Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

29 January 2014*

(Dumping — Imports of certain seamless pipes and tubes of iron or steel originating in China — Determination of a threat of injury — Article 3(9) and Article 9(4) of Regulation (EC) No 384/96 (now Article 3(9) and Article 9(4) of Regulation (EC) No 1225/2009))

In Case T-528/09,

Hubei Xinyegang Steel Co. Ltd, established in Huang Shi (China), represented by F. Carlin, Barrister, Q. Azau, lawyer, A. MacGregor, Solicitor, and N. Niejahr, lawyer,

applicant,

v

Council of the European Union, represented by J.-P. Hix and B. Driessen, acting as Agents, and by B. O'Connor, Solicitor,

defendant,

supported by

European Commission, represented initially by H. van Vliet and M. França, and subsequently by M. França and J.-F. Brakeland, acting as Agents, assisted by R. Bierwagen, lawyer,

and by

ArcelorMittal Tubular Products Ostrava a.s., established in Ostrava-Kunčice (Czech Republic),

ArcelorMittal Tubular Products Roman SA, established in Roman (Romania),

Benteler Stahl/Rohr GmbH, established in Paderborn (Germany),

Ovako Tube & Ring AB, established in Hofors (Sweden),

Rohrwerk Maxhütte GmbH, established in Sulzbach-Rosenberg (Germany),

Dalmine SpA, established in Dalmine (Italy),

Silcotub SA, established in Zalău (Romania),

TMK-Artrom SA, established in Slatina (Romania),

* Language of the case: English.

Tubos Reunidos SA, established in Amurrio (Spain),

Vallourec Mannesmann Oil & Gas France, established in Aulnoye-Aymeries (France),

V & M France, established in Boulogne-Billancourt (France),

V & M Deutschland GmbH, established in Düsseldorf (Germany),

Voestalpine Tubulars GmbH, established in Linz (Austria),

Železiarne Podbrezová a.s., established in Podbrezová (Slovakia),

represented by G. Berrisch, G. Wolf, lawyers, and N. Chesaites, Barrister,

interveners,

APPLICATION for annulment of Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China (OJ 2009 L 262, p. 19),

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 17 April 2013,

gives the following

Judgment

Background to the dispute

1 On 9 July 2008, following a complaint lodged by the Defence Committee of the Seamless Steel Tube Industry of the European Union, the Commission published a notice of initiation of an anti-dumping proceeding concerning imports of seamless pipes and tubes, of iron or steel, originating in the People's Republic of China (OJ 2008 C 174, p. 7).

2 Paragraph 2 of the notice of initiation defined the product concerned as follows:

'The product allegedly being dumped is certain seamless pipes and tubes, of iron or steel, of circular cross-section, of an external diameter not exceeding 406,4 mm with a Carbon Equivalent Value (CEV) not exceeding 0,86 according to the International Institute of Welding (IIW) formula and chemical analysis, originating in [China] and normally declared within the codes [of the combined tariff nomenclature] ex73041100, ex73041910, ex73041930, ex73042200, ex73042300, ex73042400, ex73042910, ex73042930, ex73043180, ex73043958, ex73043992, ex73043993, ex73045189, ex73045992 and ex73045993. These codes are only given for information.'

3 Under Article 17 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended, ('the basic regulation') (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 (OJ 2009 L 343, p. 51; corrigendum OJ 2010 L 7, p. 22)), the Commission decided to limit its investigation to one sample. In that connection, it chose four Chinese exporting producers accounting for 70% of the total volume of exports to the European Union of the product concerned during the investigation period. Those exporting producers included the applicant, Hubei Xinyegang Steel and a related producer belonging to the same group.

4 On 23 July 2008, the applicant and the related producer each applied for Market Economy Treatment ('MET'), as provided for in Article 2(7)(b) and (c) of the basic regulation (now Article 2(7)(b) and (c) of Regulation no 1225/2009) and, in the alternative, for Individual Treatment ('IT'), as provided for in Article 9(5) of the basic regulation (now Article 9(5) of Regulation No 1225/2009).

5 On 6 February 2009, the Commission sent to the applicant and to the related producer a disclosure of the essential facts and considerations on the basis of which it was proposing to deny them MET. In that disclosure, the Commission concluded that the first and third criteria of Article 2(7)(c) of the basic regulation were not met.

6 On 16 February 2009, the applicant submitted to the Commission observations on the disclosure of 6 February 2009.

7 On 7 April 2009 the Commission adopted Regulation (EC) No 289/2009 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in China (OJ 2009 L 94, p. 48) ('the provisional regulation').

8 In recital 13 of the provisional regulation, the Commission pointed out that the investigation of dumping and injury had covered the period from 1 July 2007 to 30 June 2008 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2005 to the end of the investigation period ('the period considered').

9 In recital 14 of the provisional regulation, the Commission stated, as regards the product concerned, that the investigation established that 'three of [the] CN codes do not refer to the product concerned, i.e. ex73041100, ex73042200 and ex73042400, and that five other CN codes were missing, i.e. ex73043120, ex73043910, ex73043952, ex73045181 and ex73045910'.

