JUDGMENT OF THE COURT (Third Chamber)

11 February 2010 *

In Case C-373/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Düsseldorf (Germany), made by decision of 30 July 2008, received at the Court on 14 August 2008, in the proceedings

Hoesch Metals and Alloys GmbH

v

Hauptzollamt Aachen,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2009,

after considering the observations submitted on behalf of:

— Hoesch Metals and Alloys GmbH, by H. Bleier, Rechtsanwalt,

— the Council of the European Union, by J.-P. Hix, acting as Agent, assisted by G.M. Berrisch and G. Wolf, Rechtsanwälte,

— the European Commission, by R. Lyal, H. van Vliet and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code') and the validity of Council Regulation (EC) No 398/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China (OJ 2004 L 66, p. 15).

2 The reference has been made in the course of proceedings between Hoesch Metals and Alloys GmbH ('Hoesch') and Hauptzollamt Aachen (Principal Customs Office, Aachen) on the determination of the non-preferential origin of silicon from China which had undergone various processing operations in India.

Legal context

The Agreement on Rules of Origin

3 The Agreement on Rules of Origin (WTO-GATT 1994), annexed to the final act signed by the European Community in Marrakesh on 15 April 1994 and approved on its behalf by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), seeks to harmonise rules of origin and establishes, for a transitional period, a harmonisation work programme.

The Community customs rules

4 Article 24 of the Customs Code provides:

'Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.'

5 Articles 35 to 40 of, and Annexes 10 and 11 to, Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1) detail, for certain products, the processing or working operations which confer origin in accordance with Article 24 of the Customs Code. Silicon metal is not one of the products contemplated by those provisions.

6 Heading 2804 in the Combined Nomenclature constituting Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EC) No 1789/2003 of 11 September 2003 (OJ 2003 L 281, p. 1; 'the CN'), is worded as follows:

'2804 Hydrogen, rare gases and other non-metals:

...

— Silicon

2804 61 00 — — Containing by weight not less than 99.99% of silicon

2804 69 00 — — Other

…'

Community legislation on anti-dumping measures

7 The provisions concerning the imposition of anti-dumping duties by the European Community are to be found in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12; 'the basic regulation').

8 Article 3(1) of the basic regulation provides:

'Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to [a] Community industry, threat of material injury to [a]

Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.'

9 Article 5 of the basic regulation governs the initiation of investigation procedures to determine the existence, degree and effect of any dumping alleged in a complaint.

10 Article 9(4) of the basic regulation provides:

'Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. Where provisional duties are in force, a proposal for definitive action shall be submitted not later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.'

11 Article 11 of the basic regulation is in the following terms:

'...

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such a likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping.

…

5. The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4 of this Article. Reviews carried out pursuant to paragraphs 2 and 3 shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review. …

6. … Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraph 2, or repealed, maintained or amended pursuant to paragraphs 3 and 4, by the Community institution responsible for their introduction. …

…'

12 The Council, by Regulation (EEC) No 2200/90 of 27 July 1990 (OJ 1990 L 198, p. 57), imposed, for the first time, a definitive anti-dumping duty on imports of silicon metal originating in China. Following a notice, in February 1995, of the expiry of the measures promulgated in Regulation No 2200/90, the Commission received a request for a review supported by evidence of dumping of the product in question, which was considered sufficient to justify the opening of an investigation. In view of the conclusions of that investigation, the Council adopted Regulation (EC) No 2496/97 of 11 December 1997 imposing a definitive anti-dumping duty on imports of silicon metal originating in the People's Republic of China (OJ 1997 L 345, p. 1).

13 The 24th recital in the preamble to Regulation No 2496/97 states:

'…

The dumping margin, expressed as a percentage of the cif export price, free-at-Community frontier, amounted to 68.1%.'

14 Article 1(2) of that regulation provides:

'The rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, shall be 49%.'

