JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

4 October 2006 *

In Case T-300/03,

Moser Baer India Ltd, established in New Delhi (India), represented by A.P. Bentley QC, K. Adamantopoulos, lawyer, and R. MacLean and J. Branton, Solicitors,

applicant,

v

Council of the European Union, represented by S. Marquardt, acting as Agent, and G.M. Berrisch, lawyer,

defendant,

supported by

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

* Language of the case: English.

and by

Committee of European CD-R and DVD+/-R Manufacturers (CECMA), formerly Committee of European CD-R Manufacturers (CECMA), established in Cologne (Germany), represented by D. Ehle and V. Schiller, lawyers,

interveners,

ACTION for annulment of Council Regulation (EC) No 960/2003 of 2 June 2003 imposing a definitive countervailing duty on imports of recordable compact discs originating in India (OJ 2003 L 138, p. 1),

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

composed of H. Legal, President, P. Lindh and V. Vadapalas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 May 2006,

gives the following

Judgment

Relevant provisions

1 Article 5 of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1; 'the basic regulation') provides:

'Calculation of the amount of the countervailable subsidy

The amount of countervailable subsidies, for the purposes of this Regulation, shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidisation. Normally this period shall be the most recent accounting year of the beneficiary, but [it] may be any other period of at least six months prior to the initiation of the investigation for which reliable financial and other relevant data are available.'

2 Article 7(3) of the basic regulation provides:

'Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. ...'

3 Article 8 of the basic regulation provides:

'Determination of injury

...

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

(a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the Community market for like products;

and

(b) the consequent impact of those imports on the Community industry.

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

...

5. The examination of the impact of the subsidised imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including: the fact that an industry is still in the process of recovering from the effects of past subsidisation or dumping, the magnitude of the amount of countervailable subsidies, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

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

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

4 Article 11(1) of the basic regulation provides:

'... [The] investigation shall cover both subsidisation and injury, and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of subsidisation, shall normally cover the investigation period provided for in Article 5. Information relating to a period subsequent to the investigation period shall not, normally, be taken into account.'

5 By its Communication 98/C 394/04 (OJ 1998 C 394, p. 6), the Commission published guidelines for the calculation of the amount of subsidy in countervailing duty investigations ('the guidelines').

6 Section A of the guidelines provides:

'Articles 5, 6 and 7 of [the basic regulation] contain provisions on the calculation of the amount of subsidy. The purpose of this communication is to explain the application of these provisions ... in order to clarify the methodology which will normally be used by the Commission in calculating the amount of subsidy in countervailing duty cases, unless special circumstances justify a departure from this methodology. In this way it is intended to render the process of calculation more open and to introduce greater certainty for economic operators and foreign governments. This communication does not bind the Community institutions in any way, but rather provides guidelines solely for the purpose of conducting countervailing duty investigations under [the basic regulation]. ...'

7 Section F(a)(ii) of the guidelines provides:

'For non-recurring subsidies, which can be linked to the acquisition of fixed assets, the total value of the subsidy has to be spread over the normal life of the assets (Article 7(3) of [the basic regulation]). Therefore the amount of subsidy ... can be spread over the normal period used in the industry involved for the depreciation of assets. This will normally be done using the straight-line-method. ...'

Background to the dispute

8 The applicant is a company established in India which manufactures various forms of storage media, including recordable compact discs ('CD-Rs').

9 After a complaint was filed by the Committee of European CD-R Manufacturers (CECMA), the Commission initiated an anti-subsidy investigation on 17 May 2002 into imports of CD-Rs from India (OJ 2002 C 116, p. 4).

10 By letter of 4 March 2003 the Commission provided the applicant with the essential facts and considerations on the basis of which it was intended to propose the imposition of definitive countervailing duties. The subsidy identified by the Commission consisted in a customs duty exemption for capital goods imported by the applicant. The amount of that subsidy was calculated by spreading it over a period of three years pursuant to Article 7(3) of the basic regulation. The statement envisaged the imposition of a countervailing duty of 10%.

11 The applicant replied to that statement by two letters of 19 March 2003, challenging both the method used in order to calculate the amount of the subsidy, and the existence and causation of the injury.

