Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 25 April 2013 [1]

Case C-638/11 P

Council of the European Union
v

Gul Ahmed Textile Mills Ltd

(Appeal — Dumping — Imports of cotton-type bed linen originating in Pakistan — Causal link between dumping and injury — Known factors causing injury, other than dumped imports — Attribution or non-attribution of injury to dumped imports)

1. Before 2002, imports of cotton-type bed linen originating in Pakistan were subject to customs duty, latterly of 12%. From 1997, they were also, with some exceptions, subject to anti-dumping duty of between 6% and 7%. [2] In January 2002, both those duties were removed. [3] In November 2002, Eurocoton, [4] acting on behalf of producers representing a major proportion of Community production, lodged a complaint with the Commission. Following investigation, a new anti-dumping duty of 13.1% was imposed in 2004. [5]

2. Gul Ahmed Textile Mills Ltd ('Gul Ahmed') is a Pakistani producer whose exported products had not been subject to the previous anti-dumping duty. [6] It brought proceedings before the General Court challenging the contested regulation on the ground, inter alia, that the determination of injury had failed to take account of the fact that imports had increased as a result of the removal of the previous duties, which was a known factor other than the dumped imports injuring the Community industry, within the meaning of Article 3(7) of Regulation No 384/96 ('the basic regulation'). [7]

3. The General Court upheld the challenge on that ground. [8]

1 — Original language: English.

2 — See Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan (OJ 1997 L 332, p. 1), as amended.

3 — See Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 (OJ 2001 L 346, p. 1) and Council Regulation (EC) No 160/2002 of 28 January 2002 amending Council Regulation (EC) No 2398/97 (OJ 2002 L 26, p. 1). As regards the latter, a revised calculation showed that there had been no dumping by any of the companies sampled in Pakistan during the investigation period (see recital 13 in the preamble); anti-dumping duties were also, in effect, removed with regard to imports from Egypt (see Article 1(2)).

4 — Committee of the Cotton and Allied Textile Industries of the European Communities.

5 — By Council Regulation (EC) No 397/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Pakistan (OJ 2004 L 66, p. 1; 'the contested regulation').

6 — See Article 1(4) of Regulation No 2398/97 and recital 29 in the preamble. More exactly, they were subject to the duty at a rate of 0.0%.

7 — 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), now repealed and replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version) (OJ 2009 L 343, p. 51).

8 — Case T-199/04 *Gul Ahmed Textile Mills* v *Council* [2011] ECR ('the judgment under appeal').

4. The Council has appealed and, supported by the Commission, argues essentially that the effect of the removal of the previous duties could not be separated or distinguished from that of the dumped imports when determining the causation of injury to the Community industry. Their removal was thus not a 'factor other than the dumped imports'. The issue is thus a compact one: should Article 3(7) of the basic regulation receive a broad or a narrow interpretation?

Relevant legislation

The basic regulation

5. As is stated in its preamble, the basic regulation was adopted in order to bring Community rules in line with changes in international agreements, particularly the WTO Anti-dumping Agreement. [9]

6. Article 1(1) of the basic regulation sets out the principle that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury. Article 1(2) defines a dumped product as one whose export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

7. Article 2 lays down the principles and rules governing determination of dumping. Essentially, for a given product exported from a third country, a normal value on the domestic market and an export price to the Community are established, and a fair comparison is made between the two, taking account of various factors which might influence differences between them. If a comparison of weighted averages shows that the normal value exceeds the export price, the amount by which it does so is the dumping margin.

8. Article 3 ('Determination of injury') provides, in particular:

'...

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

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

…

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline

9 — Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103), in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 1).

in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped 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 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, 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.

…'[10]

The contested regulation

9. Recital 19 in the preamble to the contested regulation states that the investigation period for dumping and injury was from 1 October 2001 to 30 September 2002 and that trends relevant for the assessment of injury were examined from 1999 to the end of that period.[11]

10. The existence of dumping by all Pakistani exporting producers and of injury to the Community industry having been established in recitals 30 to 102 of that preamble, causation was examined in recitals 103 to 118. It was concluded in recital 107 that, in terms of both volume and prices, imports from Pakistan exerted significant downward pressure on the Community industry and that there was a coincidence in time between those imports and the injury suffered by the Community industry. In recitals 108 to 115, in accordance with Article 3(7) of the basic regulation, the effects of six other factors were examined: subsidised imports originating in India, imports originating in third countries other than India and Pakistan, contraction of demand, imports by the Community industry, export performance by the Community industry and productivity of the Community industry. In recitals 116 to 118, it was concluded that none of those factors broke the causal link between the Pakistani imports and the injury suffered by the Community industry.