15 Following the publication, in March 2002, of a notice of the impending expiry of the anti-dumping measures, the Commission received a request for a review pursuant to Article 11(2) of the basic regulation. As a result of that review, the Council decided, by the adoption of Regulation No 398/2004, to maintain the measures imposed by Regulation No 2496/97.

16 The 27th recital in the preamble to Regulation No 398/2004 states:

'In accordance with Article 2(11) of the basic regulation, the dumping margin was established on the basis of a comparison of the weighted average normal value with the weighted average export prices, as determined above. This comparison showed the existence of dumping. The dumping margin, expressed as a percentage of the cif Community frontier price duty unpaid, was significant, i.e. 12.5%, although well below the level found in the previous investigations.'

17 Table 6 in the preamble to that regulation, relating to the Community industry's volume of silicon sales in the Community, is as follows:

	1998	1999	2000	2001	IP
Tonnes	86 718	114 587	133 568	128 219	136 421
Index	100	132	154	148	157
Y/Y trend		+32%	+17%	-7%	+6%

18 The 51st recital in the preamble to Regulation No 398/2004 states:

'The Community industry's sales to unrelated customers in the Community increased by 57% between 1998 and the IP.'

19 Table 8 in the preamble to that regulation, showing the Community industry's shares of the silicon market shows:

	1998	1999	2000	2001	IP
Percentage of market	29.8%	35.2%	34.3%	34.3%	36.7%
Index	100	118	115	115	123

20 The 54th recital in the preamble to Regulation No 398/2004 is in the following terms:

'The market share held by the Community industry increased from 29.8% in 1998 to 36.7% in the IP in line with its increased production and sales volumes due to a new facility opened in the Community. A large increase took place between 1998 and 1999 (+5.4% of the market) with the introduction of new EU manufacturing facilities. A smaller rise (+2.4 percentage paragraphs) took place between 2001 and the IP.'

21 The 71st to 74th recitals in the preamble to that regulation are worded as follows:

'(71) As explained and shown above, from 1998 to 2000 the Community industry was able to benefit from a 34% market growth and significant increase in its sales volume and market share. Thereafter however, sales volume and market share stagnated and the financial situation of the Community industry (prices, profitability, and cash flow) deteriorated.

(72) On closer examination it can be seen that the main positive developments for the Community industry took place between 1998 and 2000. From 2000 onwards, no real improvements were noticeable.

(73) The improvements seen between 1998 and 2000 can be directly attributed to decisions taken by the Community industry in 1998 to invest in additional Community production facilities. Between 1998 and 2000 EU production capacity increased by 26% from (125 000 tonnes to 158 000 tonnes). These decisions were taken in response to the anti-dumping measures on imports of silicon from China which, as outlined in recital 1, had been extended in 1997. … Therefore, it can be seen that the Community industry was able to benefit from the anti-dumping measures on imports [of] silicon from China. From 2000 to

the IP, the situation of the Community industry deteriorated, in particular with prices which fell EUR 46 per tonne, profitability which fell 7.1 percentage points, cash flow which fell by 59%, and investments which declined by 55%. By the IP the Community industry found itself in a loss-making situation. For these reasons, it is considered that during the IP, the Community industry found itself in a very fragile and vulnerable position.

…

(74) The volume of dumped imports from China considerably increased during the period under consideration and it is likely that without anti-dumping measures in place considerable increased volumes of the product concerned would be shipped to the Community market at very low prices, undercutting the Community industry prices. In view of the level of the anti-dumping duty in force, the price differential between the imported product and the one produced by the Community industry could be more than 35% if the measure were allowed to expire.'

22 Article 1(1) and (2) of Regulation No 398/2004 are in the following terms:

'1. A definitive anti-dumping duty is hereby imposed on imports of silicon falling within CN code 2804 69 00 originating in the People's Republic of China.

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, shall be 49%.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 On 15 June and 12 August 2004, Hoesch declared, at the Hauptzollamt Duisburg (Principal Customs Office, Duisburg), silicon metal under subheading 2804 69 00 of the CN for release into free circulation. Hoesch had imported the product from India and declared that country as the country of origin.