12 By two letters of 9 April 2003 the Commission rejected the applicant's arguments as to the existence of injury and of a causal link, and sent the applicant an additional statement containing a revised calculation of the amount of the subsidy, which was spread over a period of 4.2 years. The additional statement envisaged the imposition of a countervailing duty of 7.3%.

13 By letter of 14 April 2003 the applicant challenged the revised calculation of the amount of the subsidy. By letter of 5 May 2003 the Commission sent the applicant an additional explanation of that calculation. The applicant replied to that letter on 9 May 2003, putting forward additional observations.

14 Following the Commission's proposal of 20 May 2003, the Council adopted Regulation (EC) No 960/2003 of 2 June 2003 imposing a definitive countervailing duty on imports of recordable compact discs originating in India (OJ 2003 L 138, p. 1; 'the contested regulation'). That regulation imposed a definitive countervailing duty of 7.3% on imports of CD-Rs from India.

Procedure and forms of order sought

15 The applicant brought the present action by lodging an application at the Registry of the Court of First Instance on 29 August 2003.

16 By order of the President of the Fourth Chamber dated 23 January 2004 the Commission was given leave to intervene in support of the form of order sought by the Council. It did not lodge any written submissions.

17 By order of the President of the Fourth Chamber of 18 April 2005 the Committee of European CD-R Manufacturers (CECMA), now the Committee of European CD-R and DVD+/-R Manufacturers (CECMA), was given leave to intervene in support of the form of order sought by the Council. CECMA lodged its statement in intervention within the prescribed period. Observations on that statement were lodged by the applicant.

18 By letters of 13 April 2004 and 30 June 2004 the applicant requested that certain confidential items in the application, defence, reply and rejoinder be excluded from the notification to CECMA. It produced a non-confidential version of those pleadings. By letter of 5 April 2004 the Council requested that certain confidential

items in its defence be excluded from the notification to CECMA. It produced a non-confidential version of the defence which satisfied its own application for confidential treatment as well as the applicant's. The notification of those pleadings to CECMA was confined to that non-confidential version. No objection was raised by CECMA in that regard.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, in connection with measures of organisation of procedure, put written questions to the parties, to which they replied within the prescribed period.

20 The oral arguments of the main parties to the proceedings and the Commission and their replies to the questions put by the Court were heard at the public hearing on 10 May 2006. CECMA informed the Court that it would not take part in the hearing.

21 The applicant claims that the Court should:

— annul the contested regulation in so far as it applies to the applicant;

— order the Council to pay the costs;

— order CECMA to bear its own costs in any event.

22 The Council, supported by the Commission, contends that the Court should:

— dismiss the application;

— in the alternative, annul Article 1(2) of the contested regulation in so far as it imposes a definitive countervailing duty at a rate exceeding the rate that would have applied had the subsidy amount been established on the basis of a depreciation period of 6 years;

— order the applicant to pay the costs.

23 CECMA contends that the Court should:

— dismiss the application;

— order the applicant to pay the intervener's costs.

Law

24 The applicant's complaints are expressed in the form of five pleas in law concerning, first, the determination of the normal depreciation period of the imported assets in relation to calculating the amount of the subsidy and, second, the assessment of injury and causation.

25 As regards the determination of the normal depreciation period, the applicant relies on manifest error of assessment and infringement of Articles 5, 7(3) and 11(1) of the basic regulation (first plea), and on infringement of the rights of the defence and failure to state reasons (second plea).

26 As regards the assessment of injury and causation, the applicant relies on manifest error of assessment and infringement of Article 8(2), (6) and (7) of the basic regulation with regard to the analysis of the factors relating to the determination of injury and the causal link (third plea), the analysis of the effects of imports from Taiwan (fourth plea), and the analysis of the effects of anti-competitive behaviour of a CD-R patent holder (fifth plea).

First plea: infringement of Articles 5, 7(3) and 11(1) of the basic regulation and manifest error in assessment of the normal depreciation period of the assets

Introductory observations

27 By its first plea, the applicant claims that the determination in the contested regulation of the normal depreciation period for the imported assets is defective because of errors in law and a manifest error of assessment.

