aside and the legal arguments on which such an application is based must be precisely identified.

154. Firstly, the appellant made it clear in the heading of the third ground of appeal that this ground of appeal addressed the part of the judgment under appeal in which the Court of

61 — Point 26 of this Opinion.

First Instance dismissed the fifth plea. It is therefore apparent from the heading of the third ground of appeal which part of the judgment the appellant is challenging (paragraphs 260 to 279). In its reasoning in the third ground of appeal the appellant did, admittedly, mention only paragraph 272 of the judgment under appeal. However, the part of the judgment being challenged was apparent with sufficient clarity from the heading of the ground of appeal.

155. Secondly, the appellant stated that, in its opinion, the Court of First Instance did not give sufficient consideration to Article 8(7) of the basic regulation when reviewing the contested regulation. In doing so it made it clear that this related to the assessment of injury.

156. In my opinion, therefore, the third ground of appeal is admissible.

157. The appellant complains that the Court of First Instance infringed Article 8(7) of the basic regulation. Article 8(7) of the basic regulation provides that known factors other than the subsidised imports which are injuring the Community industry at the same time must also be examined to ensure that injury caused by these other factors is not attributed to the subsidised imports pursuant to Article 8(6). This provision states by way of example that, amongst other things, restrictive trade practices of, and competition between, third-country and Community producers may be considered in this context.

158. In the appellant's view, the infringement of Article 8(7) of the basic regulation lies, first, in the Court of First Instance's failure to criticise the Council's findings in the contested regulation that the allegedly anti-competitive royalties had not broken the causal connection between the subsidised imports and the injury (1). Furthermore, the Court of First Instance wrongly dismissed its complaint that the effects of the royalties should have been taken into account when evaluating the injury (2).

1. Effects of the royalties on the causal connection

159. As the Court of First Instance correctly stated in paragraph 269 of the judgment under appeal, it is necessary to examine, with regard to the causal connection between the subsidised imports and the injury, whether other factors were such as to break the causal link between the subsidised imports and the injury caused to the Community industry. [62]

62 — See Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 81; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 98; and Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, paragraph 176.

160. As the Court of First Instance correctly found, [63] it is not absolutely necessary in this context that the effects of the factor at issue should be set out in detail and taken into account. For the purposes of such an examination a finding that, despite the factor at issue, the injury caused by the subsidised imports was material will suffice. The reason for this is that under the basic regulation it is not a requirement that the subsidised imports be the principal cause of the injury and the imposition of a countervailing duty is therefore also permissible where the injury is caused by several factors. [64]

161. I cannot therefore find any error in law in the legal assessment criterion applied by the Court of First Instance. I shall now examine whether that Court erred in its application of that legal assessment criterion.

162. The Council had found that the royalties had to be paid by all CD-R producers and that producers had had to pay them even before the period during which the injury established by the Council arose. It had also considered the fact that the Indian imports and the injury to the Community industry established by it related to the same period. Based on those findings, in particular, the Council had assumed that the causal link between the subsidised imports and the injury could not have been broken by the royalty payments. [65]

163. In the proceedings before the Court of First Instance the appellant did not make a substantiated claim as to how that finding by the Council might have been incorrect. It relied simply upon the fact that, pursuant to the judgment in *Mukand,* [66] the Community institutions were obliged to determine precisely the effects of the royalties.

164. The *Mukand* judgment related, however, to a case in which only the Community producers' prices for the product concerned were adversely affected by possible anti-competitive practices by Community producers, rather than the prices of producers which imported the product concerned into the Community. [67] If, in circumstances such as those, a finding of injury is based, in particular, on the fact that prices for subsidised imports were lower than prices for goods produced in the Community, it is obvious that a practice

63 — See paragraph 269 of the judgment under appeal.

64 — See Joined Cases 277/85 and 300/86 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 62, where a contrast is drawn with previous rules. Unlike the former legal position under Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1), as amended on 24 August 1984 (OJ 1984 L 227, p. 35) it is no longer a requirement when imposing a countervailing duty that the subsidised imports be the principal cause of the injury. See in this respect Müller, W., Khan, N., Neumann, H.-A., cited in footnote 17, paragraph 3.96.

65 — See recital 134 in the preamble to the contested regulation.

66 — Case T-58/99 *Mukand and Others* v *Council* [2001] ECR II-2521.