24 The order for reference states, however, that the silicon metal at issue in the main proceedings came from China and that it had been delivered, in two-by-three metre blocks, to Metplast, a company established in India. That company subjected the blocks to various processes, in the sense that they were separated, crushed and purified. The grains produced by the crushing were sieved, then sorted by size and, finally, packaged. The purification of the silicon was carried out in such a way that unwanted slag residues were removed, partly manually and partly by machine, from the silicon grains produced by crushing the blocks. The loose iron in the silicon was then extracted by a magnetic process. The degree of purity of the silicon metal was, after all the processes carried out by Metplast, more than 98.5%, such a degree being, according to Hoesch, necessary for the use of the silicon metal in the production of aluminium alloys. However, according to the referring court, the silicon's degree of purity prior to being imported from China was not known.

25 Following investigations by the European Anti-Fraud Office (OLAF), the Hauptzollamt Aachen decided that the silicon metal at issue in the main proceedings had not been subject to origin-conferring substantial processing or working in India and that it could not, therefore, be regarded as having originated in that country. It decided, accordingly,

that the product should be regarded as having originated in China. By two assessments to duty of 6 June 2007, it claimed from Hoesch, on the basis of Article 1 of Regulation No 398/2004, post-clearance recovery of anti-dumping duty amounting to EUR 99 974.74.

26 By its action, brought before the Finanzgericht Düsseldorf, Hoesch claimed the annulment of those assessments, submitting that the silicon metal at issue in the main proceedings had been subject, in India, to substantial processing or working and should, therefore, be regarded as having originated in that country. In its submission, the crushing of the silicon blocks had resulted in their 'processing' into grains, the purification of which, requiring considerable work, had raised the silicon's degree of purity. In addition, Hoesch claimed that Regulation No 398/2004 was invalid.

27 The referring court considers that the outcome of the action depends on whether the treatment carried out in India constitutes origin-conferring processing or working, for the purposes of Article 24 of the Customs Code, in which case the silicon metal imported would not be subject to the anti-dumping duties. If not, it is uncertain of the validity of Regulation No 398/2004.

28 It considers that it is not a question of the scope of the so-called 'list' rules, drawn up by the Commission with the aim of clarifying the concepts in Article 24 of the Customs Code and available on its internet site.

29 In those circumstances, the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 24 of [the] Customs Code to be interpreted as meaning that the separation, purification and crushing of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing constitutes origin-conferring processing or working?

2. If the answer to the first question is in the negative, is … Regulation … No 398/2004 … valid?’

The questions referred

The first question

Observations submitted to the Court

30 Hoesch submits, first, that the non-preferential origin of the silicon metal is to be determined exclusively on the basis of Article 24 of the Customs Code and that, in the main proceedings, all the conditions for applying that provision are satisfied, so that the operations at issue in those proceedings should be regarded as constituting substantial processing or working conferring non-preferential origin on that product.

31 In Hoesch's submission, the operations carried out in India on the silicon imported from China should be regarded as substantial processing thereof, since the concept of substantial processing can, in this case, be defined as a modification of the input materials to the point that they acquire other characteristics. In fact, as a result of the crushing operation, the silicon blocks lost their initial form. Hoesch relies also on the Court's case-law, according to which a product's last processing is 'substantial', for the purposes of Article 24 of the Customs Code, only if the resulting product has its own specific properties and composition, which it did not possess before that processing (see, to that effect, Case 49/76 *Gesellschaft für Überseehandel* [1977] ECR 41, paragraph 6). In the main proceedings, the purification operation eliminated impurities contained in the silicon blocks, changed the silicon's purpose and enabled it to be used in an aluminium alloy.