11. Article 1 of the contested regulation imposed a definitive anti-dumping duty of 13.1% on imports of bed linen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed, originating in Pakistan and classifiable within specified codes in the Combined Nomenclature.[12]

10 — Article 3(2), (3) and (5) of the basic regulation correspond to Article 3.1, 3.2 and 3.4 of the WTO Anti-dumping Agreement; Article 3(6) and (7) correspond to Article 3.5.

11 — The investigation period for the previous anti-dumping duty had been from 1 July 1995 to 30 June 1996 (see recital 10 in the preamble to Commission Regulation (EC) No 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan (OJ 1997 L 156, p. 11)).

12 — By contrast to the previous anti-dumping duty, the rate was the same for all exporting producers. Subsequently, following a partial interim review, Council Regulation (EC) No 695/2006 of 5 May 2006 amending Regulation (EC) No 397/2004 (OJ 2006 L 121, p. 14) varied the rate for different producers in accordance with their differing dumping margins. That regulation did not, however, re-examine injury or causation.

The judgment under appeal

12. The General Court examined only the third part of Gul Ahmed's fifth plea in law, to the effect that the Council erred in law by failing to examine whether the removal of the previous anti-dumping duty on products from Pakistan and the implementation of generalised tariff preferences in favour of Pakistan at the start of 2002 broke the causal link between the imports from Pakistan and the injury suffered by the Community industry. [13]

13. At paragraph 53 of its judgment, the General Court noted that the injurious effects of the dumped imports must be correctly separated and distinguished from the injurious effects of 'known factors other than the dumped imports which at the same time are injuring the Community industry'. Without such separation and distinction, the Commission and the Council would have no rational basis to conclude that the dumped imports were indeed causing the injury. That separation requires a concrete analysis of the nature and importance of the factors in question, which cannot be based on the simple hypothesis that factors other than the dumped imports do not cause the injury and do not contribute to it.

14. At paragraphs 55 to 59, the General Court rejected the distinction between market-related developments or conduct (which the Council considered to constitute other factors) and amendments to the legislative framework of the market (which it did not). That distinction did not follow from Article 3(7) of the basic regulation or Article 3.5 of the WTO Anti-dumping Agreement, nor could it be deduced from any common features presented by the known factors listed in those provisions.

15. First, the enumeration of such factors was explicitly indicative, not exhaustive. Second, both provisions sought to avoid unnecessary protection for domestic industry by ensuring that negative effects of other factors affecting the injury are not attributed to the imports in issue. Third, if increased imports of a product on the expiry of quantitative restrictions may be taken into account when assessing the existence of injury, [14] the same must be true of the assessment of causality in accordance with Article 3(7) of the basic regulation. Consequently, the abolition of the previous anti-dumping duties and ordinary customs duties were known factors which the EU institutions had to take into account in assessing the causal link between the imports concerned and the injury suffered by the Community industry. A contrary conclusion would render the obligation under Article 3(7) ineffective where, as here, the effects of amendments to the legislative framework had been clearly raised in the administrative procedure.

16. At paragraph 84 of the judgment under appeal, the General Court stated:

'… it is not apparent from the analysis carried out by the EU institutions in this case, even in the form of a mere estimate, what the injury suffered by the Community industry would have been in the absence of any dumping, that is to say what would have been the injury arising merely from the entry into force of the scheme of generalised tariff preferences and the abolition of the previous anti-dumping duties, whether in terms of loss of market share, reduction in profitability or performance of the industry referred to above, of renunciation of lower segments of the market or any other relevant economic indicator. It was all the more necessary to analyse the impact of the measures in question since several passages of the contested regulation state that competition on prices had been "fierce", so that a diminution in the prices of imports from Pakistan following the said legislative amendments could not, in all probability, have remained without impact on the state of the market.'

13 — Gul Ahmed had also challenged the regularity of the initiation of the investigation, the calculation of normal value, the comparison between normal value and export price and the determination of material injury. Those aspects were not examined by the General Court and are not in issue in this appeal.