28 It should be observed that, in the sphere of measures to protect trade, review by the Community judicature of assessments made by the institutions must be limited to establishing whether the 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 a manifest error of assessment of the facts or a misuse of power (see Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraphs 48 and 49 and the case-law cited).

29 The same is true of the assessment of the depreciation period under Article 7(3) of the basic regulation, referred to in this case. Under that provision, the subsidy relating to the acquisition of fixed assets is to be spread 'across a period which reflects the normal depreciation of such assets in the industry concerned'. It is apparent from the wording and the scheme of that provision, which requires in particular an assessment of normal practice in the industry concerned, that the determination of the period in question is part of the wide discretion enjoyed by the Community institutions in the analysis of complex economic situations.

30 Each of the complaints made by the applicant in this case must be examined in the light of those considerations.

Assessment of the factors relating to the depreciation period (first limb)

— Arguments of the parties

31 The applicant submits that, according to Article 7(3) of the basic regulation, as interpreted by section F(a)(ii) of the guidelines, the subsidy in question should have been spread over the 'normal life of the assets' or the period of 'normal depreciation of such assets in the industry concerned'. Moreover, the practice of the Community

institutions is to determine the weighted average of the depreciation periods by reference to the accounting records of producers in the relevant industry in the country concerned.

32 According to the applicant, in the present case the Council should therefore have taken into consideration all of the evidence in the case relating to the life of the assets concerned. In that respect, by considering that the normal depreciation period of those assets (their normal life) was 4.2 years, the Council applied a period which was shorter than that resulting from the evidence provided during the investigation. Based on that evidence, the period of depreciation was 13 years (according to the applicant's accounting records) or even 15 to 20 years (according to the applicant's suppliers). According to the information for the Community industry, it was six years.

33 In addition, the Council was wrong to take the view that the normal depreciation period for the assets concerned was 4.2 years, applying a declining balance method of depreciation provided for under Indian law. There is no depreciation period in relation to the declining balance method of depreciation. Moreover, according to the applicant's calculations, applying that method the assets are not completely depreciated at the end of the period determined by the Council, as there is always a residual value.

34 The Council submits that, according to Article 7(3) of the basic regulation, the subsidy relating to the purchase of fixed assets should be spread over the normal depreciation period. The normal life of an asset, which is a different concept, can potentially be one of the factors taken into account in determining the period of depreciation. That is also the practice of the institutions relied on by the applicant.

35 The applicant confuses those two concepts when it claims, wrongly, that the institutions assumed that the period of 4.2 years was not only the depreciation period but also the life of the assets. As regards the evidence referred to by the applicant, the letters from its suppliers mention only the physical life of the goods concerned and not their appropriate depreciation period. In any event, in the present case the Council acted on the basis of Indian company law which prescribes an obligatory depreciation period regardless of the life of the assets.

36 As to the use of the declining balance method of depreciation, the Council used that method in order to determine the difference between the depreciation period applying that method and the average six-year depreciation period used in the Community industry. In that respect, the alternative calculation put forward by the applicant is not appropriate because it does not take account of constant investments.

— Findings of the Court

37 Under the first limb of the first plea the applicant raises, essentially, two complaints. First, it submits that the depreciation period applied is manifestly inaccurate in relation to information from, respectively, itself, the suppliers of the goods concerned and the Community industry. Secondly, it claims that the Council made a manifest error in assessment of the depreciation period under the declining balance method of depreciation provided for under Indian law.

38 As regards the first complaint, it is apparent, in particular, from recitals 43 and 45 of the contested regulation that in determining the depreciation period the Council took into account the method of depreciation provided for, in accounting matters, by the law of the applicant's country.

39 It must therefore be examined, first, whether the Council could legally act on that basis, rather than on the information put forward by the applicant.

40 Article 7(3) of the basic regulation does not contain any specific rules on the factors to be taken into account in determining the depreciation period. The Community institutions therefore enjoy a wide discretion with regard to the factors which may be considered to be relevant.

41 As to the purpose of the provision referred to in the preceding paragraph, it appears from a joint reading of Articles 5 and 7(3) of the basic regulation that the purpose of the determination of a normal depreciation period in the industry concerned is to calculate the amount of the advantage obtained by the exporter on the purchase of fixed assets attributable to the investigation period. It should be noted that the applicant does not submit that the method of depreciation provided for under the law of the exporter's country is irrelevant in that respect.

