JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

17 December 2008 *

In Case T-462/04,

HEG Ltd, established in New Delhi (India),

Graphite India Ltd, established in Kolkata (India),

represented initially by K. Adamantopoulos, lawyer, and J. Branton, Solicitor, and subsequently by J. Branton,

applicants,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by T. Scharf and K. Talabér-Ritz, acting as Agents,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 1628/2004 of 13 September 2004 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India (OJ 2004 L 295, p. 4) and of Council Regulation (EC) No 1629/2004 of 13 September 2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India (OJ 2004 L 295, p. 10),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V. Ciucă, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2008,

gives the following

Judgment

Factual background

1 The applicants, HEG Ltd and Graphite India Ltd, are Indian companies which manufacture and export the product concerned. This is graphite electrodes and nipples used for such electrodes with an apparent density of 1.65 g/cm^3 and an electrical resistance of 6.0 μΩm or less, which gives them a very high rate of power feed ('the product concerned').

2 In response to complaints lodged in July 2003 by the European Carbon and Graphite Association, acting on behalf of SGL Carbon Group GmbH ('SGL') and UCAR SA, representing a major proportion of the Community sector producing the product concerned, on 21 August 2003 the Commission announced, by two separate notices, the initiation of anti-dumping and anti-subsidy proceedings concerning imports of the product concerned originating in India (OJ 2003 C 197, pp. 2 and 5 respectively). The investigation covered the period from 1 April 2002 to 31 March 2003 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 1999 to the end of the investigation period ('the period considered').

3 The Commission sent questionnaires to all parties known to be concerned, to all other companies who made themselves known within the deadlines set in the notice of initiation, and to the Indian public authorities. Replies were received from the two applicants, from the two complainant Community producers, from eight user companies and from two unrelated importers. In addition, one user company made a written submission containing some quantitative information and two users' associations made written submissions.

4 Verification visits were carried out at the premises of five Community producers, two unrelated importers in the Community, four users and the two applicants.

5 On 13 November 2003 an initial meeting was held between the applicants and the Commission.

6 On 3 and 4 December 2003 and 26 February 2004, the applicants sent further comments to the Commission.

7 On 15 April 2004, the Commission published a notice regarding the application of anti-dumping and anti-subsidy measures in force in the Community following enlargement to include the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the possibility of review (OJ 2004 C 91, p. 2) ('Notice on the possibility of review of measures owing to enlargement').

8 On 27 April 2004, the Commission sent the applicants three specific disclosure documents.

9 On 19 May 2004, the Commission adopted Commission Regulation (EC) No 1008/2004 imposing a provisional anti-subsidy duty on imports of certain graphite electrode systems originating in India (OJ 2004 L 183, p. 35) and Commission Regulation (EC) No 1009/2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India (OJ 2004 L 183, p. 61) ('the provisional anti-subsidy regulation' and 'the provisional anti-dumping regulation', together referred to as 'the provisional regulations'). On the same day, it sent a letter to the applicants setting out its observations on the comments made by the applicants during the proceedings.

10 On 27 May 2004, the applicants sent their observations to the Commission on the specific disclosure documents and the provisional regulations.

11 On 14 June 2004, a second meeting was held between the applicants and the Commission.

12 On 22 June 2004, the applicants submitted their observations to the Commission following the meeting of 14 June 2004.

13 By letter of 9 July 2004, the Commission sent the applicants two general disclosure documents concerning the essential facts and considerations on the basis of which it

was proposed to impose definitive anti-dumping and countervailing duties, and a general disclosure document concerning the injury, causation and Community interest aspects of the two proceedings.

14 By letter of 19 July 2004, the applicants submitted their observations on the various documents received from the Commission. They also requested a further meeting and raised the possibility of entering into undertakings.

15 On 13 September 2004, the Council adopted Regulation (EC) No 1628/2004 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrodes originating in India (OJ 2004 L 295, p. 4) and Regulation (EC) No 1629/2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India (OJ 2004 L 295, p. 10) ('the contested anti-subsidy regulation' and 'the contested anti-dumping regulation' respectively, together referred to as 'the contested regulations').

Procedure and forms of order sought by the parties

16 By application lodged at the Court Registry on 30 November 2004, the applicants brought the present action.

17 By document lodged at the Court Registry on 21 April 2005, the Commission applied for leave to intervene in support of the form of order sought by the Council. By order of 7 June 2005, the President of the First Chamber of the Court of First Instance granted the application to intervene. By letter of 17 June 2005, the Commission informed the Court that it waived the right to lodge a statement in intervention, but that it intended to appear at the hearing.

18 Following a change in the composition of the Chambers of the Court of First Instance, the Judge-Rapporteur was attached to the Fifth Chamber, to which this case was accordingly assigned.

19 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

20 In the context of measures of organisation of procedure, the Court invited the Council to produce certain documents. The Council complied with that request.

21 The parties and the intervener presented oral argument and answered the questions put to them by the Court at the hearing on 4 June 2008.

22 The applicants claim that the Court should:

— annul the contested regulations;

— order the Council to pay the costs.

23 The Council contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

24 The Commission submits that the Court should dismiss the application.

Law

25 The applicants put forward five pleas, the first relating to the opening of an investigation into only Indian imports of the product concerned, the second relating to the defective nature of the investigations in that they were conducted on the basis of a Community of only 15 Member States, the third alleging errors in the classification of the Indian Duty Entitlement Passbook Scheme (DEPB) as subsidisation and in the determination of the amounts of countervailing duties, the fourth and fifth alleging, inter alia, failure to take into account both past anti-competitive practices and the effects of imports of the product concerned from other countries in the analysis of the injury caused to the Community industry.

First plea, relating to the opening of an investigation against only Indian imports of the product concerned

Arguments of the parties

26 The applicants take the view that the institutions infringed Article 9(5) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), Article 9(2) of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103; 'the 1994 Anti-Dumping Code'), and the principle of non-discrimination, and committed manifest errors of assessment in conducting an anti-dumping investigation into only Indian imports of the product concerned.

27 The applicants submit, in essence, that the institutions infringed the principle of non-discrimination by failing to open an investigation themselves into imports from other States that could be being dumped or by failing to engineer a complaint to open parallel proceedings. They argue that the Commission could not agree to investigate only the complaint against them and that it should have either initiated a parallel investigation into imports from other countries pursuant to Article 5(6) of Regulation No 384/96 or informed the complainants that, unless they also submitted a complaint against the other countries concerned, the proceedings would be terminated. They maintain that there are close economic links, extending to joint participation in a cartel penalised by the Commission, between the complainants and the producers in the other third countries concerned, which explains why the complaint targeted Indian imports. They further submit that the complaint or the information which they supplied to the Commission contained evidence of dumping in relation to the products concerned from States other than India (the United States, Poland, Japan, Russia, China and Mexico).

28 The applicants take the view that the principle of non-discrimination must also be observed at the time when a decision is taken to initiate an investigation. Although the wording of Article 9(5) of Regulation No 384/96 relates only to States found to have caused injurious dumping, it is clear that that article and the principle of non-discrimination, when applied together, also cover a difference in treatment stemming from an investigation into imports from one State only, although evidence supplied following the initiation of proceedings gives a prima facie indication that imports from other States should be included in the investigation.