14 — Here, the General Court cited, at paragraph 58 of its judgment, Case T-410/06 *Foshan City Nanhai Golden Step Industrial* v *Council* [2010] ECR II-879 ('*Foshan Golden Step*'), paragraphs 130 to 135.

17. Since it could not be ruled out that, without the error of law in question, the Council would not have determined the existence of a causal link between the imports forming the subject-matter of the anti-dumping procedure and the injury suffered by the Community industry, the General Court annulled the contested regulation in so far as it affected Gul Ahmed and, in effect, referred the matter back to the Council since it could not substitute its own assessment for that of the Council. The General Court considered it unnecessary to examine any of Gul Ahmed's other pleas and arguments.

Summary of the arguments on appeal

18. In support of its sole ground of appeal, namely, that the General Court infringed Article 3(7) of the basic regulation, the *Council* argues, first, that 'factors other than the dumped imports' are by definition unrelated to those imports – for example, imports from other third countries, cost inefficiency, contraction in demand, and competition among EU producers. Here, termination of the previous anti-dumping duty and implementation of the scheme of preferences for imports of the product concerned were intimately related to the dumped imports from Pakistan. That may have facilitated an increase in those imports, but injury which results from an increase in dumped imports is caused by the imports, not by factors facilitating the increase. [15]

19. Second, the General Court's reasoning does not withstand scrutiny.

20. To state that the list in Article 3(7) of the basic regulation is not exhaustive misses the point. The Council had merely submitted that the two contested factors did not constitute other factors within the meaning of the provision.

21. Paragraph 57 of the judgment under appeal fails to address the Council's submission that changes to the legislative framework matter only in so far as they produce an effect on the market; and that the two factors in issue could have had an effect on the dumped imports, but not on the performance of the EU industry.

22. It is true that all other known factors must be taken into account, and Article 3(7) of the basic regulation seeks to ensure that injury caused by other factors is not attributed to the dumped imports. However, the General Court's statement that Article 3(7) does not distinguish between market-related developments or conduct and changes to the legislative framework fails to recognise that such changes can produce an injurious effect only to the extent that they produce effects on the market. The only claimed effect of the two contested factors was that they may have facilitated the dumped imports; that any injury caused by the dumped imports was caused by them and not by the factors that may have facilitated them; and that, therefore, the two contested factors were not 'factors other than the dumped imports' in the sense of Article 3(7).

23. The judgment in *Foshan Golden Step* in fact supports the Council's interpretation. In that case, the General Court rejected the allegation that the abolition of the quantitative quota distorted the injury data and held that the Council was correct in taking account, in its injury assessment, of the increase in imports following the abolition of the quota. In other words, in so far as the injury consists of an increase in dumped imports, the institutions may attribute the entire injury to the dumped imports and need not separate and distinguish the effects of the abolition of the quota.

15 — The Council cites WTO Panel Report *European Union – Anti-dumping duties on certain footwear from China* (WT/DS405/R, adopted on 22 February 2012; '*EU – Footwear (China)*)', in which China argued that the European Union had failed to take account of the removal of the previous import quota on imports from China as a cause of injury. The panel considered at paragraph 7.527 that 'an exogenous event, such as the lifting of an import quota, which allows for an increase in the volume of dumped imports, is not itself a factor causing injury'.

24. Third, the General Court fundamentally misunderstood Articles 3(6) and (7) of the basic regulation. In paragraph 84 of its judgment, it considered that, in order to impose measures, the institutions must establish a causal link between the dumping and the injury suffered. However, it is clear from the wording of Articles 3(6) and (7) and from settled case-law[16] that the causal link to be established is between the dumped imports and the injury suffered, not between the dumping and the injury suffered.

25. Finally, the General Court's ruling leads to absurd and unacceptable results. If anti-dumping duties lapse because the EU industry does not request an expiry review or the institutions conclude that the conditions for renewal are not met, and if dumped imports from the country concerned then increase massively and take a significant market share from the EU industry, then, according to the General Court, the institutions must examine what portion of the increase in the dumped imports is due to the lapse of the previous duties, and must 'separate and distinguish' the injury caused by that increase from the injury caused by the dumped imports. That would amount to accepting that the lapse of anti-dumping duties justifies future dumping and limits the ability of the institutions to protect the EU industry against its injurious effects. If, after the removal of anti-dumping duties, dumping resumes or continues, and if the EU industry suffers injury as a result of the volume and prices of the dumped imports, then that injury is caused by the dumped imports and not by the absence of protection. The same is true with respect to the implementation of tariff preferences. Tariff preferences facilitate imports but their purpose is to facilitate fair imports, not injurious dumped imports.