10 In recitals 20 to 32 of the provisional regulation, the Commission rejected the application for MET submitted by the applicant but granted its request for IT.

11 In recitals 33 to 38 of the provisional regulation, the Commission stated that the United States had been chosen as analogue country for the purpose of calculating the normal value.

12 In recitals 53 to 126 of the provisional regulation, the Commission concluded that there was no injury to the Community industry but that there was a threat of injury to that industry.

13 On 8 April 2009, the Commission sent the applicant a disclosure document containing the essential facts and considerations for the dumping and injury calculations on the basis of which provisional anti-dumping measures had been imposed. On 11 May 2009, the applicant submitted observations on that document.

14 On 10 July 2009, the Commission sent the applicant a final disclosure document setting out the essential facts and considerations on the basis of which it was proposed to adopt definitive anti-dumping measures. On 21 July 2009, the applicant submitted observations on that communication.

15 On 24 September 2009, the Council adopted Regulation (EC) No 926/2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in China (OJ 2009 L 262, p. 19; 'the contested regulation').

16 In recitals 10 to 17 of the contested regulation, the Council confirmed the findings contained in the provisional regulation relating to the definition of the product concerned.

17 In recital 18 of the contested regulation, the Council confirmed the findings in the provisional regulation concerning the rejection of the applicant's application for MET. Moreover, in recitals 19 to 24 of the contested regulation, the Council concluded that the applicant did not, in the end, fulfil the conditions for granting IT. In particular, the Council noted that, after the investigation period, the Chinese state had acquired further shares in the holding company controlling the applicant and thus became a majority shareholder (recital 20 of the contested regulation).

18 In recitals 25 to 27 of the contested regulation, the Council confirmed the choice of the United States as analogue country for the purpose of calculating the normal value.

19 In recitals 35 to 81 of the contested regulation, the Council confirmed the findings contained in the provisional regulation relating to the absence of injury and the threat of injury for the Community industry. In that regard, the Council relied inter alia on data relating to a period after the investigation period, namely July 2008 to March 2009 ('the post-investigation period').

Procedure and forms of order sought

20 By application lodged at the Court Registry on 30 December 2009, the applicant brought the present action.

21 By document lodged at the Court Registry on 25 March 2010, the Commission sought leave to intervene in the present case in support of the form of order sought by the Council. The main parties did not oppose that application.

22 By document lodged at the Court Registry on 6 April 2010, ArcelorMittal Tubular Products Ostrava a.s., ArcelorMittal Tubular Products Roman SA, Benteler Stahl/Rohr GmbH, Ovako Tube & Ring AB, Rohrwerk Maxhütte GmbH, Dalmine SpA, Silcotub SA, TMK-Artrom SA, Tubos Reunidos SA, Vallourec Mannesmann Oil & Gas France, V & M France, V & M Deutschland GmbH, Voestalpine Tubulars GmbH and Železiarne Podbrezová a.s. ('the intervening undertakings') sought leave to intervene in the present case in support of the form of order sought by the Council. The main parties did not oppose that application.

23 By order of 31 May 2010, the President of the First Chamber of the Court granted the Commission leave to intervene.

24 By documents lodged at the Court Registry on 21 June, 30 June and 25 August 2010, the applicant applied for confidential treatment vis-à-vis the intervening undertakings of certain parts of the application, the reply and the rejoinder. The intervening undertakings did not oppose that application.

25 On 14 July 2010, the Commission lodged its statement in intervention. The main parties were able to submit observations on that statement in intervention.

26 By order of 31 August 2010, the President of the First Chamber of the Court granted the applications for leave to intervene of the intervening undertakings.

27 By document lodged at the Court Registry on 30 September 2010, the applicant applied for confidential treatment vis-à-vis the intervening undertakings of certain parts of the Commission's statement in intervention and of the observations which it had submitted on that statement. The intervening undertakings did not oppose that application.

28 On 23 November 2010, the interveners lodged their statement in intervention. The main parties were able to submit their observations on that statement in intervention.

29 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Second Chamber, to which the present case was consequently assigned.

30 By order of 16 May 2011, the President of the Second Chamber of the Court suspended these proceedings pending judgment in Case C-337/09 P *Council* v *Zhejiang Xinan Chemical Industrial Group*.

31 On 22 May 2012, the applicant requested the removal of the stay of proceedings and that the present case be treated as a priority.

32 On 19 July 2012, the Court of Justice gave judgment in Case C-337/09 P *Council* v *Zhejiang Xinan Chemical Industrial Group*. The stay of proceedings was therefore removed on that date.

33 On hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of the Rules of Procedure, requested the parties to lodge certain documents and put to them written questions. The parties complied with those requests within the prescribed period.

34 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 17 April 2013.

35 The applicant claims that the Court should:

— annul the contested regulation to the extent that it imposes anti-dumping duties on exports by the applicant and collects provisional duties imposed on such exports;

— or, alternatively, annul the contested regulation to the extent that it collects the provisional duties imposed on the applicant;

— order the Council to pay the costs;

— order the interveners to bear their own costs.