67 — *Mukand and Others* v *Council,* cited in footnote 66, particularly paragraphs 46 to 48 and 52 to 55.

that artificially raises the prices of products produced in the Community might be such as to call into question the causation between the subsidised imports and the injury. [68]

165. In circumstances such as those of the present case, in which the allegedly anti-competitive royalties had to be paid by all producers, the possibility that the chain of causation has been broken is not obvious, however. This is particularly so where the Council has established that royalties were paid earlier on but the timing of the established injury (the price drop) coincided with the subsidised goods entering the Community market. In the light of this, therefore, the appellant should have made a substantiated claim to show why the allegedly anti-competitive charging of royalties breaks the causal connection assumed by the Council. [69] As it did not do so, the Court of First Instance cannot be blamed for upholding the Council's findings. [70]

166. Nor can I therefore find any error in law in the Court of First Instance's application of the legal assessment criterion in this case.

68 — *Mukand and Others* v *Council*, cited in footnote 66, paragraph 46. See also *AGST Draht- und Biegetechnik*, cited in footnote 15, paragraphs 45 to 54, according to which it is necessary to substantiate the extent to which artificially high prices on one market may also have an effect on another market.

69 — See *AGST Draht- und Biegetechnik*, cited in footnote 15, paragraphs 45 to 54.

70 — See point 25 of this Opinion.

2. Assessment of injury

167. The Court of First Instance stated with regard to the assessment of injury that in the present case, unlike the circumstances in *Mukand*, the alleged anti-competitive behaviour had an effect on all producers. The royalty payments therefore had no bearing on the factors taken into account in calculating the level of undercutting. The Council was therefore entitled to assume that the factor at issue could not explain the difference between Community prices and the Indian prices. [71]

168. It should be noted in this context, firstly, that a finding of injury to the Community industry is not merely a requirement for the

71 — See paragraph 274 of the judgement under appeal.

imposition of a countervailing duty on subsidised imports;[72] it can also play a role in relation to the *amount* of the countervailing duty.

169. Under the third sentence of Article 15(1) of the basic regulation the countervailing duty must not exceed the amount of the countervailable subsidies, but should be less if a lesser duty would be adequate to remove the injury to the Community industry (the so-called '*lesser duty*' rule). Under the '*lesser duty*' rule, therefore, the subsidy margin is compared with the injury elimination level. If the injury elimination level is lower than the subsidy margin, only a countervailing duty in the amount of the injury elimination level should be imposed.

170. The objective of the '*lesser duty*' rule is to ensure that only the competitive advantage of the subsidised imports is compensated to protect the Community industry. The '*lesser duty*' rule is therefore intended to reduce the conflict between the concept of trade protection for the Community industry from subsidised imports, on the one hand, and the principle of having a Community industry that is as competitive as possible, with the lowest possible prices for customers of the product concerned within the Community, on the other. The prices of subsidised imports should be increased by the countervailing duty only to the extent necessary in order to protect the Community industry. However, they are not supposed to afford the Community industry a greater competitive advantage over subsidised imports.

171. Once account is taken of this purpose of the *'lesser duty'* rule, it becomes clear that, when regard is had to other factors within the meaning of Article 8(7) of the basic regulation, a narrower screening process can be appropriate under the *'lesser duty'* rule than is the case when examining whether another factor breaks the causal link between the subsidised imports and the injury. As it is possible to impose a countervailing duty even where the injury is caused by several factors, it is sufficient, when conducting an examination of causation, to apply the broader screening process described above.[73] The effects of the factor at issue need not necessarily be set out in detail and taken into account in this context. However, even in such a case, the aim of the *'lesser duty'* rule is that the Community industry should not be afforded protection beyond what is necessary. In order to achieve that aim it may be appropriate, when computing the injury elimination threshold, to take account of factors which, although not breaking the causal link between the subsidised imports and the injury, might nevertheless have an effect on the level of the

72 — If there should be no injury caused by the subsidised imports because the causal link between the subsidised imports and the injury is broken by another factor, no countervailing duty may be imposed. I have already addressed this question above (points 159 to 166 of this Opinion).