26. *Gul Ahmed* submits that the claims in the appeal are inaccurate, irrelevant, and incorrect as a matter of law.

27. First, Article 3(7) of the basic regulation does not limit the factors whose injurious effects are to be taken into account. But, even if it did, it could not be said that the removal of the previous duties in 2002 was intimately related to dumped imports. Rather, it was the result of sovereign actions of the EU institutions. The generalised tariff preferences were, moreover, in no way specific to bed linen.

28. Second, it is circular to assert that any injury that results from an increase of dumped imports does not result from the factors facilitating the increase in dumped imports. The *EU – Footwear (China)* report cited by the Council does not give adequate reasoning, but makes the contradictory claim that an 'exogenous event' – in that case, the lifting of a quota – can be 'intimately related' to dumped imports. The factors in issue in the present case directly reduced the EU duty burden on all bed linen imports from Pakistan, thereby directly affecting the price levels of those imports on the EU market and not merely facilitating an increase in the volume of dumped imports.

29. Third, the factors in question did have a direct impact on the EU market. They were intentional acts of government as a direct result of which, without any change to the f.o.b. prices of the Pakistani producers, EU producers were facing imports entering the EU market at substantially lower prices. In other words, the factors in question directly and independently affected Community price levels to a substantial degree.

16 — The Council cites: Case T-107/04 *Aluminium Silicon Mill Products* v *Council* [2007] ECR II-669, paragraphs 41 to 46; GATT Panel Report, *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted on 27 April 1994, paragraphs 562 to 572; Case T-190/08 *CHEMK and KF* v *Council* [2011] ECR II-7359, paragraphs 134 to 152; and WTO Appellate Body Report *United States – Anti-dumping measures on certain hot-rolled steel products from Japan* (WT/DS184/R, adopted on 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R; '*US – Hot-rolled steel*'), paragraphs 216 to 236.

30. Fourth, the Council does not explain why the causal link should be between the dumped imports and the injury suffered, not between the dumping and the injury. Whether the two factors in question and their effects are considered in relation to the dumping or to the dumped imports, they remain sovereign acts of the EU institutions which by themselves produced direct effects on the economic indicators considered in the injury and causation assessment.

31. Finally, the appeal misinterprets the implications of the General Court's decision by mischaracterising the changes in the legislative framework. The removal of the previous anti-dumping duty was not a lapse of that duty, but the correction of its invalid imposition after finding that no dumping had actually occurred. Nor did the grant of special tariff preferences merely facilitate imports – it directly lowered the price levels of imports on the EU market, independently of any actions of Pakistani exporting producers.

32. The General Court's decision in no way implies that the lapse of anti-dumping duties justifies future injurious dumping and limits the ability of the institutions to protect the EU industry against the effects of such dumping. It merely requires that the effect of deliberate sovereign changes in the EU legislative framework be considered as a separate other factor when evaluating the economic indicators of injury to the EU industry. That in no way prejudges the outcome of the evaluation.

33. Supporting the Council's pleas in law, the *Commission* examines the structure and logic of Article 3, in particular Article 3(6) and (7), of the basic regulation.

34. The crucial question in Article 3(6) is whether 'dumped imports' – the terms used throughout Article 3 – are causing injury, and specifically whether their volume and/or price levels are responsible for an impact on the Community industry. Article 3(2) and (3) confirm that an objective analysis is required. As regards pricing, it is the price levels themselves which matter and not the considerations which led them to be fixed as they are. In the present case, the level of EU customs and other import duties were factors that influenced the choice of price level (the exporter having apparently chosen not to increase his ex-factory price to take advantage of the reduced duties). If both the price and the considerations affecting it were causal factors, that would constitute a form of double counting.

35. In Article 3(7), 'factors other than the dumped imports' must therefore be something other than the volume and/or price levels of those imports or the factors or considerations which affected them. That is confirmed by the listed examples of such factors, none of which concerns either the dumped imports or the price or volume of those imports. Even though the examples are illustrative and not exhaustive, their drafting shows a deliberate intention to avoid matters relating to the dumped imports themselves.