42 Nevertheless, it observes that consideration of that method departs from the guidelines and the previous practice of the Community institutions.

43 As regards the guidelines, according to section F(a)(ii) thereof, the value of the subsidy has to be spread 'over the normal life of the assets [concerned]' and '[t]herefore the amount of subsidy ... can be spread over the normal period used in the industry involved for the depreciation of assets.' Although it should be observed, therefore, that the guidelines refer both to the 'normal [depreciation] period' and the 'normal life' of the assets concerned, it does not follow from those two references that the Commission restricted the scope of the factors used in the application of Article 7(3) of the basic regulation.

44 Moreover, the applicant itself claims that the previous practice of the Community institutions with regard to the application of the aforementioned provisions of the basic regulation and the guidelines was to find the average depreciation period applied in accounting records in the industry of the country concerned. To the extent that depreciation is regulated in that country, the method of depreciation provided for under national law may be relevant in that regard.

45 As regards the applicant's argument that in calculating a subsidy the Community institutions have never made reference to a method of depreciation provided for under the law of the country concerned, it should be recalled that Article 7(3) of the basic regulation allows the institutions discretion as to what factors are to be taken into account in the determination of the normal depreciation period. The fact that the Community institutions did not use the method in question in other anti-subsidy investigations does not lead, in itself, to infringement of that provision (see, by analogy, Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359, paragraphs 68 and 69).

46 In addition, although the applicant's argument regarding previous practice should be interpreted as being based on infringement of the principle of legal certainty, it should be observed that, when the applicable legislation leaves the institutions a certain discretion, the fact that they exercise that discretion without explaining in detail and in advance the criteria which they intend to apply in every situation does not infringe that principle, even where the institutions create new policy options (Case 250/85 *Brother* v *Council* [1988] ECR 5683, paragraphs 28 and 29; Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 118; and Case T-118/96 *Thai Bicycle Industry* v *Council* [1998] ECR II-2991, paragraphs 67 to 69).

47 Accordingly, the view must be taken that the Community institutions were able to take account of the method of depreciation provided for under the law of the

country of the exporter concerned to determine the normal depreciation period of the assets in question without infringing Article 7(3) of the basic regulation.

48 Secondly, in respect of the applicant's information according to which it applied the average depreciation period of 13 years in its accounts, it is apparent from recital 40 of the contested regulation that the accuracy of that data was called in question by the fact that the classification of the assets was not the same in its accounting records and tax records.

49 As for the certificates from the suppliers according to which the goods in question could be used for 15 to 20 years, as noted by the Council those certificates do not state the depreciation period of those goods in the industry concerned but mention only their physical life.

50 As regards the depreciation period of six years applied by the Community industry, according to recitals 44 and 45 of the contested regulation the economic state of that industry is not comparable to that of the Indian industry concerned.

51 Accordingly, the information relied on by the applicant does not show that the assessment made by the Council in the present case is manifestly incorrect.

52 As regards the applicant's second complaint, regarding manifest error in the application of the method of depreciation provided for under Indian law, it should be noted that the declining balance method does not entail reliance on a set depreciation period as such.

53 In the present case, the Council used a formula to calculate that period, corresponding to application of the declining balance method by an undertaking in the applicant's situation. In particular, it noted in recital 45 of the contested regulation that application of that method in circumstances of ongoing regular investments allows '30% faster' depreciation of assets than the straight-line method, which corresponds to the period of 4.2 years used in this case.

54 In that regard, the applicant has not shown that such an approach was, in itself, manifestly incorrect. Nevertheless, it seeks to call in question the accuracy of the Council's calculations by putting forward an alternative calculation according to which application of declining balance depreciation results in a residual value at the end of the fifth year.

55 In that respect, the alternative calculation put forward by the applicant is based on the depreciation of an asset invested over the first year and not on ongoing investments. Since that calculation was based on criteria different from those taken into account by the Council, it cannot be relied on to challenge the accuracy of the assessment carried out by the latter.

56 In the light of the foregoing, the complaints made by the applicant under the first limb of the first plea cannot be accepted.