29 The applicants point out the particular importance of Article 9(5) of Regulation No 384/96, in that it derives from Article 9(2) of the 1994 Anti-Dumping Code which itself is an expression of the most-favoured nation principle. In the field of anti-dumping, this principle reflects the requirement that anti-dumping duties should not unfairly limit access to the market of goods from one Member State that is a member of the World Trade Organisation (WTO) while imports from other countries may be dumped and cause injury but not be subject to such duties. The Commission is not able to determine whether or not they were dumped and the exact extent of the apparent injury without conducting an investigation.

30 Furthermore, the applicants take the view that the institutions committed manifest errors of assessment in considering that the evidence presented did not justify the opening of investigations in relation to imports from States other than India. That failure to open investigations also constitutes an infringement of the principle of sound administration.

31 The applicants also allege that the Commission adopted a discriminatory attitude as regards the definition of the products concerned. Chinese imports were excluded from the investigation on the ground that the products in question were not manufactured using premium needle coke whereas, in respect of the Indian imports, the Commission refused to exclude from the investigation graphite electrodes and nipples used for such

electrodes manufactured without using premium needle coke because it is the basic physical and technical characteristics of the end product and its end uses, irrespective of the raw materials used, that determine the product definition. They note that the Chinese products have the same end use as the lower end of the product concerned.

32 Finally, in this plea, the applicants claim that their rights of defence have been infringed owing to the fact that some evidence was excluded from the non-confidential version of the complaint on the ground that it would damage the essential business interests of a competitor. Moreover, that is another indication of collusion between the complainants and some importers of the product concerned in third countries, explaining why that evidence is not taken into account.

33 The Council disputes the applicants' arguments.

Findings of the Court

— Alleged discriminatory attitude as regards the definition of the product concerned

34 This complaint must be rejected at the outset as having no factual basis. First, it is apparent from recitals 11 to 14 in the preamble to the provisional anti-dumping regulation, to which recital 6 of the contested anti-dumping regulation refers, that

premium needle coke was not one of the factors used by the institutions to define the product concerned. Secondly, the applicants do not adduce any evidence to show that the institutions based their exclusion of Chinese imports from the investigation on the fact that those imports were not manufactured using premium needle coke.

— The failure to open an investigation into other potential sources of dumping

35 According to settled case-law, the general principle of equal treatment and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 71 and the case-law cited).

36 It is true that the Commission is entitled under Article 5(6) of Regulation No 384/96 to initiate an investigation on its own initiative in certain special circumstances. Similarly, it is common ground that it is Commission practice, in certain circumstances, to ask a complainant to extend the scope of his complaint. However, there is no need to raise the question as to whether it should have proceeded in this way in this case. A difference in treatment which consists of opening anti-dumping proceedings against Indian imports only, while there is evidence to justify investigating other imports, even if this were proved, cannot constitute an infringement of either Article 9(5) of Regulation No 384/96, or Article 9(2) of the 1994 Anti-Dumping Code or the general principle of equal treatment.

37 First of all, it is stated in Article 9(5) of Regulation No 384/96 that '[a]n anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted'.

38 It is apparent from the very wording of this provision that it prohibits discriminatory treatment between imports which have all had anti-dumping duties imposed in respect of imports of the same product (see, to that effect, Case T-89/00 *Europe Chemi-Con (Deutschland)* v *Council* [2002] ECR II-3651, paragraph 58). What is at issue here, however, is an alleged difference in treatment between imports which have had anti-dumping duties imposed and imports which have not been the subject of any investigation. The facts of the present case therefore do not fall within the scope of Article 9(5) of Regulation No 384/96.

39 Secondly, as regards Article 9(2) of the 1994 Anti-Dumping Code, it suffices to point out that the scope of that provision is equivalent to that of Article 9(5) of Regulation No 384/96, in that it prohibits discriminatory treatment when anti-dumping duties imposed on a product are collected on the basis of the source of the imports in question. It therefore does not apply in this case.

40 Thirdly, the argument alleging infringement of the general principle of equal treatment cannot be upheld either.

41 The fact that Article 9(5) of Regulation No 384/96 is an illustration of the principle of equal treatment (*Europe Chemi-Con (Deutschland)* v *Council*, paragraph 38 above, paragraph 51) does not mean that the institutions are not required to comply with that principle when applying other provisions of Regulation No 384/96 (see, as regards Article 2(7)(b) of that regulation, Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon* v *Council* [2003] ECR II-4741, paragraphs 60 and 61).

42 According to settled case-law, however, observance of the principle of equal treatment must be reconciled with observance of the principle of legality, according to which no one may rely to his own advantage on an unlawful act committed in favour of a third party (Case T-120/44 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 77, and the case-law cited). The applicants' argument, which relies entirely on the fact that an investigation should also have been conducted into other imports, seeks to do just that. The principle of equal treatment does not therefore apply in the present case and the failure to open an investigation into other possible sources of dumping cannot affect the lawfulness of the contested anti-dumping regulation.

43 As a result, the applicants' arguments alleging infringement of the principle of sound administration and manifest errors of assessment in the evaluation of evidence provided by the applicants must also be rejected, since they seek to show that the Commission should have opened an investigation into imports from third countries. For the same reason, the applicants' criticisms relating to the fact that the complainants focused their complaint on Indian imports alone are of no relevance as far as the lawfulness of the contested anti-dumping regulation is concerned.

— Infringement of the principle of observance of the rights of the defence

44 According to settled case-law, observance of the rights of the defence is a fundamental principle of Community law (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 15, and Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet* v *Council* [1997] ECR II-2461, paragraph 81).

45 According to that principle, in the context of an investigation preceding the adoption of an anti-dumping regulation the undertakings concerned must be placed in a position during the administrative procedure in which they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence relied on by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (*Al-Jubail Fertilizer* v *Council*, paragraph 44 above, paragraph 17; Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, paragraph 84; and *Ajinomoto and NutraSweet* v *Council*, paragraph 44 above, paragraph 83).

46 In this case, it must be observed that certain evidence contained in the confidential version of the complaint was not summarised in the non-confidential version. This is the case, in particular, of Annexes 1, 5 to 7, 9 to 11, 15 to 18, 20 and 21, 23, 26, 28 to 31, and 33 to 44 of the complaint, which contains 45 annexes.

47 However, it was for the applicants to place the institutions in a position to assess the difficulties which the absence of a summary of the evidence in question in the non-confidential version of the complaint could cause them (see, to that effect, *Ajinomoto and NutraSweet* v *Council*, paragraph 44 above, paragraphs 109 and 110).

48 In this case, it is apparent from the documents provided by the applicants in the annex to their application that, although they briefly referred in their observations on the complaint to the absence of a summary, at the beginning of the proceedings, on 3 October 2003, they did not mention it again in their subsequent correspondence.

49 It follows that, by failing to have sufficiently alerted the Commission and then the Council, the applicants cannot rely on infringement of their rights of defence.

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

Second plea, alleging infringement of fundamental procedural requirements in that the investigations were conducted on the basis of a Community of only 15 Member States

Arguments of the parties

51 The applicants take issue with the fact that the duties imposed by the contested regulations cover the territory of the 10 new Member States, although no investigation was carried out there, and therefore take the view that there is no legal basis for imposing those duties. In that regard, this situation is different from that of duties adopted before enlargement, in respect of which the investigation was conducted on the correct territorial basis.