Assessment

36. The procedure for reaching a decision to impose an anti-dumping duty in accordance with the basic regulation and the WTO Anti-dumping Agreement follows a step-by-step approach, with a clear internal logic. First, it must be established that dumping is taking place. For that purpose, various steps must be completed, one by one. The normal value of the product in question must be determined, then the export price, and the two must be compared to ascertain whether there is dumping and, if so, what the dumping margin is. That process is set out in some detail in Article 2 of the basic regulation. Where dumping is found to exist, Article 3 then lays down a procedure for determining injury. Various factors must be examined in order to determine whether the volume and/or price levels of dumped imports are responsible for a material impact on the Community industry. If they are, it is necessary to consider whether known factors other than the dumped imports are also

injuring the Community industry and to take the findings into account when fixing the level of any anti-dumping duty. Thus, only when dumping has been found to exist and the volume and/or price levels of dumped imports have been found to be responsible for a material impact on the Community industry must other factors be examined.

37. In its action at first instance, Gul Ahmed took issue with a number of aspects of the process prior to the stage at which factors other than dumped imports had to be examined. The General Court did not examine those aspects because it considered that the failure to consider whether the removal of the previous duties was a known factor other than the dumped imports which was also injuring the Community industry was sufficient to justify annulment.[17] Thus, even on the assumption that the investigation was properly initiated, that normal value was correctly determined and fairly compared with export prices to produce a reliable dumping margin, and that material injury caused by dumped imports was correctly established, the failure to regard the removal of previous duties as another known factor causing injury and to examine it as such was, in the General Court's judgment, fatal to the validity of the contested regulation.

38. That limitation of the scope of the judgment under appeal circumscribes the appeal itself. This Court too must proceed on the basis that the existence of dumping (by all Pakistani exporting producers) was correctly established in accordance with Article 2 of the basic regulation, and that the dumped imports were duly shown to cause material injury to the Community industry in accordance with all the provisions of Article 3(2), (3), (5) and (6) of that regulation.

39. I would stress however that those assumptions must be made only for the purposes of this appeal. If – as I shall propose – this Court decides to uphold the Council's appeal and refer the case back to the General Court, those issues will have to be examined, and it may transpire that the contested regulation must be annulled on one or more of the other grounds raised by Gul Ahmed.

40. In addition, it must be assumed for the purposes of the appeal – a fortiori, since these are aspects which were not called into question by Gul Ahmed at first instance – that the Council correctly examined those factors other than the dumped imports which it did consider in accordance with Article 3(7) of the basic regulation, and correctly reached the conclusion that none of them broke the causal link between the Pakistani imports and the material injury caused by those imports to the Community industry. The factors examined included the effects of subsidised imports from India, imports from third countries other than India and Pakistan and imports by the Community industry. (Since the contested regulation had already reached the view that there was dumping by all Pakistani exporting producers,[18] there were, on that basis, *no undumped imports* from Pakistan which could also have been examined.) Those effects were also influenced, to varying degrees, by the removal of the previous duties.

41. To that extent, therefore, the General Court's statement in paragraph 84 of its judgment to the effect that the analysis carried out by the EU institutions did not show what injury would have been suffered by the Community industry in the absence of any dumping, as a result merely of the removal of the previous duties, does not seem fully justified.

42. On the one hand, injury (or the lack of it) arising in other circumstances also affected by the removal *was* examined and was found not to break the causal link in issue.

17 — Paragraphs 84 and 85 of the judgment under appeal.

18 — See recital 70 in the preamble.

43. On the other hand, the examination of factors other than the dumped imports takes place only when it has already been established that there is dumping and that dumped imports are causing injury to the Community industry. The existence of dumping and of injury caused by dumped imports is a prerequisite for that examination, which concerns factors that are causing injury at the same time as the dumped imports, in order to separate and distinguish their effects. It can serve no purpose, in that context, to consider factors which might have caused injury in the absence of dumping and dumped imports.

44. However, the Council accepts that, even if the removal of the previous duties was taken indirectly into account in the examination of factors other than the dumped imports, it was not examined directly as a separate factor. It is the need to carry out such direct and separate examination which the Council disputes.