36 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

37 The Commission contends that the Court should dismiss the action.

38 The intervening undertakings contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The scope of the action

39 The intervening undertakings, without raising a plea of inadmissibility against the action, as they confirmed at the hearing, emphasise that the applicant seeks the annulment of the contested regulation to the extent that it imposes anti-dumping duties on 'exports by the applicant'. They submit that the applicant can seek annulment of the contested regulation only to the extent that it imposes anti-dumping duties on products produced by the applicant.

40 At the hearing, the applicant stated that the form of order which it sought should be understood in the sense indicated by the intervening undertakings, which was formally noted.

41 Therefore, without prejudice to the obligations which may arise from Article 266 TFEU in the event of annulment on grounds affecting the contested regulation to a greater extent, the form of order sought by the applicant must be interpreted as seeking the annulment of the contested regulation to the extent that it imposes anti-dumping duties on exports of products produced by the applicant and collects provisional duties imposed on those exports.

Substance

42 The applicant raises three pleas in law in support of its action. The first plea alleges a manifest error of assessment in the definition of the product concerned. The second plea alleges infringement of Article 9(5) of the basic regulation. The third plea alleges infringement of Articles 3(9), 9(4) and 10(2) of the basic regulation.

43 The Court considers it appropriate to rule first on the third plea in law raised by the applicant.

44 The third plea in law is essentially divided into two parts. The first part alleges infringement of Article 3(9) and Article 9(4) of the basic regulation. The second part, put forward in the alternative, as the applicant confirmed at the hearing, alleges infringement of Article 10(2) of the basic regulation.

45 The first part of the third plea in law must therefore be examined first.

46 The applicant claims that the existence of a threat of injury must be established to a higher standard than that of material injury. According to the applicant, that was recognised by the Commission itself in the case which gave rise to the judgment in T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757. The few cases referred to by the Council in its written pleadings support that conclusion. In the present case, the institutions failed to satisfy the high standard of proof required. They also failed to take due account of post-investigation period data. In particular, the applicant challenges the Council's conclusions that the Community industry was in a vulnerable position at the end of the investigation period and that further dumped imports were imminent.

47 The Council contests the applicant's presentation of the Commission's arguments in *Euroalliages* v *Commission*, cited in paragraph 46 above. Moreover, the Council points out that the institutions have already adopted measures on the basis of a threat of injury. There is no reason to consider that the

level of proof is higher for the threat of injury than for material injury. The Council also states that it properly took account of post-investigation period data. The Council contests the applicant's arguments concerning the vulnerable position of the Community industry at the end of the investigation period and the imminence of further dumped imports.

48 The Commission states that special care was taken in establishing a threat of injury in the present case since post-investigation period data were taken into account, which is normally not the case.

49 Article 9(4) of the basic regulation provides that an anti-dumping duty is to be imposed where the facts as finally established show that there is, inter alia, injury. According to Article 3(1) of the basic regulation, 'the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry'.

50 Article 3(9) of the basic regulation defines the existence of a threat of material injury as follows:

'A determination of a threat of material injury shall be based on facts and not merely on an allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

In making a determination regarding the existence of a threat of material injury, consideration should be given to such factors as:

(a) a significant rate of increase of dumped imports into the Community market indicating the likelihood of substantially increased imports;

(b) sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;

(c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and

(d) inventories of the product being investigated.

No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.'

51 In the present case, the Council concluded that the Community industry had not suffered material injury during the investigation period, although it was in a vulnerable situation at the end of that period.

52 Having concluded that the Community industry had not suffered material injury during the investigation period, the Council found that there was a threat of injury in the present case.

53 As a preliminary, it must be noted 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 Case C-373/08 *Hoesch Metals and Alloys* [2010] ECR I-951, paragraph 61). In that respect it must be observed that the examination of a threat of injury involves the assessment of complex economic matters and that

the judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there have been manifest errors in the assessment of those facts or a misuse of powers. That limited judicial review does not mean that the European Union judicature must refrain from reviewing the institutions' interpretation of information of an economic nature. In particular, the Court must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, Case T-158/10 *Dow Chemical* v *Council* [2012] ECR, paragraph 59).

54 It must also be noted that, under Article 3(9) of the basic regulation, a determination of a threat of material injury must be based on 'facts and not merely on an allegation, conjecture or remote possibility'. Furthermore, the change in circumstances which would create a situation in which the dumping would cause injury must be 'clearly foreseen and imminent'. It follows that the determination of a threat of injury must be clearly apparent from the circumstances of the case. It also follows that the injury threatened must be impending.

55 The applicant contests the Council's conclusion that, although it had not suffered injury, the Community industry was in a vulnerable position at the end of the investigation period. It also contests the Council's conclusion concerning the existence of a threat of injury.