52 Such an automatic extension of anti-dumping and anti-subsidy duties to the 10 new Member States is contrary to Article 1(1) and (2), Articles 2 to 7 and Article 9(4) and (5) of Regulation No 384/96, and to Article 1(1), Articles 8 to 12, Article 15 and Article 31 of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1). In essence, the applicants argue that the fact that those various provisions refer either to the Community or to the Community industry means that the investigation must be conducted on the basis of a well-defined territory, namely, the Community, rather than part of the Community. That follows also from the relevant provisions of the 1994 Anti-Dumping Code and of the Agreement on Subsidies and Countervailing Measures concluded within the WTO (OJ 1994 L 336, p. 156; 'the ASCM'). The applicants further submit that an investigation encompassing the 10 new Member States was necessary for the purpose of determining precisely the dumping margin and the injury which the dumping would cause or which would be caused by the alleged subsidies. Finally, they point out that the initiation of anti-dumping proceedings must be based on information on the evolution of the volume of the imports and the effect of those imports on prices of the like product and their impact on the Community industry, so that measures adopted on the basis of 15 Member States cannot be imposed automatically in a Community of 25 Member States without consideration as to whether these cases could have been initiated at all on the basis of similar information for the enlarged Community.

53 The applicants essentially take the view that the Commission was entitled to conduct an investigation which took into account the fact that enlargement was imminent, since no provision of Regulations Nos 384/96 and 2026/97 prevents it from sending requests for information.

54 They reject the Council's argument based on the method suggested in the Notice on the possibility of review of measures owing to enlargement. That notice cannot provide justification for the institutions' departure from the relevant regulations. While the applicants acknowledge that the Notice does state that pending proceedings may result in duties being applied across the new Member States, they take the view, in essence, that the recommended solutions, in particular, the possibility of obtaining an interim review from the Commission were of no interest in relation to proceedings which were not yet concluded at the time of enlargement. They point out, in that regard, that there

is no possibility of requesting an interim review until at least one year has expired from the date of imposition of the relevant measures.

55 The fact that it has been observed, in certain cases, that the conclusions of the investigation were not radically altered by widening the examination to include the new Member States is irrelevant outside the individual cases examined.

56 The Council considers that it correctly extended application of the anti-dumping and anti-subsidy measures to the enlarged Community. It follows from the limited overall economic importance of enlargement that the findings of the investigations conducted in the Community of 15 Member States are, in principle, also valid for the enlarged Community, which is confirmed by the limited number of requests for an interim review. It maintains that an automatic review of all existing anti-dumping and anti-subsidy measures would have created a significant burden and additional costs for all operators involved and would therefore not be feasible in practical terms.

57 The Council submits that the Notice on the possibility of review of measures owing to enlargement provides a complex transitory solution within the Community's discretion and consisting of a two-pronged review mechanism to ensure that adjustments can be made where justified.

58 First, it follows that, from 1 May 2004, all the anti-dumping and anti-subsidy measures in force will automatically apply to imports into the Community enlarged to 25 Member States, and that, if pending investigations initiated before 1 May 2004 were to lead to the imposition of measures, these would equally apply to imports into the 25 Member State Community.

59 Secondly, a review mechanism was set up to ensure that corrections could be made. The Council notes in this regard that the Commission was prepared to carry out a partial or full review, at the request of any interested party, of anti-dumping and anti-subsidy measures pursuant to Article 11(3) of Regulation No 384/96 and Article 19 of Regulation No 2026/97, before expiry of the one-year period, since the Commission announced that it would use its right to conduct reviews on its own initiative. The Council observes that the applicants did not avail themselves of that opportunity and considers that it was because they did not believe that an interim review would have produced results more favourable to them.

60 Moreover, the Council considers that the applicants' submissions are purely formalistic in that they do not claim that an investigation covering all 25 Member States would have yielded different results and did not present any evidence whatsoever to that effect.

61 Finally, the Council points out that, for greater thoroughness, the Commission assessed the impact of enlargement in all pending investigations, including the two sets of proceedings at issue, and that there was no significant difference in the results.

Findings of the Court

62 It is common ground that although the investigation period lasted from 1 April 2002 to 31 March 2003, while the Community was made up of only 15 Member States, the provisional regulations were adopted on 19 May 2004 and the contested regulations on 13 September 2004, when the Community comprised 25 Member States.

63 It must be observed that anti-dumping duties and countervailing duties are not a penalty for earlier behaviour but a protective and preventive measure against unfair competition resulting from dumping and subsidies (see, as regards anti-dumping duties, Case T-138/02 *Nanjing Metalink* v *Council* [2006] ECR II-4347, paragraph 60). Furthermore, under Article 3(2) of Regulation No 384/96 and Article 8(2) of Regulation No 2026/97, a determination of injury must be based on positive evidence and involve an objective examination of both the volume of the dumped or subsidised imports and the effect of the dumped or subsidised imports on prices in the Community market for like products, and the consequent impact of those imports on the Community industry.

64 It follows that, when anti-dumping and countervailing duties are determined, it is the composition of the Community at the time of their adoption that must be taken into account. To the extent that the information obtained by the Commission during the investigation period was not obtained with the enlargement in view and thus concerns only the Community of 15 Member States, it was for the Commission, when adopting the provisional regulations, and, where appropriate, the Council, when adopting the contested regulations, to establish whether that information was also relevant with regard to a Community composed of 25 Member States.

65 It is true that Article 6(1) of Regulation No 384/96 and Article 11(1) of Regulation No 2026/97 imply that factors arising after the investigation period must not be taken into account. In the present case, however, the fact that the Community's enlargement constitutes an event that took place after the investigation period cannot in any way relieve the institutions of the duty referred to in the previous paragraph.

66 As the Court of First Instance has had occasion to point out in relation to Article 6(1) of Regulation No 384/96, the investigation period and the prohibition on consideration of factors relating to a subsequent period are intended to ensure that the results of the investigation are representative and reliable, by ensuring that the factors on which the determination of dumping and injury is based are not influenced by the conduct of the

producers concerned following the initiation of the anti-dumping proceeding, and therefore that the definitive duty imposed as a result of the proceeding is appropriate to remedying effectively the injury caused by the dumping (*Nanjing Metalink* v *Council*, paragraph 63 above, paragraph 59).

67 Furthermore, by using the term 'normally', Article 6(1) of Regulation No 384/96 does allow exceptions to the rule against taking account of information relating to a period subsequent to the investigation period. As regards circumstances favourable to the undertakings concerned by the investigation, it has been held that the Community institutions cannot be required to incorporate in their calculations factors relating to a period subsequent to the investigation period unless such factors disclose new developments which make the proposed anti-dumping duty manifestly inappropriate (Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 88, and Case T-188/99 *Euroalliages and Others* v *Commission* [2001] ECR II-1757, paragraph 75). If, on the other hand, factors relating to a period subsequent to the investigation period justify, because they reflect the current conduct of the undertakings concerned, the imposition or increase of an anti-dumping duty, it is clear, on the basis of the foregoing, that the institutions are entitled, indeed obliged, to take account of them (*Nanjing Metalink* v *Council*, paragraph 63 above, paragraph 61). The same reasoning can be followed in relation to the application of Article 11(1) of Regulation No 2026/97, the drafting of which on this is point is identical to that of Article 6(1) of Regulation No 384/96.