45. It is common ground, moreover, that the injurious effects of the dumped imports must be correctly separated and distinguished from those of other known factors which are injuring the Community industry at the same time and that, without such separation and distinction, there would be no rational basis for concluding that the dumped imports were indeed causing the (whole) injury. [19]

46. The question is whether it is correct to separate and distinguish the effects of the removal of the previous duties from those of the dumped products or rather to consider the two sets of effects as so intimately related that separation and distinction would be inappropriate.

47. The Council and the Commission have stressed the difference between 'dumping' and 'dumped imports' in the context of the basic regulation. I agree that the difference is important.

48. *Dumping*, as defined in Article 2 of both the WTO Anti-dumping Agreement and the basic regulation, implies a strategic choice made by an exporter. Put simply, he decides to sell products intended for one or more export markets at a price significantly lower than that which he would normally charge on his home market, in the hope of gaining commercial advantage. Of course, the exporter's price will be calculated – initially at least – so as to ensure that the price on the market in the importing territory will be advantageous. It will therefore take account of any applicable import duties. If import duties are removed, the exporter will be able to adjust his strategy to derive optimal advantage from the new leeway. That does not, however, affect the question whether there is dumping or not.

49. The products sold in that way become *dumped imports* in the importing territory. If the price at which they can be acquired there is appreciably lower than the price at which the domestic industry can sell like products, and if the volume of imports is significant, then the domestic industry is likely to suffer material injury, as defined in Article 3 of both the WTO Anti-dumping Agreement and the basic regulation.

50. It is consequently possible for there to be dumping without injury or injury without dumping. Dumping may significantly undercut domestic prices in the importing territory but the volume of dumped imports may be too small to cause material injury; or an exporter may sell at an unusually low ex-works price in order to gain a foothold in a particular export market but shipping costs may be so high that his competitive advantage in that market is not sufficient to have a significant impact on the domestic industry. Conversely, production costs in the exporting country (and shipping costs to the importing territory) may be so low that a product can be sold for export at 'normal value' and still cause material injury to the domestic industry in the importing territory.

19 — Paragraph 53 of the judgment under appeal; see also *US – Hot-rolled steel*, cited in footnote 16, point 223.

51. However, an anti-dumping duty may be imposed only if dumping and injury are both demonstrated. The two must be established separately, by separate procedures, and cannot be conflated.

52. As the Council and the Commission have pointed out, the direct cause of any injury to the domestic industry is the combination of price (in the importing territory) and volume of the dumped imports. It is clear from the whole of Article 3 of both the WTO Anti-dumping Agreement and the basic regulation that a causal link must be established between the dumped imports and the injury. The dumping itself (sale for export at a price significantly lower than the normal price in the exporting country) is one (albeit perhaps the most important) of the factors which determine the price of the dumped imports in the importing territory. Another obvious factor is the cost of shipping the goods. And a third is the presence or absence (and, if present, the level) of any duties borne by the goods in the importing territory. All of those factors (and there may be others) have a *direct* influence on the *price* at which the dumped imports are sold in the importing territory, which is itself a *direct* cause of the *injury* in question. By that token, such factors are only *indirect* causes of that *injury*, operating at one remove.

53. It would be absurd if, once it has been demonstrated in accordance with Article 3(6) of the basic regulation that the volume and/or price levels of the dumped imports are responsible for an impact on the Community industry, the examination under Article 3(7) of known 'factors other than the dumped imports' were to include the dumping itself among those factors. Likewise, it would seem perverse to consider low shipping costs or the mere absence of duty on the imports as such other factors.

54. I do not see that the analysis can be different if shipping costs are suddenly reduced, or if a duty previously imposed is removed. Such events remain one step away from the direct cause, but inextricably part of its genesis. If a producer's decision to cut his ex-works price for export sales by (say) 10%, so that he is selling at a minimal profit or even at a loss, cannot be viewed as a factor 'other than the dumped imports', whose injurious effects can be 'separated and distinguished' from those of the dumped imports, the same must be true of a decision of the relevant authority of the importing territory to remove a previously applicable customs duty of 12%.

55. Put more simply, whether a duty on imports is higher or lower, it can have no adverse effect whatever on the domestic industry concerned unless goods are actually imported. The same is true of a removal or reduction of duty. There can be no situation in which the removal of a duty on imports can cause material injury to the domestic industry in the absence of imports. Whatever effect it has is inextricably bound up with the effect of the imports whose price it influences, whether those imports are dumped or not. Where the effects of all known dumped or undumped imports are examined, then the effect of any application or removal of duty influencing the price of those imports has also been examined.