The first complaint in the first part of the third plea in law, concerning the situation of the Community industry at the end of the investigation period

56 In order to reach the conclusion that the Community industry was in a vulnerable situation at the end of the investigation period, the institutions pointed out that anti-dumping measures had been imposed in 2006 to counteract the injurious dumping caused by imports from a number of other countries. However, the Community industry could not benefit fully from the market expansion, since the imports which had been subject to anti-dumping measures since 2006 were replaced by imports originating in China. The full recovery of the Community industry was therefore not achieved. If the market circumstances were to change, the Community industry would be exposed to the possible injurious effects of the dumped imports. That situation had already occurred in the past, when the level of demand was at normal levels, which led to the adoption of anti-dumping measures in 2006 (recitals 47 to 49 of the contested regulation, read in the light of recitals 87 to 89 of the provisional regulation).

57 The applicant relies, in particular, on the contradictions between the institutions' conclusion and the relevant economic data in the present case. The Council contests the applicant's arguments and emphasises, inter alia, the estimates or economic data concerning the post-investigation period.

58 As a preliminary, it must be pointed out that, even though the Council's conclusion as regards the situation of the Community industry at the end of the investigation period is contained in the part concerning the injury, it is not irrelevant to the analysis of the threat of injury. In particular, the Commission found, in recital 126 of the provisional regulation that, in the absence of measures, the Chinese dumped imports would imminently cause material injury to the already 'vulnerable' Community industry, particularly in terms of reduced sales, market share, production and profitability. The Council, in the contested regulation, expressly confirmed the Commission's conclusions in that respect (recital 81 of the contested regulation).

59 First, it is necessary to note the relevant evidence in the present case, which was referred to by the Commission in the provisional regulation and which show the development of the situation of the Community industry during the period considered, that is to say, until the end of the investigation period:

— the Community industry's production increased by 7% (recital 67 of the provisional regulation);

— the production capacity utilisation increased by 9% to 90% during the investigation period, and showed elevated rates in 2006 and in 2007 (recital 69 of the provisional regulation);

— the level of stocks increased by 12%; however, the Commission noted that 'the relevance of this indicator in the injury analysis is limited' since the vast majority of the production is made in response to orders (recital 72 of the provisional regulation);

— the sales volume by the Community industry increased by 14% (recital 73 of the provisional regulation);

— the Community industry's market share decreased by 5.2 percentage points (recital 75 of the provisional regulation);

— the level of employment remained stable (recital 77 of the provisional regulation);

— productivity increased by 7% (recital 78 of the provisional regulation);

— the average wage per employee increased by 16% (recital 79 of the provisional regulation);

— the sales prices of the Community industry increased by 21% (recital 80 of the provisional regulation);

— the profitability of the Community industry's sales to independent customers, as a percentage of net sales, increased by 27%, or by 3.3 percentage points, to 15.4% during the investigation period, the rate of profit for 2005 and, in particular, 2006 and 2007 were also very high (recital 82 of the provisional regulation);

— the return on investments, that is to say, the profit expressed as a percentage of the net book value of investments, increased by 10%, or by 4.6 percentage points, to 51.7% during the investigation period, after having reached 85.1% in 2006, and 79.2% in 2007 (recital 82 of the provisional regulation);

— the net cash flow from operating activities increased by 73% to EUR 634 million during the investigation period, and the Commission stated, moreover, that '[t]here was no indications that the Community industry [had] encountered difficulties in raising capital' (recital 84 of the provisional regulation);

— the Community industry's annual investments increased by 185% to EUR 284 million during the investigation period (recital 85 of the provisional regulation).

60 Those elements were confirmed by the Council in recital 46 of the contested regulation.

61 It must be pointed out in that respect that, as the applicant essentially –and rightly – claims, besides the decrease of the Community industry's market share, the economic factors referred to above are all positive and, on the whole, paint a picture of an industry in a situation of strength, not of fragility or vulnerability. Moreover, the Commission itself indicated in recital 88 of the provisional regulation that 'any injury suffered by the Community industry [had been] limited and [had] not led to any significant

economic problem'. That finding shows that, in the context of the situation of the Community market during the period considered – i.e. until the end of the investigation period –, the Community industry was not in a vulnerable situation, that is to say, liable to suffer injury as a result of imports originating in China. The finding, pointed out by the Council in its written pleadings, that the Community industry's market share decreased by a few percentage points during the period considered is not sufficient by itself to support the conclusion that the Community industry was in a vulnerable situation at the end of the investigation period. Moreover, that finding must be considered in the light of the fact that the Community industry had a significant market share during the investigation period, namely 63.6%, and that its sales had grown strongly, by more than 14%, during the period considered. It must also be considered in the light of the fact that non-dumped imports from other countries had increased in volume by 35% during the period considered (recital 142 of the provisional regulation) and that the market share corresponding to those imports had increased from 7.8% to 8.5%. Therefore, in view of all of those factors, it must be found that the institutions' conclusion that the Community industry was in a vulnerable situation at the end of the investigation period was not supported by the relevant economic data in the present case (similarly, with other economic data, Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraphs 95 and 96).

62 The other evidence put forward in the contested regulation or by the institutions in their written pleadings before the Court does not call that finding into question.