68 In addition, it should be recalled that, according to settled case-law, in the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine (see Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 48 and the case-law cited). It is also settled case-law that, where the Community institutions have such discretion, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of

the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 73).

69 Clearly, the accession of 10 new Member States between the end of the investigation period and the adoption of the contested regulations is a relevant aspect which the institutions were bound to examine, within the meaning of the case-law referred to in paragraph 68 above, in order to assess its impact on the two pending investigations.

70 Contrary to the Council's contention, merely referring to the supposed limited overall economic importance of enlargement cannot relieve the institutions of the above-mentioned obligation, since such a consideration of a general kind does not concern the particular economic sector to which the imports in question belong.

71 The Notice on the possibility of review of measures adopted by the Commission does not in any way constitute the taking of sufficient account of the effects of enlargement on pending proceedings. On the contrary, that method consists of not examining automatically the effects of enlargement, while providing for the possibility of subsequent review of the measures in question. The mere possibility of such a review, which is left to the Commission's discretion and would be conducted after the regulations have been adopted, cannot relieve the institutions of their obligation to ensure that the enlargement of the Community would not affect the amount of anti-dumping and anti-subsidy duties.

72 However, it is apparent from the general disclosure document relating to the injury, causation and Community interest aspects of the two proceedings, that, in the present case, the Commission did evaluate the effects of enlargement on the relevance of the data obtained during the investigation period. The Commission observes in that

document — its findings being uncontested by the applicants — that, first, the Indian imports to the new Member States were priced slightly lower than those recorded during the investigation period and, secondly, in terms of sales, production and imports of the product concerned, the share of the 10 new Member States was minimal. Furthermore, it is mentioned in the same document that the only two known facilities producing the product concerned in the new Member States are located in Poland and that the Commission obtained information from an anti-dumping investigation carried out by the Polish authorities in 2003 showing that the prices of the Indian imports into Poland were 4% lower than those of imports into the Community of 15.

73 By carrying out such a verification after the investigation period, the Commission thereby assured itself that the information obtained during the investigation was still representative of the Community as it was composed at the time of the adoption of the anti-dumping and countervailing duties. It therefore did not fail to fulfil its obligation to examine all the relevant factors of the present case.

74 It is apparent from the findings above that the argument alleging that the institutions should have ascertained whether the information in their possession enabled them to open an investigation in relation to an enlarged Community must be rejected. It necessarily follows that the information on which the Commission based its decision to initiate the proceedings in question could also justify the initiation of an investigation in relation to a Community made up of 25 Member States.

75 As regards the references to the provisions of the 1994 Anti-Dumping Code and the ASCM, it suffices to state that the applicants have not shown how the content of those provisions differs from that of the provisions of Regulations Nos 384/96 and 2026/97 which give effect to the specific obligations contained therein.

76 It follows from the above that the second plea must be rejected.

Third plea, relating to the classification of the DEPB Scheme as subsidisation and to the determination of the amount of countervailing duties

Arguments of the parties

77 The applicants maintain that the contested anti-subsidy regulation is contrary to the principle of proportionality, to Articles 1(1), 2(1)(a)(ii) and 15(2) of Regulation No 2026/97 and Annex III thereto and Articles 1.1(a)(1)(ii) and 19.3 of the ASCM, and is vitiated by a manifest error of assessment and procedural defects through the imposition of countervailing duties in inappropriate amounts.

78 First of all, they describe how the Indian DEPB scheme ('the DEPB') operates: an exporter receives a credit upon export of a product corresponding to the amount of import duties paid upon importation of input raw materials necessary for manufacture of the exported product on a per unit basis, in accordance with 'standard technical input-output norms' ('SIONs'). They stress the importance of a refund of the duties paid on importation of the inputs necessary for manufacture of the product concerned, and particularly of the most costly, premium needle coke, which is not available in India.

79 The applicants dispute the classification as subsidisation in the contested regulation. In any event, even if it were arguable that the DEPB scheme has the elements of a subsidy, it was wrongly decided in the regulation that the countervailable benefit was constituted by the full amount of the duty usually payable on all imported inputs. Only the excess collected may constitute a subsidy.

80 In the first place, that is the conclusion reached from a reading of Article 2(1)(a)(ii) of Regulation No 2026/97 in conjunction with Annex I(i) thereto. Annex II(I)(2) also supports that analysis. It shows that, if a scheme results in an excess drawback, then there may be a subsidy to the extent of the excess. It is therefore for the Commission to determine whether there is an excess, before possibly classifying it as a subsidy. The same approach is taken by the definition in Annex III(I). According to the applicants, since the DEPB should be classified as a substitution drawback scheme, the relevant provision is Annex III of Regulation No 2026/97, which the Council failed to analyse.

81 The Council's argument, to the effect that a drawback subsidy may exist even if there is no payment of excess, when the scheme in question does not strictly adhere to the provisions of Annexes I to III to Regulation No 2026/97, is based on the mistaken premiss that those annexes contain a series of conditions for what constitutes a perfect drawback scheme. Rather they are guidelines for determining whether there are safeguards in place to ensure that excess is not possible.

82 Secondly, the DEPB was wrongly considered not to be a properly constituted drawback scheme because there is no procedure in India for verifying that it is correctly implemented. The applicants consider that it is such a scheme, made up of the following elements: the application and strict enforcement of the SIONs; the fact that credits are granted on exports and can only be used for imports of input raw materials, in accordance with the 'input-output' rules. They also point out that most Indian

exporters use the DEPB scheme as they would a drawback scheme that made it a strict requirement that all drawbacks be used exactly against inputs consumed in the manufacturing process of the exported goods. They do this because it makes economic sense. This scheme was conceived as an incentive for economic traders, but with pragmatism and economy of administration on an Indian-wide scale also in mind.

83 Thirdly, the applicants criticise the institutions for failing to investigate whether an excess resulted when inputs were taken into account. They thus infringed the principle of sound administration and the fundamental principles of Regulation No 2026/97. They submit, in essence, that the Commission has a specific duty to examine whether the government of the exporting country has a system or procedure in place to confirm which inputs are consumed in the manufacturing process of the exported product, and in what amounts. If it was believed that there was no such system in place in India, the Commission should have investigated whether the DEPB did in practice operate efficiently and to what extent it might grant an excess drawback to exporters, in order to countervail only that. It is illogical to consider that it is for the Indian authorities to carry out a new examination, since a further examination presupposes the existence of sufficient verification systems which, if they had been in place, would have prevented the grant of an excess drawback. The applicants point out that, in any event, it is for the Community institutions to determine whether a subsidy exists and if so in what amount.

84 Fourthly, they observe that it is a fundamental principle of international law, made clear in the ASCM and the Community customs system, that a manufacturer should not be required to bear duties on goods imported only for the purposes of further working and then re-export. However, there is no internationally binding definition of the conditions which such a system must satisfy. The approach of the Community institutions

amounts to imposing on India, a developing country without an advanced customs system, a system which mirrors exactly that which exists under the Community Customs Code.

85 In the fifth place, and in the alternative, should it be decided that the total amount of the drawback is a subsidy regardless of whether it is excess or not, the applicants point out that the Commission still has to identify the countervailable portion of that subsidy. They state that, under Article 5 of Regulation No 2026/97, the only countervailable part of a subsidy is the benefit conferred on the recipient. As it is a universally acknowledged principle that exported goods need not bear import duties on inputs consumed in their manufacture, then a benefit may only arise if an exporter receives drawback in excess of the import duties paid on the inputs consumed in the manufacture of the exported goods.