56. In the present case, the institutions examined the imports from Pakistan, which, they concluded, were all dumped.[20] That conclusion must be assumed to be correct, for the purposes of this appeal. They examined also the effects of subsidised imports from India, imports from third countries other than India and Pakistan and imports by the Community industry. Gul Ahmed has not alleged that the effects of any other imports should have been examined. It seems to me, therefore, that there was no possible scope for the institutions to examine the removal of the previous duties independently, as a possible separate factor which was at the same time injuring the Community industry.

20 — I add that, if there had been *undumped* imports from Pakistan, the effect of removing the previous duties might indeed have been that those imports could be sold at (even) lower prices, which might have caused injury to the Community industry. The removal of duties would not, however, have transformed those imports into *dumped* imports. Nor, thus, could it have provided a basis for imposing an anti-dumping duty.

57. The essential point is that the effect of removing a duty is measured through what then happens to prices and volumes of imports, which may be dumped or not. It cannot be evaluated independently. [21]

58. I am not unconscious of the attraction of the opposite view. It is clear that a decision of the EU legislature to remove, almost simultaneously, a customs duty and an anti-dumping duty, both of which previously affected a certain category of products, is quite unrelated to anything over which the manufacturers of those products have any control. It must therefore be regarded as a factor 'other than' any dumping in which they have engaged.

59. However, such a decision is a factor other than the dumping which at the same time is influencing the price – and hence possibly the volume – of the dumped imports. It is not a factor other than the dumped imports which at the same time is injuring the Community industry.

60. It is helpful here to bear in mind that an anti-dumping duty is not a sanction designed to punish a dumping exporter for his behaviour. It is rather (clumsy though it may be) a mechanism designed to redress, as nearly as possible, an imbalance considered unfair to the domestic industry. Viewed in that light, the fact that a removal of previous duties is unrelated to the conduct of any dumping exporter can be seen as of no relevance when deciding whether its effects should be separated and distinguished from those of the dumped imports.

61. Finally, I would recall that, in the present case, the removal of the previous duties affected the price not only of the dumped imports but also of other imports that were not dumped. The dumped imports were found to cause injury. The others were not.

62. I thus reach the view, from an analysis of the principles and procedure governing the imposition of anti-dumping duties, that the General Court erred in considering that the removal of the previous duties should have been examined as a separate factor other than the dumped imports in the context of Article 3(7) of the basic regulation.

63. That view should however be confronted with certain other specific considerations referred to by the General Court in its judgment or raised by the parties in the course of the appeal.

64. First, can any conclusions be drawn from the illustrative list of 'factors other than the dumped imports' in Article 3(7) of the basic regulation?

65. The factors listed are: volume and prices of imports not sold at dumping prices; contraction in demand; changes in patterns of consumption; restrictive trade practices of, and competition between, third country and Community producers; developments in technology; and export performance and productivity of the Community industry.

66. With the arguable exception of 'developments in technology', none of those factors seem likely to cause the effects of the dumped imports. In particular, they do not affect the price at which those imports are available in the EU, which is the factor causing injury to the Community industry.

67. It is true that technological developments rendering the exporting industry more productive may affect that price. However, since the productivity of the Community industry (as compared, necessarily, with that of the exporting industry) features in the next item on the illustrative list, that cannot be the aspect of technological development which is referred to here. I therefore agree with

21 — See also the WTO Appellate Body Report in *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* (WT/DS336/AB/R, adopted on 17 December 2007, point 261 et seq.), concerning Article 15.5 of the Agreement on Subsidies and Countervailing measures (OJ 1994 L 336, p. 156), whose terms reflect those of Article 3(6) and (7) of the basic regulation. The report rejected the view that the effects of subsidies must be distinguished from those of the subsidised imports, stressing that what must not be attributed to those imports was 'any known factors *other than subsidised imports*' (point 267, emphasis in the original).

the Commission that the words 'developments in technology' are not to be interpreted as relating to developments which affect price levels by enhancing productivity but rather to those which, independently of such levels, enhance the attractiveness – and thus increase the sales – of a more advanced product over that of a previous version. An obvious example is provided by successive 'generations' of mobile phone technology.