32 Hoesch then argues that the requirement of a change of tariff subheading laid down by the list rules, unlike numerous rules of origin of goods, is not among the conditions laid down in Article 24 of the Customs Code. Therefore, the change of a tariff subheading is not a condition for applying that Article 24. In addition, since the list rules and the Chapter Notes to Chapter 28 of those rules ('the Chapter Notes') have not been published in the *Official Journal of the European Union* and are available only on the internet in English, they are not mandatory. Hoesch takes the view that, were it necessary to refer to the Chapter Notes, they would confirm the non-preferential origin of the product at issue in the main proceedings. Indeed, it is clear from the Chapter Notes that the operations of purification and crushing the silicon can constitute, under certain conditions, substantial processing or working conferring origin on it. Those conditions are satisfied in the main proceedings.

33 On the other hand, the Commission suggests taking account of the list rules and the Chapter Notes in order to ensure, in particular, uniformity in the application of the customs regulations and conformity in the application of those regulations with the Community's obligations within the framework of the World Trade Organisation ('the

WTO'). Those rules set out the provisional results of the negotiations in the context of the harmonisation work in the WTO's Committee on Rules of Origin set up by the Agreement on Rules of Origin.

34 In addition, the recourse, in the list rules, to the criterion of a change of tariff subheading, according to which the goods concerned must be regarded as having undergone their last substantial processing or working only if their tariff subheading is altered, is, in the Commission's submission, justified from a technical point of view, since, in the main proceedings, that criterion would take account of the operations necessary for the production of silicon metal and of the purposes of its manufacture. Silicon's classification in subheading 2804 61 or 2804 69 of the CN depends on its degree of purity, that is to say, respectively, for the first subheading, a degree of at least 99.9% and, for the second, a degree lower than 99.9%, and thus corresponds not only to the use which is made of it, but also to the work necessary for its manufacture. In addition, the Commission contends that, in the main proceedings, no real objective distinction can be drawn between the raw material, that is to say the silicon in the form of metal blocks, and the grains of silicon metal obtained by its separation, then its sieving, sorting and packaging, since those operations have in no way changed the properties or composition of the silicon metal, which continues to be metallurgical silicon, the purpose of which remains the manufacture of aluminium alloys.

35 However, relying on Chapter Notes Nos 3 and 4, the Commission submits that the purification and crushing of the silicon may, in certain circumstances, despite the lack of a change of tariff position, constitute substantial origin-conferring processing or working, provided, first, that the purification represents a stage of manufacture in the course of which at least 80% of the existing impurities are eliminated or that, as a result thereof, a degree of purity is attained which enables a specific use of the existing product or, second, that the crushing corresponds to a deliberate reduction of the silicon leading to a specific result. However, the Commission notes that, according to the referring court's findings, the elimination of at least 80% of the impurities has not been proved. Moreover, the Commission observes that the silicon grains thus obtained were sieved,

which means that they were of different sizes before being sieved. It would not therefore be appropriate to hold that a deliberate and controlled reduction of the silicon blocks was effected.

The Court's reply

36 By its first question, the referring court is asking, in essence, whether the separation, crushing and purification of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing constitutes origin-conferring processing or working, for the purposes of Article 24 of the Customs Code.

37 Article 24 of the Customs Code states that goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

38 In that regard, the Court has held that it was clear from Article 5 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165), the provision which was the forerunner of Article 24 of the Customs Code but which is identical in effect, that the decisive criterion is that of the last substantial process or operation (Case C-26/88 *Brother International* [1989] ECR 4253, paragraph 15, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 32).

39 As regards the applicability of the list rules, the Court held in Case C-260/08 *HEKO Industrieerzeugnisse* [2009] ECR I-11571, paragraphs 20 and 21, that although those list rules drawn up by the Commission contribute to the determination of the non-preferential origin of goods, those rules do not have binding legal force. Accordingly, the content of those rules must be compatible with the rules of origin as set out in Article 24 of the Customs Code, and may not alter the scope of those rules. That statement is equally valid for the Chapter Notes.

40 Likewise, although relevant acts of secondary legislation must be interpreted in the light of the agreements adopted within the framework of the WTO, the fact remains that the Agreement on Rules of Origin establishes, for the present, only a harmonisation work programme for a transitional period. Since that agreement does not constitute complete harmonisation, the WTO's members enjoy a margin of discretion with regard to the adaptation of their rules of origin (*HEKO Industrieerzeugnisse*, paragraph 22).