86 The Council disputes the merits of this plea.

Findings of the Court

87 In this plea, the applicants essentially allege that the institutions erred in law in their definition of subsidisation, erred in their legal classification of the DEPB, and finally, infringed a procedural obligation by failing to investigate how the DEPB actually functions.

88 The wording of this plea includes a reference to the principle of proportionality. However, at no point do the applicants explain why the classification of the DEPB as a subsidy is contrary to the principle of proportionality. Such a submission does not

satisfy the requirements of Article 44(1) of the Rules of Procedure of the Court of First Instance, on the ground that it is not sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. Accordingly, the submission must be declared inadmissible (see, to that effect, Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraphs 333 and 334).

— Alleged error of law in defining subsidisation

89 Under Article 2(1)(a)(ii) of Regulation No 2026/97: 'A subsidy shall be deemed to exist if … there is a financial contribution by a government in the country of origin or export, that is to say, where … government revenue that is otherwise due is forgone or not collected (for example, fiscal incentives such as tax credits); in this regard, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have been accrued, shall not be deemed to be a subsidy, provided that such an exemption is granted in accordance with the provisions of Annexes I to III.'

90 It is apparent from that provision that, contrary to what the applicants claim, Annexes I to III to Regulation No 2026/97 are not mere guidelines to determine whether there are safeguards against excess drawbacks, but contain rules which must be complied with in order to avoid classification of a remission or exemption from duties as a subsidy. Such a conclusion is evident from the very clear wording of Article 2(1)(a)(ii) of Regulation No 2026/97. Furthermore, it follows from the scheme of that article that the derogation given to exemptions or remissions from duty is an exception to the principle that a

subsidy exists where government revenue that is otherwise due is forgone or not collected. That derogation must therefore be interpreted narrowly.

91 Consequently, by deciding in recitals 8 and 9 of the contested anti-subsidy regulation that, in the absence of compliance with the provisions of Annexes I to III of Regulation No 2026/97, the countervailable benefit was made up of total import duties normally due on all imports, the Council did not err in law in interpreting Article No 2026/97. In fact, limiting classification as a subsidy solely to the excess collected, as the applicants suggest, presupposes that the system for remission or exemption of import duties is compatible with Article 2(1)(a)(ii) of Regulation No 2026/97, and thus, with Annexes I to III thereto.

92 For those reasons, the argument based on an alleged infringement of Article 5 of Regulation No 2026/97, according to which '[t]he amount of countervailable subsidies … shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period', must be rejected. It is based on the same false premiss that exporters are entitled to drawback in respect of duties on the inputs used in the exported products, whereas it is clear from the foregoing that such entitlement is conditional on compliance with Article 2(1)(a)(ii) of Regulation No 2026/97.

93 That conclusion is not undermined by the reference to Annex I(i), Annex II(I)(2), point I.2, and Annex III(I) in which it is stated, in essence, that a drawback scheme may constitute a subsidy if it results in a payment of amounts which exceed those levied. It must be pointed out that those various provisions recall the principle set out in Article 2(1)(a)(ii) of Regulation No 2026/97, but are not intended to specify the exact criteria which must be met by a drawback scheme to be compatible with that article, since those criteria are set out in other provisions in Annexes II and III to Regulation No 2026/97.

94 Finally, as regards Articles 1(1) and 15(2) of Regulation No 2026/97 and Articles 1.1(a)(1)(iii) and 19.3 of the ASCM, to which the wording of this plea refers, the applicants do not explain how those provisions could in any way affect the analysis of the conditions which a scheme for exemption or remission of import duties must satisfy to avoid classification as a subsidy.

— Alleged error in the classification of the DEPB as a subsidy

95 According to Annex II(II)(4) of Regulation No 2026/97: 'Where it is alleged that … a drawback scheme … conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the Commission must normally first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the Commission must normally then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export.' Annex III(II)(2) of Regulation No 2026/97, concerning substitution drawback systems, contains similar wording.

96 According to Annex II(II)(5) of Regulation No 2026/97: 'Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved will normally need to be carried out in the context of determining whether an excess payment occurred. If the Commission deems it necessary, a further examination may be carried out in accordance with paragraph [II]4.' Annex III(II)(3) of Regulation No 2026/97, concerning substitution drawback systems, contains similar wording.

97 In order to find that the DEPB could not be classified as an authorised drawback or substitution drawback scheme, the Council took as its basis, inter alia, the circumstances described in recital 9 of the contested anti-subsidy regulation, according to which:

'[The Government of India] did not apply an effective verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) of … Regulation [No 2026/97] and, in the case of substitution drawback schemes, Annex III(II)(2) [to Regulation No 2026/97]). Additionally, the [Government of India] did not carry out a post-export examination based on actual inputs involved to determine whether an excess payment occurred, although this would normally be required in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to … Regulation [No 2026/97]).'

98 It must be held that the Council correctly interpreted the criteria set out in Annexes II and III to Regulation No 2026/97, the aim of which is to verify that the country of export's drawback scheme enables the actual consumption of inputs or substitution inputs to be confirmed. The first criterion relates to the existence of a system or procedure which enables such verification to be carried out. The second criterion, which applies in the alternative, in the event that such a procedure or system does not exist or is defective, consists of the country of export having recourse to an examination based on the actual inputs used or transactions performed.

99 The Council rightly found that the DEPB did not meet the criteria laid down in Annexes II and III to Regulation No 2026/97.

100 First, it is not apparent from the description of the DEPB as it appears in recitals 23 to 30 of the provisional anti-subsidy regulation — which is confirmed by the Council in recital 6 of the contested anti-subsidy regulation and is not disputed by the applicants — that the Government of India put in place a verification procedure or mechanism. Contrary to what the applicants maintain, the combination of several factors, including the application of the SIONs, the use of credits for imports of inputs, and the fact, cited in their written pleadings, that most Indian exporters use the DEPB scheme as they would a drawback scheme that made it a strict requirement that all drawbacks be used exactly against inputs consumed in the manufacturing process of the exported goods, do not equate to a verification system or procedure within the meaning of Annex II(II)(4) and Annex III(II)(2) to Regulation No 2026/97.

101 Secondly, it is common ground that the Government of India did not carry out a post-export examination, as it was required to do in the absence of a verification system or procedure in accordance with Annexes II(II)(5) and Annex III(II)(3) to Regulation No 2026/97. This point is confirmed, moreover, by the applicants' argument to the effect that it is for the Community to carry out such an examination.

102 The Council was therefore entitled to consider that the DEPB did not satisfy the criteria laid down in Annexes II and III to Regulation No 2026/97 and that, therefore, it could not be classified as an authorised drawback or substitution drawback scheme for the purposes of Article 2(1)(a)(ii) of that regulation.

103 This finding is not affected by the use of the adverb 'normally' in Annexes II and III to Regulation No 2026/97. Although that wording implies that, in particular circumstances, the institutions may use other criteria, it cannot deprive them of the possibility of basing their finding that a drawback or substitution drawback scheme is unauthorised on the fact that the criteria laid down are not met.