Classification of the assets as moulds and failure to take account of the information in the applicant's accounting records (first and second complaints of the second limb)

— Arguments of the parties

57 The applicant relies on the Council's practice according to which the exporter's accounting records constitute the principal source of information. That practice is comparable to that of taking into consideration accounting records maintained in accordance with generally accepted principles in the country concerned for the purpose of calculating production costs in dumping cases. The Council ought therefore to have based its assessment on the depreciation period following from the accounting records.

58 The applicant claims that the Council infringed Article 7(3) of the basic regulation, as interpreted in its practice, by failing to take account of that period and by classifying the assets concerned as moulds, although those assets are shown as machines in the applicant's accounting records. The applicant admits that the same assets were classified differently in its accounting and tax records. However, where there is a difference the classification in the tax records cannot prevail over that in the accounting records.

59 The contested regulation also lacks a statement of reasons in that regard. The Council should have given reasons for its choice of classification of the assets concerned, based on objective elements associated with their nature, and not simply on the conflict between the applicant's accounting and tax records.

60 Moreover, in its letter to the Commission of 14 April 2003, the applicant stated that only a proportion of the assets concerned had been reclassified as moulds in its tax records. That information was based on the applicant's declaration of income, which was examined by the Commission during the investigation. Thus the Commission had all the information necessary to check the applicant's calculations.

61 The Council contends that although, in principle, exporters' accounting records constitute the principal source of information, the institutions are not bound by that information but should consider the matter from the perspective of the normal depreciation period in the industry concerned. It was not appropriate in the present case to take as a basis the depreciation period in the applicant's accounting records. First, the classification of the assets in those accounts was inconsistent with their classification for taxation purposes. Secondly, the average depreciation period applied in the Community industry, which was making losses, was approximately six years, and the depreciation period applied by the applicant, a company which was profitable and investing constantly and heavily, should have been significantly lower than that average.

62 The Council submits that the applicant reclassified the assets in question as moulds in its tax return. It follows from the Indian legislation that the same assets must be classified consistently for tax and accounting purposes. In order to define the appropriate period of depreciation the Council therefore proceeded on the basis that the reclassification of the assets for taxation purposes should have resulted in a reclassification of the assets in the applicant's accounting records.

63 That reasoning is sufficiently set out inter alia in recital 41 of the contested regulation. Having regard to that statement of reasons, the Council was not required to address the objective nature of the assets in question. In addition, the applicant also failed to demonstrate that the reclassification of the assets for taxation purposes was based on their objective nature, and not solely on the applicant's tax interests.

64 As for the applicant's statement that the reclassification for taxation purposes did not affect all of the assets in question, the Council replies that the applicant did not produce any evidence to substantiate that fact in its letter to the Commission of 14 April 2003 or in its application. Furthermore, it follows from the Commission's reply of 8 May 2003 that the information given in the letter of 14 April 2003, namely the total value of the imported goods, conflicted with the information previously submitted and verified during the investigation. Accordingly the Commission could not verify the new information nor, consequently, take it into account.

— Findings of the Court

65 According to recitals 39 to 43 of the contested regulation, the Council determined the depreciation period of the assets in question by reference to the method of depreciation provided for under the Indian legislation for goods such as moulds. It thus refused to base that determination on the depreciation period referred to in the applicant's accounting records, in which those assets are shown as machines.

66 The applicant admits that it reclassified the assets in question as moulds in its tax return relating to the investigation period. Nevertheless it submits that the Council infringed Article 7(3) of the basic regulation by basing its determination on a classification shown in the tax records rather than taking account of information shown in the accounting records.

67 First of all it should be recalled, as noted in paragraph 45 above, that the mere fact that the Community institutions did not use the same method in other anti-subsidy investigations does not lead, in itself, to infringement of the abovementioned provision. Moreover, in this case, according to recitals 40 and 41 of the contested

regulation the reason that account was taken of the tax information was the fact that the classification of the assets in question in the applicant's accounting records was not consistent with that shown in its tax records. It cannot therefore be maintained that the Council disregarded the information in the applicant's accounting records on arbitrary grounds.