41 It is apparent from those considerations that when interpreting Article 24 of the Customs Code, the courts of the Member States may have recourse both to the Chapter Notes and to the list rules, provided that that does not result in an alteration of that article (see *HEKO Industrieerzeugnisse*, paragraph 23).

42 As regards the question of the relevance of the criterion of a change of tariff subheading, a criterion to be inferred from the list rules, in order to determine whether the operations in question in the main proceedings constitute, for the purposes of Article 24 of the Customs Code, origin-conferring processing or working, the Court has already held that it is not sufficient to seek criteria defining the origin of goods in the tariff classification of processed products, since the Common Customs Tariff was conceived to fulfil special purposes and not in relation to the determination of the origin of the products (see *Gesellschaft für Überseehandel*, paragraph 5; Case 162/82 *Cousin and Others* [1983] ECR 1101, paragraph 16; and *HEKO Industrieerzeugnisse*, paragraph 29).

43 The Court has also decided that, although it is correct that a change in the tariff heading of a product, caused by a processing operation, constitutes an indication of the substantial nature of that processing or working, the fact remains that processing or working may be substantial in nature even if there is no such change of heading (*HEKO Industrieerzeugnisse*, paragraph 35). That finding is also applicable to the criterion of a change of tariff subheading.

44 It follows that in order to determine whether, having regard to the conditions laid down by Article 24 of the Customs Code, the processing operations at issue in the main proceedings are origin-conferring, criteria other than that based on a change of tariff subheading must be taken into consideration.

45 In that regard, it follows from the Court's case-law that the determination of the origin of goods must be based on a real and objective distinction between the basic product and the processed product, depending fundamentally on the specific material qualities of each of those products (see *Gesellschaft für Überseehandel*, paragraph 5; *Cousin and Others*, paragraph 16; and *HEKO Industrieerzeugnisse*, paragraph 29).

46 It is also important to note that the last processing or working is 'substantial', for the purposes of Article 24 of the Customs Code, only if the product resulting therefrom has its own specific properties and composition, which it did not possess before that process or operation. Activities altering the presentation of a product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of that product (see *Gesellschaft für Überseehandel*, paragraph 6; Case 93/83 *Zentrag* [1984] ECR 1095, paragraph 13; and *HEKO Industrieerzeugnisse*, paragraph 28).

47 In addition, the Court has stated that operations of processing a product which do not bring about a substantial change in its properties and composition, because they consist only in dividing it up and altering its presentation, do not constitute, by contrast, a sufficiently pronounced qualitative change which could be regarded as having brought

about the manufacture of a new product or even as an important stage in its manufacture (see, to that effect, *Zentrag*, paragraph 14).

48 In the main proceedings, it is appropriate to point out that the selection of silicon's classification in subheading 2804 61 or 2804 69 of the CN depends on its degree of purity, that is to say, respectively, for the first subheading, a degree of at least 99.9% and, for the second, a degree lower than 99.9%. It must be held, as the Commission submits, that such a difference in classification corresponds both to the difference in use of the silicon and to the work necessary for its manufacture.

49 In this case, the operations of processing the silicon, carried out in India, comprised its separation, crushing, purification, sieving, sorting and packaging. As regards, first, the silicon's separation, sieving, sorting and packaging, it is clear from the papers in the Court's file that those operations in no way altered its properties or composition, since, following those processing operations, it continued to be metallurgical silicon for use, according to the undisputed information in that file, in the manufacture of aluminium alloys.

50 Indeed, the Court has already held that, first, the grinding of a raw material to various degrees of fineness cannot be considered as a substantial process or operation on it because the only effect of doing so is to change the consistency of the product and its presentation for the purposes of its later use; it does not bring about a significant qualitative change in the raw material. Secondly, the quality control by grading to which the ground product is subjected and the manner in which it is packaged relate only to the requirements for marketing the product and do not affect its substantial properties (see, as regards the determination of the origin of raw caseine, *Gesellschaft für Überseehandel*, paragraph 7).