63 In particular, the finding, relied on by the institutions, that the Community industry would be exposed to the possible injurious effects deriving from the dumped imports if the economic trend were to reverse (recital 89 of the provisional regulation, confirmed by the Council in recital 47 of the contested regulation), would allow the determination, if necessary, of a situation of vulnerability in the future. That finding is therefore irrelevant for the purposes of concluding that the Community industry was in a vulnerable situation at the end of the investigation period. That is also the case as regards the evidence put forward by the Council in its written pleadings before the Court, concerning the post-investigation period economic data, and the inferences which the Council draws from it in relation to the deterioration of the Community industry's situation. In addition, it must be noted that the finding relied on by the institutions relating to the deterioration of the economic context has already been held, by the European Union judicature, to be based on an error of law, since the basic regulation expressly provides, in the part relating to the analysis of the injury, that factors such as contraction in demand must not be attributed to the dumped imports (Case C-245/95 P *Commission* v *NTN and Koyo Seikodu* [1998] ECR I-401, paragraph 43, and *NTN Corporation and Koyo Seiko* v *Council*, cited in paragraph 61 above, paragraphs 97 to 99; see also recital 35 of Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85 (OJ 1992 L 286, p. 2), referred to in both judgments).

64 The finding, made by the Commission in recital 87 of the provisional regulation, and confirmed by the Council in recital 46 of the contested regulation, that the increase of importations originating in China certainly limited the Community industry's inclination 'to invest and expand production capacity to follow the expansion in the market' is not supported by the relevant evidence in the present case. First, it is clear from the figures set out above that the Community industry's inclination to invest was not limited, since the Community industry's annual investments increased by 185% during the period considered. Secondly, as can be seen from, inter alia, recitals 91 and 92 of the provisional regulation, the existence of a threat of injury in the present case is based on the foreseeable and imminent risk that Community consumption would soon decrease considerably. The Commission's view was based on public information and on data provided by the Community industry. Likewise, the institutions noted, on several occasions, that the expansion of the Community market was 'exceptional' (see, inter alia, recital 87 of the provisional regulation, and recitals 47 and 48 of the contested regulation). There is therefore an obvious contradiction between, on the one hand, the claim that imports originating in China limited the Community industry's inclination to expand its production capacity and, on the other, the emphasis on the 'exceptional' nature of the expansion of the Community market and the

imminent risk of a considerable contraction in demand. In the circumstances of the present case, as found by the institutions, it was, on the contrary, logical for the Community industry not to develop its production capacities. Lastly, it must be recalled that the Commission itself indicated in recital 88 of the provisional regulation that 'any injury suffered by the Community industry was limited and did not [lead] to any significant economic problem'. That finding considerably minimises the impact of the dumped imports originating in China on the situation of the Community industry during the period considered.

65 Lastly, the institutions' claims that the Community industry had not fully recovered from the dumping carried out before 2006, are not based on any concrete evidence. In particular, no evidence has been submitted to establish what the institutions meant by 'full recovery' of the Community industry in view, inter alia, of the economic data set out above. The applicant is therefore correct in claiming, in its written pleadings, that the institutions have not proven that the Community industry had not recovered from previous dumping.

66 In the light of all of those considerations and, in particular, of the fact that the institutions' conclusion is not supported by the relevant data in the present case, it must be found that the Council made a manifest error of assessment in confirming the Commission's conclusion that the Community industry was in a vulnerable situation at the end of the investigation period.

The second complaint in the first part of the third plea in law, concerning the existence of a threat of injury

67 The contested regulation, following, in that respect, the structure of the provisional regulation, is based on two parts. The first part concerns the '[l]ikely developments of Community consumption, imports from the country concerned and the situation of the Community industry after the investigation period' (recitals 90 to 112 of the provisional regulation and recitals 50 to 65 of the contested regulation). The second part concerns specifically the 'threat of injury' (recitals 113 to 125 of the provisional regulation and recitals 66 to 81 of the contested regulation).

68 It should be noted that, in the contested regulation, the Council confirmed the Commission's conclusion that there was a threat of injury 'as of the end of the investigation period' (recital 81 of the contested regulation), even though it took into account data available during the post-investigation period.

69 As regards the first part of the contested regulation, it must be pointed out that the post-investigation period data confirm the institutions' forecast of the contraction of the Community market. In particular, the figures set out in recital 51 of the contested regulation show that Community consumption decreased by 27.7% between the end of the investigation period, on 30 June 2008, and March 2009. However, injury factors such as the contraction in demand must not be attributed to the dumped imports (see paragraph 63 above and the case-law cited).

70 As regards the second part of the contested regulation, which the present dispute concerns specifically, the Council's conclusion is based on the analysis of four factors. Those factors use the criteria laid down in the basic regulation. They concern the development of dumped imports (recitals 66 to 68 of the contested regulation), the availability of free capacity of the exporters (recitals 69 to 71 of the contested regulation), the price of imports from China (recitals 72 and 73 of the contested regulation) and the level of inventories (recital 74 of the contested regulation). As regards the last factor, the Council concluded, in essence, that it was not relevant to the analysis of the threat of injury.