68 Secondly, it is apparent from recital 38 of the contested regulation that the Community institutions based their determination on the depreciation period applicable for accounting purposes. In that examination the applicant's tax return was referred to only in connection with seeking the appropriate classification of the assets in question for accounting purposes. As is apparent from recital 41 of the contested regulation, that reference was justified by the fact that the same assets should have been classified in an identical manner in the accounting and tax records. Accordingly, the applicant is wrong to argue that the Community institutions unlawfully gave priority to the tax records over the accounting records.

69 Finally, it should be noted first that the applicant did not challenge the Council's view that, although an undertaking may use different methods of depreciation in its accounting and tax records, the same asset must be classified identically in both records. Secondly, it does not maintain that the classification of the assets in its tax records was incorrect. Indeed the investigation carried out by the Commission did not show that the classification of the assets in the tax return had been challenged by the Indian authorities or adjusted by the applicant.

70 In those circumstances, the Council could lawfully have taken the view that, since the applicant changed the classification of the assets in question in its tax records, account had to be taken of the same change for accounting purposes.

71 As regards the applicant's subsidiary plea regarding absence of a statement of reasons for that finding, it is settled case-law that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and uphold their rights and to enable the competent Community Court to exercise its power of review (see Case T-89/00 *Europe Chemi-Con (Deutschland)* v *Council* [2002] ECR II-3651, paragraph 65 and the case-law cited).

72 In that respect, recitals 40 to 42 of the contested regulation state that the applicant's information concerning the classification of the assets in the accounting records was inconsistent with the change in their classification in the tax records, when the classification of the same assets in both records should have been identical. Accordingly, the contested regulation does make sufficiently clear the reasons for which the Council did not base its determination on the classification of the assets in the applicant's accounts, but referred to other relevant factors.

73 Finally, the applicant alleges that the classification of the assets as moulds did not affect all of the assets in question, a fact which it pointed out to the Commission by letter of 14 April 2003.

74 The Council's reply to that contention is that the information put forward to support it was inconsistent with other information obtained during the investigation and that it cannot therefore be taken into account.

75 It is apparent from the information submitted by the parties in reply to the written question put by the Court that, in support of the contention at issue, the applicant referred to the information in its tax return in respect of the investigation period. It

is common ground that the value of the assets entered in that return does not correspond to the value used to calculate the subsidy. The Council states that the institutions were not able, on the basis of those elements alone, to compare the contention at issue with other information verified in the investigation.

76 Nevertheless, the applicant submits that the different values which resulted, which may be explained by the addition of transport and installation costs, did not prevent the Community institutions from seeing that the reclassification did not affect all of the imported assets.

77 The Council stated, in this respect, that the Community institutions had not been able to ascertain the precise value of the assets classified as moulds because, first, the applicant did not explain the classification criteria of its assets in the tax return and, secondly, it had not provided a complete and verifiable list of those assets. In the absence of that information, the Community institutions had not been able to verify the figures submitted by the applicant in support of its contention.

78 In the light of the latter information, which was not called in question by the applicant before the Court, it must be considered that the applicant did not put forward any evidence to enable the Community institutions to verify the accuracy of its contention and, if necessary, to take account of the proportion of the assets in question which had not been classified as moulds. Accordingly, solely by that contention it cannot challenge the determination in the contested regulation.

79 Consequently, without infringing Article 7(3) of the basic regulation the Council was able to take the view that the assets in question, classified as moulds for taxation purposes, should also have been taken into account as such for the purposes of

determining their depreciation period for accounting purposes and that it was not therefore appropriate to base that determination on information shown in the applicant's accounting records. Furthermore, the applicant has not shown that a statement of reasons is lacking in that respect.

80 The claims set out by the applicant in the first two complaints of the second limb must therefore be rejected as unfounded.

Taking into account the applicant's profitability and investments (third complaint of the second limb)

— Arguments of the parties

81 According to the applicant, the Council infringed Article 7(3) of the basic regulation by making a distinction between profitable and unprofitable companies for the purpose of determining the depreciation period. That distinction does not follow at all from the basic regulation. Furthermore it is illogical, because the normal life of an asset and its normal depreciation period are connected with its nature, not the profitability or investment schedule of the company which owns it.