51 It thus seems that the separation of the silicon metal blocks, on the one hand, and the subsequent sieving, crushing and packaging of the silicon grains resulting from their crushing, on the other, cannot be regarded as operations which can confer origin on the silicon metal.

52 As regards, secondly, operations of purification and crushing a product, it is clear from the Chapter Notes that those two operations can confer origin on the product subjected to them, even in the absence of a change of its tariff subheading. The same applies, according to the terms of Chapter Note No 3, to purification if it is carried out at a stage of manufacture of the product in the course of which at least 80% of existing impurities are eliminated. It also applies, by virtue of Chapter Note No 4, to crushing if it corresponds to the deliberate and controlled reduction, other than by mere crushing, in the product's particle size with different physical or chemical characteristics from the input materials.

53 In that regard, it is important to state that the criteria resulting from Chapter Notes Nos 3 and 4 permit a significant qualitative alteration in the silicon's properties, a real and objective distinction between the raw material and the processed product and the silicon's intended use to be taken into account. They comply, therefore, with the case-law noted in paragraphs 45 to 47 of the present judgment. Since those criteria do not change the scope of Article 24 of the Customs Code, recourse to them is justified in the circumstances of the main proceedings.

54 However, the referring court notes that the criteria laid down by Chapter Notes Nos 3 and 4 are not satisfied in the main proceedings, because it is neither proven that the operation of purification at issue in those proceedings eliminated 80% of the existing impurities nor is it possible to hold that the crushing at issue in those proceedings corresponds to the deliberate and controlled reduction in the particle size of the silicon blocks. In those circumstances, the operations of purification and crushing silicon, as carried out in India, do not constitute substantial processing or working, for the purposes of Article 24 of the Customs Code, permitting the product obtained to be regarded as originating in the State in which those operations took place.

55 In view of the foregoing considerations, the reply to the first question is that the separation, crushing and purification of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing, as carried out in the main proceedings, do not constitute origin-conferring processing or working, for the purposes of Article 24 of the Customs Code.

The second question

56 If the silicon metal at issue in the main proceedings is regarded as originating in China, the referring court is asking, by its second question, about the validity of Regulation No 398/2004. More particularly, it has doubts, first, that the Council made an error of assessment by relying on a false premiss in the establishment of the existence of injury to the Community industry and, second, whether the maintenance of the 49% rate of anti-dumping duty by Regulation No 398/2004 is compatible with Article 9(4) of the basic regulation.

Preliminary observations

57 It is appropriate to note, at the outset, that by its question the referring court only considered it necessary, as is clear from the order for reference, to request the Court to review the validity of Regulation No 398/2004 as regards the existence of injury to the Community industry and the maintenance of the rate of anti-dumping duty by that regulation.

58 Hoesch submits that Regulation No 398/2004 is invalid on the ground, first, of a manifest error of assessment in the establishment of a causal link between the imports

of Chinese origin and the injury suffered by the Community industry and, second, of the exceeding of the procedural time-limit in the review of the anti-dumping measures.

59 According to settled case-law, the procedure established in Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice, with the result that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, to that effect, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 18).

60 That being so, the validity of Regulation No 398/2004 should not additionally be appraised by reference to grounds not specified by the referring court (see, by analogy, *Ordre des barreaux francophones et germanophone and Others*, paragraphs 17 to 19).

61 It is appropriate to recall, secondly, that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40 and the case-law cited).

62 Furthermore, it is settled case-law that the determination of the existence of injury to the Community industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been manifest error in the appraisal of those facts or misuse of powers (see *Ikea Wholesale*, paragraph 41 and the case-law cited, and Case C-398/05 *AGST Draht- und Biegetechnik* [2008] ECR I-1057, paragraph 34).