68. The nature of the factors listed in Article 3(7) of the basic regulation thus supports my view that the type of factor envisaged is one which causes injury to the Community industry in a way which is unrelated to the dumped imports and in particular does not affect their price levels.

69. Second, does *Foshan Golden Step*[22] support the opposite view?

70. I think not. On the contrary, I agree with the Council that, in the judgment under appeal, the General Court appears to have misread its previous case-law. In *Foshan Golden Step*, the injury suffered by the Community industry had been established over a period during which a previous quantitative restriction on imports had been removed. The applicant argued that the increase in volume of imports which inevitably resulted from that removal should not be taken into account when determining the injury caused by the dumped imports over the relevant period. The General Court found that 'where the institutions find that imports of a product which has until then been subject to quantitative restrictions increase after those restrictions have lapsed, they may take that increase into account for the purposes of their assessment of the injury sustained by the Community industry'. If, as seems reasonable, that logic is transposed to the effect on price levels of the removal of previous duties, the result must be that any fall in prices due to that removal may be taken into account when assessing injury – not that it must be regarded as a separate factor also causing injury. The same reasoning and conclusion are to be found in *EU - Footwear (China)*.[23]

71. Third, does the fact that, as Gul Ahmed stresses, the removal of the previous duties was a 'sovereign act' of the EU institutions make any difference?

72. Again, I think not, and I have explained my reasons in particular in points 59 and 60 above. The sovereign act of the EU institutions was undoubtedly a factor other than the dumping which influenced the price of the dumped imports. It was not a factor other than the dumped imports which *independently* caused injury to the Community industry.

73. Finally, would the judgment under appeal lead to absurd and unacceptable results if upheld, as the Council argues?

74. The Council submits essentially that, if removal of a previous duty had to be regarded as a factor other than dumped imports, injuring the Community industry at the same time as those imports, the European Union's ability to impose a further anti-dumping duty on products on which a previous anti-dumping duty had lapsed would be limited, because the lapse of the previous duty would have to be regarded as affecting the causal link between the dumped imports and the injury.

75. I am not entirely won over by that argument. The result would not necessarily be, in law, as drastic as the picture painted by the Council. If the lapse of a previous anti-dumping duty had to be taken into account when assessing the causal link between dumped imports and injury to the Community industry, that would not mean that the causal link must always be broken by the lapse. All would depend on a correct assessment of the facts and a correct attribution of causality, leading – in the hypothesis – to a possible reduction of any new duty.

22 — Cited in footnote 14, in particular at paragraph 134.

23 — Cited in footnote 15.

76. However, the fact that I do not regard this argument of the Council as conclusive in no way affects the view which I have reached on other grounds. Moreover, I believe the Court would be wise to bear the argument in mind if it were inclined to the opposite view. If the Commission and the Council were in doubt as to their ability to reimpose an anti-dumping duty in the event of new dumping following the lapse of a previous duty, they might be significantly less willing to allow duties to lapse in the first place, unless conclusively required to do so.

77. I am therefore unshaken in my view that, in the judgment under appeal, the General Court erred in considering that the removal of the previous duties should have been examined as a separate factor other than the dumped imports in the context of Article 3(7) of the basic regulation.

78. Consequently, I consider that the judgment under appeal should be annulled. In that event, the state of the proceedings allows this Court to give final judgment on the third limb of Gul Ahmed's fifth plea in law at first instance, which should accordingly be dismissed. It is not, however, possible for this Court to rule on any of the other pleas or arguments which were not examined at first instance. The case should therefore be referred back to the General Court for determination of those other pleas and arguments.

Costs

79. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138, 140 and 184 of the Rules of Procedure, read together, Gul Ahmed, the unsuccessful party, should be ordered to pay the costs of the Council while the Commission, as intervener, should bear its own costs. The appropriate award of costs at first instance must, however, be determined anew by the General Court in the light of its decision on the matters referred back to it.

Conclusion

80. I therefore consider that the Court should:

— set aside the judgment of the General Court in Case T-199/04;

— dismiss the third limb of Gul Ahmed's fifth plea in law in that case;

— refer the case back to the General Court to determine the remainder of Gul Ahmed's pleas in law;

— order Gul Ahmed to pay the costs of the Council, and the Commission to pay its own costs, in the present appeal; and

— reserve the costs for the remainder.