73 — See points 159 to 166 of this Opinion.

injury elimination threshold. When computing the injury elimination threshold it may be appropriate in this respect to use a narrower screening process than when examining causation. [74]

172. It should nevertheless be borne in mind that, as mentioned above, the assessment and evaluation of commercial data required for the adoption of measures to protect trade are complex tasks and that the Community institutions for that reason enjoy a broad discretion. [75]

173. In the light of the foregoing, consideration will now be given to whether the Court of First Instance took due account of the allegedly excessive royalties when examining the exercise of discretion by the Council with regard to computation of the injury elimination threshold and the application of the *'lesser duty'* rule.

174. It should be mentioned, first, in this context that in the past academic writers have often referred to the danger that failure to take account of infringements of European competition law in proceedings in which trade-protection measures are imposed might be contrary to the competition-law objectives of the Treaties. [76]

175. In cases in which prices of imports from non-member countries are compared with Community producers' prices artificially increased because of anti-competitive practices, there is indeed a risk that the threshold determined in order to remove the competitive advantage of the subsidised imports may be set at too high a level. An injury elimination threshold that is set too high is detrimental to customers of the product concerned and not justified by a need to protect Community industry.

176. In my opinion, however, this does not mean that, in all cases in which alleged anti-competitive behaviour has an effect on prices, the Council is compelled within the scope of its discretion to take account of that behaviour when computing the injury elimination threshold. I do not consider it absolutely essential for the Council to take such behaviour into account when computing the

74 — See Adamantopoulos, K., Pereyra, M.J., *EU Antisubsidy Law & Practice*, 2nd edition, Sweet & Maxwell 2007, paragraph 6-039; Müller, W., Khan, N., Neumann, H.-A., cited in footnote 17, paragraph. 14.3, where it is stated that the other factors have to be eliminated when computing the injury elimination threshold.

75 — See point 23 of this Opinion. Account should also be taken in this connection of the fact that, in some language versions of the third sentence of Article 15(1) of the basic regulation, the actual *application* of the '*lesser duty*' rule to the injury elimination threshold appears to be a matter within the discretion of the Community institutions: see, for instance, the English ('should') or the German versions ('sollte'). By contrast, a discretion cannot necessarily be inferred from other language versions, such as the French ('doit'), Spanish ('será') and Slovene ('mora'). If one takes account of the fact that, under Article 19.2 of the Agreement on Safeguards (OJ 1994 L 336, p. 184), the application of the '*lesser duty*' rule to the injury elimination threshold, albeit regarded as desirable, is not mandatorily prescribed, there is in my view much to support the argument that the Community institutions do indeed have a discretion in regard to the application of the '*lesser duty*' rule.

76 — Temple Lang, J., case-note on the *Mukand* judgment, *Common Market Law Review*, 2002, p. 633 et seq., 635; Branton, J., Trade Law Meets Antitrust in the European Court: Judgment in *Mukand* v *Council*, *International Trade Law Review*, 2001, p. 184 et seq.; Clough, M., Conflicts between EEC Anti-dumping and Competition Law, *European Competition Law Review*, 1992, p. 222 et seq.

injury elimination threshold, especially in a case in which all of the producers in question might be affected by the allegedly anti-competitive behaviour. In that case the payment of a royalty constitutes a condition under which all producers have to operate. Unless that behaviour is attributable to the Community industry itself, the Community industry has, in view of those conditions, a justifiable need for protection in the form of a countervailing duty protecting it from the subsidised imports.

177. In the present case the Court of First Instance, in paragraph 274 of the judgment under appeal, took account of the fact that all producers of CD-Rs had to pay the allegedly anti-competitive royalties and that the allegedly anti-competitive behaviour could not be attributed to the Community industry. The Court of First Instance was therefore able correctly to find in paragraph 275 of the judgment under appeal that the allegedly excessive royalties could not affect calculation of the level of undercutting and that no criticism could be levelled at the Council's finding in recital 134 in the preamble to the contested regulation.

D — *Conclusion*

178. In conclusion, therefore, the third ground of appeal must also be dismissed in its entirety.

IX — Conclusion of the legal assessment

179. In the light of all of the foregoing, the appeal is unfounded. It should therefore be dismissed in its entirety.

X — Costs

180. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, in my opinion, the appellant has been unsuccessful, it should be ordered to pay the costs.

181. Under the first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to appeal proceedings pursuant to Article 118 thereof, the Commission should be ordered to bear its own costs.

XI — Conclusion

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

— dismiss the appeal;

— order the appellant to pay the costs of the proceedings;

— order the Commission to bear its own costs.