63 It is in the light of the foregoing considerations that the validity of Regulation No 398/2004 must be examined.

The establishment of injury to the Community industry

64 The referring court observes, first, that the doubts it entertains with regard to the validity of Regulation No 398/2004 arise from the judgment in Case T-107/04 *Aluminium Silicon Mill Products* v *Council* [2007] ECR II-669, by which the General Court annulled Article 1 of Council Regulation (EC) No 2229/2003 of 22 December 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating [in] Russia (OJ 2003 L 339, p. 3) on the ground, in particular, that the Council made manifest errors of assessment in the establishment of injury to the Community industry. The referring court points out that the regulation annulled by that judgment relates to the same investigation and reference periods as those relating to Regulation No 398/2004 and that the economic development of the Community silicon market was identical for those two regulations, so that Regulation No 398/2004 should be annulled for the same reasons.

65 In that regard, it must be held that those two regulations differ on an essential point. Regulation No 2229/2003 imposed, for the first time, anti-dumping duties on imports of silicon metal originating in Russia and was promulgated as a result of the initial investigation conducted under Article 5 of the basic regulation. The Council was, therefore, required to establish the existence of injury caused to the Community industry by those imports. On the other hand, Regulation No 398/2004 maintained anti-dumping measures on imports of silicon originating in China, measures which have been in force since 1990, and was therefore adopted following a review carried out under Article 11(2) of the basic regulation. In that regard, it is appropriate to note that a review procedure is, as a rule, objectively different from that of an initial investigation, which is governed by other provisions of the same regulation (Case C-422/02 P *Europe Chemi-Con (Deutschland)* v *Council* [2005] ECR I-791, paragraph 49).

66 The objective difference between the two procedures lies in the fact that imports subject to a review proceeding are those on which definitive anti-dumping duties have already been imposed and in respect of which sufficient evidence has generally been adduced to establish that the expiry of those measures would be likely to result in a continuation or recurrence of dumping and injury. On the other hand, where imports are subject to an initial investigation, the purpose of that investigation is precisely to determine the existence, degree and effect of any alleged dumping even if the initiation of such an investigation presupposes the existence of sufficient evidence to justify the initiation of that procedure (*Europe Chemi-Con (Deutschland)* v *Council*, paragraph 50).

67 It follows, indeed, from Article 11(2) of the basic regulation that the maintenance of anti-dumping measures beyond the date on which they usually expire is only possible if it has been established, in a review, that the expiry of the measures 'would be likely to lead to a continuation or recurrence of dumping and injury'. It follows that the General Court's findings in *Aluminium Silicon Mill Products* v *Council* as regards the existence of injury for the purposes of examining the validity of Regulation No 2229/2003 are, as such, irrelevant in deciding on the validity of Regulation No 398/2004.

68 Secondly, the referring court considers that there is a contradiction between, on the one hand, the second sentence of the 71st recital in the preamble to Regulation No 398/2004, according to which the sales volume and market share of the Community industry 'stagnated' after 2000, and, on the other hand, the information relating to its sales volume and market share in Tables 6 and 8 in the preamble to that regulation.

69 In that regard, it is appropriate to note, first, that Table 6 shows that, between 1998 and 2000, the Community industry's sales of silicon increased by 54%, whereas, between 2000 and the IP, those sales recorded a progression of about 2.1%. In addition, Table 8 in

the preamble to that regulation shows that the Community industry's market share rose from 29.8% to 34.3% between 1998 and 2000 and from 34.3% to 36.7% between 2000 and the IP.

70 It follows that, whilst it is correct that the volume of silicon sales and the Community industry's market share increased during the IP, the fact remains that, taking account of the significant increase in the sales volume between 1998 and 2000, namely 54%, the Community industry ceased to develop after 2000 and could thus be regarded as stagnating. Consequently, there is no contradiction between, on the one hand, Tables 6 and 8 in the preamble to Regulation No 398/2004 and, on the other, the 71st recital in its preamble.