71 The applicant's arguments are focused on the development of Chinese imports, in terms of volumes and prices, and on the other export markets as regards the available capacities of the Chinese exporters. The applicant essentially claims that there are contradictions between the Commission's forecasts, confirmed by the Council, and the post-investigation period data and that the analysis of the other export markets is incomplete.

72 First, as regards the development of dumped imports, the Commission first considered that a downward trend in the overall situation of the Community market would 'not have any considerable impact on the development of the volumes of dumped imports' (recital 115 of the provisional regulation). It added that the findings concerning that factor should not be based on a simple observation of the development of the volume of dumped imports in absolute terms, but should also take account of the market context in which that development is taking place and of whether or not that development might have resulted in an increase or decrease of the market share held by these dumped imports. In that context, it found that the market shares corresponding to the dumped imports had shown a 'substantial increase' during the period considered, and that there was 'no sign of [that trend] stopping or reversing' in a period when demand had already started to contract. The Commission therefore concluded that 'the market share of the dumped Chinese imports [was] set to increase [and] the pressure of these dumped imports on the Community market [was] likely to increase substantially' (recital 116 of the provisional regulation).

73 In that regard, it must be pointed out that, according to the data set out in the contested regulation, the volume of imports originating in China decreased significantly in the post-investigation period, a decrease which was very large in absolute terms, as the applicant rightly points out in its written pleadings. According to the table in recital 52 of the contested regulation, those imports decreased by 24.6%. Moreover, in relative terms, the increase of the market share held by those imports was small, namely 0.7 percentage points over that period.

74 The Commission's statement, referred to above, that the overall situation of the Community market would not have a 'considerable' impact on the 'development of the volumes' of imports originating in China and that the pressure of those imports on the Community market was likely to increase 'substantially' is contradicted by the post-investigation period data, which were taken into account by the Council in the contested decision.

75 The Council, in the contested regulation, sees no contradiction between the Commission's statements and the economic data in question. Interpreting recital 116 of the provisional regulation to that effect, it states that 'what matters is not the absolute volume of such imports, but their relative importance in relation to consumption, in other words, their market share in the total Community market'. In that regard, it notes that, in relative terms, imports originating in China have 'slightly increased' (recital 68 of the contested regulation).

76 However, although the Commission did indeed refer to the development of the volume of imports originating in China in both absolute and relative terms, that reasoning was based on a 'substantial' increase of that volume. It is in that context that it found that the pressure of those dumped imports on the Community market was likely to increase 'substantially'.

77 That interpretation of recital 116 of the provisional regulation is confirmed by other recitals. Thus, in recital 95 of the provisional regulation, the Commission indicated that, even if, as a result of the decreasing market, the 'total imports volume' would decrease – 'which decrease [was] however expected not to be significant' – the market share corresponding to the imports originating in China would increase proportionally. It maintained its position in recital 133 of the provisional regulation and indicated that the incipient reduction of consumption '[had not had] any effect on the volume' of imports, the market share of which had instead increased. It added that there was 'no reason to believe that in a similar, even worse short term scenario, this trend [would] be reversed'.

78 Therefore, there is a significant difference between the Commission's estimates in the provisional regulation and the economic data from the post-investigation period which were taken into account by the Council in the context of the contested regulation. It must be noted at this stage that one of the criteria for finding a threat of injury is a significant rate of increase of dumped imports into the Community market indicating the likelihood of 'substantially' increased imports (Article 3(9) of the basic regulation). According to the Council's own statements in the contested regulation, importations originating in China had 'slightly increased' during the post-investigation period (recital 68 of the contested regulation). That slight increase, in relative terms, and the significant decrease, in absolute terms, of imports originating in China do not support the conclusion that, in the present case, a significant increase of imports was likely. Furthermore, the 0.7 percentage point increase of the market share of the imports originating in China must be considered in the light of the 0.1 percentage point decrease of the market share corresponding to the Community industry's products during the post-investigation period (recital 53 of the contested regulation).

79 In the second place, as regards the availability of free capacity on the part of the exporters, the institutions' analysis concerns, first, the free production capacity in itself, and secondly, the risk that Chinese exports would be redirected to the Community market.

80 In that respect, it must be noted that, under Article 3(9) of the basic regulation, the institutions must examine, inter alia, the sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community, account being taken of the availability of other export markets to absorb any additional exports.

81 In that context, it must be noted that, where the institutions examine the risk of redirection of exports to the European Union, in view of an increase of production and exportation capacities in the exporting country, they must take into account not only the existence of other export markets, but also the potential development of internal consumption in the exporting country (see, to that effect and by analogy, *NTN Corporation and Koyo Seiko*, cited in paragraph 61 above, paragraph 109).