104 The applicants' arguments that there is no internationally binding definition of a drawback scheme and that India is a developing country cannot invalidate this finding. In this regard, it suffices to point out that Annexes II and III to Regulation No 2026/97 accord with Annexes II and III to the ASCM which make no distinction in favour of developing countries.

105 For the sake of completeness, it may be noted that the DEPB is not based on the actual inputs or substitution inputs used in the exported product, but on a mere estimate of their quantity. In this respect, the scheme does not include any condition on actual use of inputs in the exported product. However, the existence of such a condition implicitly but necessarily follows from Article 2(1)(a)(ii) of Regulation No 2026/97 and Annexes II and III thereto

— The absence of an investigation into how the DEPB actually functions

106 As is apparent from paragraphs 95 and 96 above, the Commission need only determine whether the government of the exporting country has in place and applies a monitoring system or procedure. It is in no way required, contrary to the applicants' claim, to conduct an investigation in order to verify the way the DEPB functions in practice. On the contrary, in the absence of an appropriate monitoring system or procedure it is for the exporting country and not the Community to carry out a further examination based on the actual inputs and transactions in question. This complaint must therefore be rejected.

107 In the light of the foregoing, the third plea in law must be rejected.

Fourth plea, alleging failure to take into account the effects of anti-competitive practices on the Community market for which fines were imposed when determining injury

Arguments of the parties

108 The applicants claim that the contested regulations infringe, on the one hand, Article 1(1), 3(1), (6) and (7), and Article 9(4) of Regulation No 348/96, Articles 3 and 9 of the 1994 Anti-Dumping Code, and, on the other hand, Articles 1(1), 8(1), (6) and (7) and 15(1) of Regulation No 2026/97 and Articles 15 and 19 of the ASCM, and are vitiated by a manifest error of assessment, inasmuch as they impose definitive duties on imports of the product concerned in the absence of a correct and proper determination of the injury caused, in particular by taking as a basis data made unreliable by the existence of an anti-competitive agreement.

109 They point out that anti-dumping and countervailing duties may only be imposed if it has been shown following an investigation that material injury has been caused to the Community industry. Under the WTO rules, it is necessary to ensure that recourse to trade protection measures does not foreclose access of the imports at issue to the Community market, while the injury to the Community industry may have been caused by other factors. An accurate calculation of the exact level of injury is therefore necessary so as to prevent injury caused by other factors being attributed to the imports under examination and to enable the proper application of the lesser duty rule.

110 The applicants also note the importance attached by the Community judicature to the determination of the part played by other factors in the injury caused to the Community industry and, in particular, the effects of any anti-competitive practices. Thus, in Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, the Court of Justice annulled a duty on the ground that the Commission had not correctly determined the

injury caused by the imports nor considered whether the relevant Community industry was responsible for its own injury through anti-competitive actions on its part.

111 The applicants claim that, according to the judgment of the Court of First Instance in Case T-58/99 *Mukand and Others* v *Council* [2001] ECR II-2521, it is for the Commission to decide whether the market under investigation was affected by the anti-competitive activities in question and accordingly whether reliable conclusions could be drawn in respect of injury. They also point out that, under Article 8(6) and (7) of Regulation No 2026/97 and Article 3(6) and (7) of Regulation No 384/96, the institutions are required to refrain from attributing to the imports under examination the injurious effects on the Community industry of its own anti-competitive conduct. They infer that, in the event of anti-competitive practices leading to price-fixing on the Community market in respect of products which are the subject of an anti-dumping or anti-subsidy investigation, the Commission should terminate proceedings on the basis that that anti-competitive activity invalidates the injury and causation determinations, and indeed makes them impossible.

112 In this case, the applicants submit that the anti-competitive conduct penalised by the Commission in its decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the European Economic Area Agreement (OJ 2002 L 100, p. 1) should have been taken into account. The principal effects were artificially high prices up to March 1998. That prevented both an exact determination of the alleged price undercutting by Indian imports and of the appropriate profitability levels of the Community industry. Also, the effect of the anti-competitive practices was to raise the Community producers' market shares artificially. Therefore, no conclusions should be drawn from the fact that price levels fell. The applicants infer that it was not possible for the Commission to make any reliable assessment of injury indicators. They submit that the Commission should have considered whether the difficulties experienced by the Community industry were not due to its own actions. They maintain that the circumstances of the present case make the analysis easier than it was in *Mukand and Others* v *Council*, cited in paragraph 111 above, because the anti-

competitive practices took place on the same market as the imports in question. They conclude that it is impossible to compare the price levels of Community and Indian graphite electrodes.

113 The applicants dispute the analysis that the effects of the cartel had ceased by the beginning of the period considered, 1 January 1999. It is an illusion to think that the effects of a long term price-fixing and market-sharing cartel disappear immediately, especially in an oligopolistic market. They point out that, on 1 January 1999, the Commission's investigation of the cartel had just begun and the effects of the cartel were at their height, since, in particular, the prices charged had been agreed in prior years and were therefore very high. The subsequent drop in prices was therefore attributable more to the gradual cessation of the effects of the cartel than to the Indian imports. In that regard, the applicants claim that they submitted to the Commission evidence of contemporaneous and matching price increases showing that the market was not free of the effects of the cartel.

114 They conclude from the foregoing that the Commission committed manifest errors of assessment in the determination of both injury and causation. On the one hand, the Commission did not have adequate and reliable indicators for measuring the injury. The applicants claim, in essence, that since the purpose of countervailing and anti-dumping measures is, in principle, to restore a level playing field, the Commission must have a clear idea of where the level playing field stands. Here, the only quantifiable issues were the declines in performance of the Community industry, which is not comparable to material injury justifying the imposition of duties.On the other hand, as regards the examination of causation, the decline in performance on the part of Community producers must be seen as self-inflicted, the consequence of their anti-competitive practices, not of the Indian imports.

115 The Council submits that the institutions examined whether the relevant injury data were affected by the past cartel and correctly concluded that that was not the case.

Findings of the Court

116 Article 1(1) of Regulation No 384/96 provides that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

117 Article 3 of the regulation provides:

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

…

6. It must be demonstrated, from all the relevant evidence … that the dumped imports are causing injury within the meaning of this Regulation. …

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices … restrictive trade practices of … third country and Community producers.'

118 According to Article 9(4) of Regulation No 384/96, '[w]here the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention … a definitive anti-dumping duty shall be imposed by the Council'.

119 Articles 1, 8 and 15 of Regulation No 2026/97 are drafted in a similar way with regard to countervailing duties.

120 According to settled case-law, the question whether a Community industry has suffered injury and, if so, whether that injury is attributable to dumped or subsidised imports and whether imports from other countries or, more generally, whether other known factors contributed to the injury to the Community industry involves the assessment of complex economic matters in respect of which the institutions enjoy a wide discretion. Consequently, review by the Community courts of the assessments of the institutions must be confined to ascertaining whether the procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers (see, to that effect, Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131, and *Mukand and Others* v *Council*, paragraph 111 above, paragraph 38).

121 First, as regards the argument alleging that the injury indicators were unreliable, it should be borne in mind that under Article 3(2) and (3) of Regulation No 384/96 and Article 8(2) and (3) of Regulation No 2026/97, a determination of injury is to be based, inter alia, on increases in imports, changes in prices on the Community market and changes in the profitability of the Community industry. It is important, therefore, that the indicators on which the institutions base their findings should be consistent with normal market conditions (see, to that effect, *Mukand and Others* v *Council*, paragraph 111 above, paragraph 46).