71 It is appropriate to point out, next, that it is stated in the 72nd recital in the preamble to Regulation No 398/2004, the content of which is not challenged, that, since 2000, no real improvements were noticeable in the development of the Community industry. Likewise, the 73rd recital in the preamble to that regulation states, also unchallenged, that, from 2000 to the IP, the situation of the Community industry deteriorated and it found itself in a very fragile and vulnerable position during the IP.

72 Finally, under Article 1(2) of Regulation No 2496/97, the rate of the definitive anti-dumping duty applicable to imports of silicon metal originating in China, before duty, was 49%. Therefore it is probable that market shares of imports of Chinese silicon were less significant than they would have been had anti-dumping duties not been imposed. In that context, since it is apparent from the 74th recital in the preamble to Regulation No 398/2004, the content of which is not challenged, that the volume of dumped imports from China considerably increased during the period between 1 January 1998 and the end of the IP and that it is likely that without anti-dumping measures in place considerable increased volumes of the product concerned would be shipped to the Community market at very low prices, undercutting the Community industry prices,

the Council concluded, correctly, that it was highly likely that the Community industry would suffer from imports of Chinese silicon if anti-dumping duties were not imposed.

73 In those circumstances, the Council did not make a manifest error of assessment when it concluded that it was likely that the expiry of the anti-dumping measures would lead to a recurrence of injury to the Community industry.

The maintenance of the rate of the anti-dumping duty

74 The referring court asks whether the maintenance, by Article 1(2) of Regulation No 398/2004, of the rate of the anti-dumping duty at 49% is compatible with the last sentence of Article 9(4) of the basic regulation, despite the fact that the dumping margin, which was 68.1% according to the 24th recital in the preamble to Regulation No 2496/97, was no more than 12.5% according to the 27th recital in the preamble to Regulation No 398/2004.

75 Hoesch argues, in that regard, that fixing a customs rate higher than the anti-dumping margin is precluded under Article 9(4) of the basic regulation which, by virtue of Article 11(5) thereof, also applies to reviews.

76 As stated in paragraphs 66 and 67 of the present judgment, for the purposes of a review of anti-dumping measures which are about to expire, carried out under Article 11(2) of

the basic regulation, the Community authorities have only to establish whether the expiry of the measures would be likely to lead to a continuation or recurrence of dumping and injury, in which case those measures would be maintained. If not, the anti-dumping measures are to be repealed. That statement is confirmed by the wording of Article 11(6) of that regulation, according to which, where warranted by reviews, measures are to be repealed or maintained pursuant to Article 11(2), whereas Article 11(6) states that the measures may not only be repealed or maintained, but also amended, pursuant to paragraphs 3 and 4 of that article. Consequently, a review of measures about to expire cannot lead to the amendment of the measures in force.

77 Moreover, the final sentence of Article 9(4) of the basic regulation, lays down a requirement that the 'amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry'. However, in the light of the general scheme and purposes of the system of which that article forms part, it is not intended to apply to the procedure under Article 11(2) of that regulation. In addition, as stated in the preceding paragraph of the present judgment, the Community authorities may, for the purposes of a review of anti-dumping measures carried out under Article 11(2) of the basic regulation, only either maintain or repeal those measures.

78 In this case, the Community authorities concluded, as a result of that review, that the expiry of the anti-dumping measures would probably lead to the recurrence of injury. The Council therefore, correctly, and in accordance with Article 11(2) and (6) of the basic regulation, decided to maintain the rate of the anti-dumping duty at 49%.

79 In the light of the foregoing considerations, the reply to the second question is that its examination has not revealed any factors of such a kind as to affect the validity of Regulation No 398/2004.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The separation, crushing and purification of silicon metal blocks and the subsequent sieving, sorting and packaging of the silicon grains resulting from the crushing, as carried out in the main proceedings, do not constitute origin-conferring processing or working for the purposes of Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.**

2. **The examination of the second question raised by the referring court has not revealed any factors of such a kind as to affect the validity of Council**

Regulation (EC) No 398/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China.

[Signatures]