82 In the present case, having concluded that there was significant free production capacity in China and that the Chinese exporters' inclination to export had increased, the Commission noted that the percentage of Chinese exports to the Community, as a percentage of total Chinese exports, had significantly increased during the period considered 'from 1% in 2005 to 9% during the investigation period'. In addition, it indicated that '[t]he other main markets [were] the USA with 36% (up from 31% in 2007), Algeria (6%, up from 2% in 2006) and South Korea (6%, up from 3% in 2005)', and that it could be expected on that basis that 'a significant part of the newly created excess capacity [would] be directed to the EC market' and that 'some of these markets, and in particular … the US market' would shrink significantly (recital 119 of the provisional regulation). In the contested regulation, the Council confirmed the Commission's findings, without providing any additional evidence.

83 It must be found, as the applicant rightly points out in its written pleadings, that the institutions did not take into account, in their analysis, 'the availability of other export markets to absorb any additional exports', as required under Article 3(9) of the basic regulation. It can be seen from recital 119 of the provisional regulation that the Commission referred to the United States, Algeria and South Korea only in order to indicate what share of total Chinese exports corresponded to those countries. No specific data was advanced concerning the development of those markets and their potential capacity to absorb additional exports. Nevertheless, it is 'on that basis' that the Commission found that 'a significant part of the newly created excess capacity [would] be directed to the EC market'. If, as the institutions state, the production capacity in China and the volume of exports increased (recital 118 of the provisional regulation) and, at the same time, the share of total Chinese exports of the abovementioned three countries also increased, as can be seen from recital 119 of the provisional regulation, that means that the volumes of exports to those three countries increased as well. The only indication of the development of markets in other countries is the statement that 'a

significant shrinking of some of these markets, and in particular of the US market' was also to be expected. Besides the fact that the latter statement is imprecise, in particular in respect of the countries and volumes concerned, and that it comes after the Commission's conclusion that a significant part of the newly created excess capacity would be directed to the European market, it must be viewed in the light of the fact that, as regards the European Union market, the institutions also predicted a significant contraction of demand. That latter consideration is absent from the institutions' analysis concerning the potential redirection of Chinese exports to the European Union market.

84 Furthermore, it must be emphasised that the institutions did not at any time consider the Chinese internal market and the possible effect of that market on the potential absorption of additional production capacity. The institutions referred only to the share of exports as a percentage of the total sales of the sampled exporters. That circumstance, which was also invoked by the Council in its written pleadings before the Court, has no bearing on the assessment of whether the Chinese internal market was capable of absorbing significant free production capacity.

85 Lastly, the Commission stated, in recital 119 of the provisional regulation, that the percentage of Chinese exports to the European Union significantly increased during the period considered. However, that finding must be considered in the light of the fact, pointed out on several occasions by the institutions themselves, that those exports 'replace[d]' the imports originating in, inter alia, Russia and Ukraine, and subject to anti-dumping duties since 2006. The Commission also noted, in recital 130 of the provisional regulation, the 'clear coincidence in time' between the rapid increase in the market share of the Chinese products and the corresponding substantial erosion of the market shares held by imports from Russia and Ukraine, 'which were their closest competitor in terms of prices'. At no point in the analysis of the potential redirection of exports did the institutions refer to that consideration, which is nevertheless relevant inasmuch as the removal of the 'closest competitor in terms of prices' may explain, at least in part, the increase of the percentage of Chinese exports to the European Union during the period considered.

86 In the third place, as regards the prices of imports originating in China, the Commission stated in the provisional regulation that there was 'no reason' to believe that in an economic environment characterised by a substantial contraction in demand 'there may be a tendency for low prices to increase'. 'On the contrary', according to the Commission, from the supplier's perspective, when consumption falls, 'low prices are expected to be kept low', with the objective of gaining further market shares or at least maintaining and consolidating the existing ones (recital 121 of the provisional regulation). It therefore concluded that the negative effect of the very low prices was twofold. On the one hand, the significant price differential was likely to cause a shift towards the dumped imports, because users would be more likely to buy increasing quantities of goods that were sold at low prices. On the other hand, the existence of such low prices in the market was likely to be used by buyers as a negotiating tool to depress the prices offered by the Community producers and other sources, thereby causing a depressive effect on both volumes and prices (recital 123 of the provisional regulation).

87 As can be seen from the table in recital 52 of the contested regulation, the post-investigation period data show that, contrary to what was asserted by the Commission, the prices of imports originating in China significantly increased in a context of contraction of the Community market, as the applicant rightly observes in its written pleadings. Thus, the available data show an increase of the prices of imports originating in China of more than 35% during the post-investigation period (recital 52 of the contested regulation). At the same time, the prices of the Community industry increased by 18.7% (recital 53 of the contested regulation). It must be pointed out in that respect that, contrary to what the Commission seems to suggest in the provisional regulation, the contraction of demand does not necessarily affect the levels of prices. An economic operator faced with a decrease in demand has a choice between decreasing its sales volume and reducing its prices.