122 An analysis of the relevant passages of the provisional regulations, confirmed by the contested regulations, does not show that the institutions committed a manifest error of assessment in considering that, on the date on which the period under examination began, 1 January 1999, the effects of the anti-competitive conduct penalised in Decision 2002/271 had disappeared (recital 46 of the provisional anti-dumping regulation and recital 90 of the provisional anti-subsidy regulation, confirmed, respectively, by recital 18 of the contested anti-dumping regulation and recital 27 of the contested anti-subsidy regulation).

123 It is apparent from recitals 77 to 81 of the provisional anti-dumping regulation and recitals 121 to 125 of the provisional anti-subsidy regulation, confirmed by the Council in recital 21 of the contested anti-dumping regulation and recital 29 of the contested anti-subsidy regulation, that that conclusion is supported by a sufficiently convincing analysis in an area in which the institutions enjoy a wide discretion.

124 The finding that the effects of the cartel had ceased on 1 January 1999, the date chosen as the starting point for the period considered, was based on the observation that virtually all the transactions actually invoiced and paid in 1999, and the ensuing prices resulted from agreements set after the date on which the cartel ceased to operate (March 1998). That finding is in turn based on the following circumstance, referred to

in recital 78 of the provisional anti-dumping regulation and recital 122 of the provisional anti-subsidy regulation:

'The investigation has found that in the period 1998–1999, annual contracts covered around 40% of the transactions, six-month contracts covered around 35% and three-month contracts or single orders covered around 25%. Long-term contracts (e.g. three-year contracts) have been gaining ground relatively recently, but were, in the years 1997–98, marginal, if not totally non-existent, as one could logically expect in a market that was characterised by high prices.'

125 In addition, the Council relies on the finding, set out in recital 80 of the provisional anti-dumping regulation and recital 124 of the provisional anti-subsidy regulation, that an analysis of long term prices of the products concerned on the Community market had shown that prices increased gradually during the 1990s, reaching a peak in 1998, then declined sharply by 14% between 1998 and 1999.

126 The Commission explained moreover why the development of prices in another market, that of large diameter electrodes (i.e. with a diameter above 700 mm), was not relevant (recital 79 of the provisional anti-dumping regulation and recital 123 of the provisional anti-subsidy regulation).

127 It remains to be ascertained whether the above considerations are invalidated by the applicants' arguments.

128 First of all, in order to show that the effects of the cartel on the market in question were still being felt on 1 January 1999, the applicants submit that on that date the Commission's investigation of the cartel had just begun and the anti-competitive effects were at their height. It suffices to point out that the institutions rightly took Decision 2002/271 as their basis, from which it is clear that the investigation began on 5 June 1997 (recital 32) and that the infringement persisted until February/March 1998 (recital 155).

129 Secondly, the applicants refer to the oligopolistic structure of the market in question and the fact that competition on that market was absent or very limited to assert that competition could not be re-established immediately, but only gradually. As is clear from paragraphs 122 to 126 above, the existence of a manifest error of assessment is not apparent from a mere reading of the provisional and definitive regulations. It is thus for the applicants to adduce evidence which would enable the Court of First Instance to reach a different conclusion (see, to that effect, *EFMA* v *Council*, paragraph 45 above, paragraph 106; Case T-210/95 *EFMA* v *Council* [1999] ECR II-3291, paragraph 58; and *Mukand and Others* v *Council*, paragraph 111 above, paragraph 41).

130 In this regard, the applicants submitted evidence showing, in their view, that SGL and UCAR simultaneously increased prices after 1 January 1999 and, therefore, that normal market conditions were not restored. That evidence was cited and further evidence submitted in their letter of 22 June 2004.

131 Without there being any need to question the probative value of some of those documents taken from the Internet (extracts from the Yahoo Finance and UCAR and SGL websites), it suffices to point out that those documents do not touch upon the essential factor which prompted the Commission, as confirmed by the Council, to find that normal market conditions were restored on 1 January 1999, namely the sharp 14% fall in prices between 1998 and 1999. By those documents, the applicants seek only to show that there were simultaneous price increases after 1 January 1999, and in

particular, between 2002 and 2004. Those documents do not therefore call into question the reasoning to the effect that on 1 January 1999, the effects of past anti-competitive behaviour had disappeared, and accordingly that the injury indicators were sufficiently reliable. Since that analysis is not directly called into question, the alleged parallel increase in prices cannot be regarded as having arisen from the conduct that was penalised by Decision 2002/271 or as constituting evidence of the absence of normal market conditions.

132 In that regard, the facts in this case are different from those which gave rise to the judgment in *Mukand and Others* v *Council*, paragraph 111 above, relied on by the applicants, in which the Council did not dispute the existence of the evidence which, the Court of First Instance held, rendered the analysis of the prices of the product concerned unreliable.

133 Secondly, and as a result, the applicants' other arguments must also be rejected.

134 First of all, the institutions did not commit any manifest error of assessment in considering that, once the effects of the practices penalised in Decision 2002/271 had disappeared, the Community market enjoyed normal conditions of competition.

135 Next, it is true that, according to settled case-law, in determining injury, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves (*Extramet Industrie* v *Council*, paragraph 110 above, paragraph 16, and Case T-107/04 *Aluminium Silicon Mill Products* v *Council*

[2007] ECR II-669, paragraph 72). However, for the reasons outlined above, it must be held that any injury which the Community might have caused to itself had ceased on the date on which the examination period began.

136 Finally, as regards the applicants' references to alleged infringements of Articles 3 and 9 of the 1994 Anti-Dumping Code and Articles 15 and 19 of the ASCM, it appears that they do not argue that the content of those provisions was different from that of the provisions in Regulations Nos 384/96 and 2026/97 which give effect to the specific obligations contained therein.

137 In the light of the foregoing, the fourth plea in law must be rejected.

Fifth plea relating to the Council's failure, when determining injury, to take into account the effects of other factors and to the choice of method for calculating injury

Arguments of the parties

138 In essence, the applicants criticise the institutions for attributing all the injury to the Indian imports, whereas a proper investigation as regards other factors, and in particular, of other imports that were undercutting prices would certainly have led to the conclusion that there was dumping from countries other than India, in particular

from Japan. Consequently, both the provisional regulations and the contested regulations are contrary either to Article 3(7) of Regulation No 348/96 or to Article 8(7) of Regulation No 2026/97.

139 Furthermore, the applicants consider that in this case, where other factors may have played a role in the drop in prices of the products, the Commission should not have calculated the profit margin on the basis of a target price allegedly corresponding to what it would have been in the absence of dumping and subsidy (price underselling) but should have followed the well-established basis of price undercutting. The applicants consider that the method favoured by the Commission in this case, which is based on a comparison of Indian export prices with Community industry target prices with a supposedly reasonable profit margin, has the effect of making the Indian imports bear the burden of all supposed injury caused to the Community industry even though the Commission has concluded that Indian imports are not the sole cause thereof. This is precisely what Article 3(7) of Regulation No 384/96 and Article 8(7) of Regulation No 2026/97 set out to avoid.

140 The applicants maintain that the Council appears to confuse the separate concepts of causation and the exclusion of other factors from the injury analysis. The applicants are not suggesting that, in any given anti-dumping or anti-subsidy case, other factors causing injury should deprive the Community industry of all protection, just that injury caused by those other factors should not be attributed to the dumped imports, as Article 3(7) of Regulation No 348/96 requires.

141 The Council considers that this plea should be rejected.

Findings of the Court

142 Under Article 3(7) of Regulation No 384/96 and Article 8(7) of Regulation No 2026/97, known factors other than the dumped or subsidised imports which are injuring the Community industry at the same time are also to be examined to ensure that injury caused by these other factors is not attributed to the dumped or subsidised imports.

143 As the Court has had occasion to point out, it is possible to attribute to the imports considered responsibility for injury even if their effects are merely part of more extensive injury attributable to other factors, and in particular, imports from third countries (see, to that effect, Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 62).

144 However, it is for the institutions to establish whether those other factors were not such as to break the causal link between the imports in question and the injury suffered by the Community industry (see, to that effect, Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraphs 79, 81 and 82, and Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 98).

145 Similarly, it is for the institutions to ensure that the injury attributable to other factors is not taken into account when injury is determined within the meaning of Article 3(7) of Regulation No 384/96 and of Article 8(7) of Regulation No 2026/97 and that, therefore, the anti-dumping or countervailing duty imposed does not exceed the level necessary to remove the injury caused by the dumped or subsidised imports (see, to that effect, as regards the application of Article 4(1) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1998 L 209, p. 1), the wording of

which is similar to that of Article 3(7) of Regulation No 384/96 and of Article 8(7) of Regulation No 2026/97, Case T-210/95 *EFMA* v *Council*, paragraph 129 above, paragraphs 59 and 60).

146 Accordingly, the institutions are required to assess the effects of other known factors, and in particular, the effects of imports of the product concerned from third countries, not only when analysing the causal link between the imports examined and the injury suffered by the Community industry, but also when determining the injury suffered by the latter.

147 It is in the light of those considerations that the applicants' complaints relating, on the one hand, to the failure to take into account the effects of other factors and, on the other hand, to the choice of method for calculating the injury elimination level must be assessed.

— The complaints relating to the failure to take into account the effects of other factors

148 The applicants' only express criticism is levelled at the failure to take into account the effect of the Japanese imports.

149 In its provisional regulations, the relevant recitals of which (83 to 88 of the provisional anti-dumping regulation and 127 to 132 of the provisional anti-subsidy regulation) were confirmed by the Council (recital 21 of the contested anti-dumping regulation and recital 29 of the contested anti-subsidy regulation), the Commission endeavoured to

show that no indications could be found that imports from certain third countries other than India had contributed to the injurious situation suffered by the Community industry.

150 It came to the following conclusion, set out in recital 87 of the provisional anti-dumping regulation and in recital 131 of the provisional anti-subsidy regulation:

'Given the average prices, the small volume of [the] imports [from third countries other than India], their limited market share and the above considerations in terms of product range, no indications could be found that these third country imports, whether or not originating from facilities owned by the two complainant Community producers, contributed to the injurious situation suffered by the Community industry notably in terms of market shares, sales volumes, employment, investment, profitability, return on investment and cash flow.'

151 That conclusion is based on a number of factors which are not expressly criticised by the applicants.

152 It is thus not disputed that only imports from three countries other than India, namely, Japan, Poland and the United States, had a share of the Community market above 1% during the investigation period, and that their CIF Community frontier price ('the CIF price') was above that of the Indian imports. The CIF price of the Polish imports exceeded those of the Community industry. According to the findings in the provisional regulations, the market share of the United States declined from 5.3 to 4.7%.

153 It is true that the provisional regulations contain few explanations relating to the Japanese imports. They simply mention that 'the market share of Japan rose from 2.1% in 1999 to 2.6%' and that the CIF price of those imports undercut the Community industry's price, but was above India's (recital 128 of the provisional anti-subsidy regulation and recital 84 of the provisional anti-dumping regulation).

154 Although such imports are certainly not such as to break the causal link between the imports examined and the injury suffered by the Community industry, it was for the institutions to establish whether those imports were not a separate source of injury to the Community industry, and if that was the case, not to attribute that injury to the imports examined.

155 Even though the statement of reasons in the contested regulations with regard to the Japanese imports is succinct, it is made clear to the requisite legal standard, however, in the contested regulations and the provisional regulations to which they refer, that such an effect was regarded as non-existent or too insignificant to be the source of any significant injury.

156 First, it is clear from those regulations that the obligation on the institutions not to attribute to the imports under examination injury suffered by the Community industry which was caused by other factors, and in particular, by imports of the product concerned from third countries, was properly construed. Indeed, the following is stated in recital 117 of the provisional anti-subsidy regulation, and in a similar way in recital 73 of the provisional anti-dumping regulation:

'In accordance with Article 8(6) and (7) of … Regulation [No 2026/97], the Commission examined whether subsidised imports have caused injury to the Community industry to a degree that enables it to be classified as material. Known factors other than the

subsidised imports, which could at the same time be injuring the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the subsidised imports.'

157 Secondly, the institutions were entitled to consider, in this case, that the effects of imports from third countries were non-existent or only very limited, and consequently that those imports were not the source of any significant injury that they would have had to ensure were not attributed to the imports examined.

158 In this regard, it is stated in recital 136 of the provisional anti-subsidy regulation, and similarly in recital 92 of the provisional anti-dumping regulation, that 'the effect of the decline in demand linked to the slowdown in the steel market, of the return to normal competition conditions after dismantling of the cartel, of the performance of other Community producers, of the imports from other third countries, of the export performance of the Community industry was non-existent or only very limited and consequently not such as to alter the provisional finding that there is a genuine and substantial causal link between the subsidised imports from the country concerned and the material injury suffered by the Community industry'.

159 Such a conclusion with regard to imports the volume of which increased by only 0.5% over the entire period examined, which was adopted in an area where, for the reasons referred to in paragraph 120 above, the institutions enjoy a wide discretion, does not appear to be manifestly wrong.

160 It follows that the applicants' first complaint must be rejected.

— The complaint relating to the choice of method for calculating the injury elimination level

161 The choice of method of calculation falls within the discretion enjoyed by the institutions in respect of determinations of injury suffered by the Community industry and which is justified by the complex economic assessments inherent in such determinations. Recourse to a method of calculation based on the profit margin which the Community industry could reasonably have anticipated in the absence of unfair practices, as opposed to a method of calculation based only on price undercutting, is not vitiated by any manifest error of assessment.

162 The profit margin to be used by the Council when calculating the target price that will eliminate the injury in question must be limited to the profit margin which the Community industry could reasonably anticipate under normal conditions of competition, in the absence of the dumped or subsidised imports (Case T-210/95 *EFMA* v *Council*, paragraph 129 above, paragraph 60). The applicants have not been able, however, to show that that was not the case here.

163 This second complaint, and therefore, the fifth plea must be rejected.

164 It follows that the action must be dismissed in its entirety.

Costs

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

166 Since the applicants have been unsuccessful and the Council applied for costs, the applicants must be ordered to pay, in addition to their own costs, the costs incurred by the Council. The Commission shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. **Orders HEG Ltd and Graphite India Ltd to bear their own costs and to pay the costs of the Council;**

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

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 17 December 2008.

[Signatures]

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