88 The Council, in recital 73 of the contested regulation, does not provide any evidence to explain the contradiction between the evidence put forward by the Commission and the post-investigation period data. The Council merely points out that the increase of prices had already been noted in the provisional regulation. Although it is true that the Commission referred, in recitals 98 and 122 of the provisional regulation, to that increase of prices after the investigation period, attributing that increase to the increase of the prices of raw materials and energy costs, the Commission specified that the latter increase had taken place between April and October 2008. In the contested regulation, the Council does not provide any explanation or additional details concerning, in particular, the development of prices of raw materials and energy costs in the post-investigation period. That lack of explanation must, moreover, be considered in the light of the claims of certain parties, referred to by the Council in recital 93 of the contested regulation, according to which some producers entered into fixed price agreements with suppliers of iron ore and other major production inputs, with the result that they were not able to profit from the 'very sharp decrease in costs that those raw materials [had] been experiencing since immediately after the investigation period'. The Council, in the contested regulation, did not call the latter statement into question.

89 The Council also refers, in recital 73 of the contested regulation, to a 'parallelism' in price movements of the Community industry. The 'parallelism' in price movements cannot be seen from the post-investigation period economic data since the prices of the Community industry increased by 18.7% whereas, during the same period, the prices of Chinese imports increased by more than 35% (recitals 52 and 53 of the contested decision). Moreover the difference between the sales prices of the Community industry and the imports originating in China decreased significantly, from EUR 476 per tonne during the investigation period to EUR 448 per tonne during the post-investigation period. Expressed as a percentage of the sales price of the Community industry, that price difference thus went from 40% during the investigation period to 30% during the post-investigation period.

90 In any event, even if the increase in prices of the product concerned during the post-investigation period may be explained by an increase in the prices of raw materials and energy costs, that does not support the Commission's conclusions, in recital 123 of the provisional regulation, concerning the negative effect of the 'very low' prices of imports originating in China on the prices and volumes of the Community industry. It must be pointed out, in that regard, that one of the criteria for finding a threat of injury is the entry of imports at prices that would 'to a significant degree, depress prices or prevent price increases' (Article 3(9) of the basic regulation). In the light of the post-investigation period data, it does not follow from the facts of the present case that the criterion laid down by the basic regulation may be regarded as having being met. Furthermore, as regards the depressive effect of the 'very low' prices on the volumes of the Community industry, referred to by the Commission in recital 123 of the provisional regulation, it must be noted that the market share of the Community industry during the post-investigation period decreased by only 0.1 percentage points.

91 In conclusion, it must be found that, as regards the four factors laid down in Article 3(9) of the basic regulation relating to the analysis of a threat of injury, one factor is regarded as irrelevant by the institutions (stocks), two factors show inconsistencies between the Commission's estimates, confirmed by the Council in the contested regulation, and the relevant post-investigation period data (volume of imports and price of imports) and one factor (capacity of the exporter and risk of redirection of exports) is incomplete in respect of the relevant evidence to be taken into account. Those inconsistencies and lacunae must be viewed in the context of the requirements laid down by the basic regulation that the threat of injury must be based 'on facts and not merely on an allegation, conjecture or remote possibility' and that the change in circumstances which would create a situation in which the dumping would cause injury must be 'clearly foreseen and imminent'.

92 In the light of all of those considerations, and of the fact that the Court found in the context of the first complaint that the Council made a manifest error of assessment in concluding that the Community industry was in a vulnerable situation at the end of the investigation period, it must be held that the Council infringed Article 3(9) of the basic regulation in finding, in the present case, that

there was a threat of injury. Accordingly, the Council also infringed Article 9(4) of the basic regulation in imposing a definitive anti-dumping duty on the exports of products produced by the applicant and collecting provisional duties imposed on those exports.

93 Consequently, the first part of the third plea in law raised by the applicant must be upheld. Since the contested regulation was based on the finding of a threat of injury and the Council erred in that regard, that regulation must be annulled to the extent that it imposes anti-dumping duties on exports of products produced by the applicant and collects provisional duties imposed on those exports, without it being necessary to examine either the second part of the third plea in law or the other pleas in law put forward in support of the action.

Costs

94 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

95 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Consequently the Commission, which intervened in support of the Council, must bear its own costs.

96 The intervening undertakings must bear their own costs, in accordance with the form of order sought by the applicant in that respect.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China to the extent that it imposes anti-dumping duties on exports of products produced by Hubei Xinyegang Steel Co. Ltd and collects provisional duties imposed on those exports;**

2. **Orders the Council of the European Union to bear its own costs and to pay those incurred by Hubei Xinyegang Steel Co;**

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

4. **Orders ArcelorMittal Tubular Products Ostrava a.s., ArcelorMittal Tubular Products Roman SA, Benteler Stahl/Rohr GmbH, Ovako Tube & Ring AB, Rohrwerk Maxhütte GmbH, Dalmine SpA, Silcotub SA, TMK-Artrom SA, Tubos Reunidos SA, Vallourec Mannesmann Oil & Gas France, V & M France, V & M Deutschland GmbH, Voestalpine Tubulars GmbH and Železiarne Podbrezová a.s. to bear their own costs.**

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 29 January 2014.

[Signatures]