82 By adopting the premiss that the applicant would invest heavily over a period of six years, the Council was also in breach of Articles 5 and 11(1) of the basic regulation. The fact that the applicant was profitable and that it invested during the investigation period and the two previous years does not constitute evidence that

the same level of profitability and investment was maintained for six years. Thus the Council's approach means that it is speculating on events after the investigation period.

83 The Council replies that it did not distinguish between profitable and unprofitable companies. It merely relied on the fact that the applicant was investing constantly and heavily in order to conclude that the applicant was depreciating its assets very quickly. Accordingly, the Council sought to ascertain the normal depreciation period for a company in the same situation as the applicant. The applicant is wrong to claim that profitability does not affect depreciation periods, as profitability is important in terms of the choice of that period.

84 In concluding that the applicant is profitable and that it invests heavily, the Council relied on information obtained in the investigation which was not disputed. In accordance with Articles 5 and 11(1) of the basic regulation, it did not use any information subsequent to the investigation period.

— Findings of the Court

85 It is common ground that the Council took into account the fact, ascertained in the investigation, that the applicant was very profitable and was making ongoing regular investments. That fact was relied on in two respects. First, of the two methods of depreciation possible under Indian legislation the Council referred to the declining balance method of depreciation, which allows swifter depreciation. Secondly, the Council calculated the depreciation period under that method in circumstances of ongoing and regular investments.

86 Those considerations are set out in recital 45 of the contested regulation:

'[T]he position of the exporting producer is very different to the average company. It is very profitable, it is investing constantly and heavily and it is therefore reasonable to assume that its depreciation period would be significantly lower than the abovementioned average. Therefore, it was considered appropriate to apply a declining balance method which takes account of the fact that it allows swifter depreciation than the straight-line method. It is noted that in circumstances of ongoing regular investments, the declining balance method of depreciation provided by the Indian Companies Act set out in recital 43 allows 30% faster depreciation than the equivalent straight-line method over a representative period of six years applicable when using the straight-line method. This corresponds to a period of 4.2 years as compared to six years for the straight-line method ...'

87 The applicant submits that, by taking into account its profitability and investments, the Council infringed Article 7(3) of the basic regulation and Articles 5 and 11(1) of that regulation.

88 As regards Article 7(3) of the basic regulation, it should be observed that under that provision the Council is required to determine the depreciation period in the industry concerned. That determination may thus entail taking account of circumstances specific to the exporter concerned. As has already been pointed out in paragraph 40 above, in the absence of specific rules for that purpose, the Community institutions enjoy discretion with regard to the relevant factors to be taken into account.

89 In that respect, the applicant has not adduced any proof in support of its contention that an exporter's profitability cannot affect the depreciation period of its assets. On the other hand, the Council rightly stated that the choice of a method of

depreciation by an exporter may depend, inter alia, on anticipated investments and, accordingly, on the profitability of the company concerned.

90 In those circumstances, the applicant has not shown that the Council infringed Article 7(3) of the basic regulation.

91 As for Article 5 of the basic regulation, that provision lays down that the amount of the subsidy is to be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidisation. In this case, the Community institutions concluded that the applicant's favourable financial situation during the three financial years under consideration had influenced its choice of depreciation method. They then referred to the method thus chosen to determine the portion of the subsidy attributable to the investigation period. The applicant is therefore wrong to allege that the Community institutions included in the calculation of the amount of the subsidy a benefit attributable to a period other than the investigation period.

92 In respect of Article 11(1) of the basic regulation, it provides, inter alia, that information relating to a period subsequent to the investigation period is not, normally, to be taken into account to determine subsidisation and injury. Consequently, the relevant information for the purposes of the analysis conducted by the Community institutions is normally that relating to a period ending with the investigation period. Nevertheless that provision does not preclude taking into account forecasts of future events in the analysis of that information, in so far as those forecasts are relevant and based on objective evidence obtained during the investigation.

93 So far as concerns the relevance of such forecasts in this case, the applicant has not succeeded in calling in question the Council's determination that the profitability of

the exporter concerned and its anticipated investments can be relevant in determining the method of depreciation to be used.

94 As regards the substance of the forecasts taken into account by the Council, the applicant does not dispute that it regularly invested substantial amounts over a period of three years up to the end of the investigation period. Although that fact does not necessarily lead to the view taken by the Council that the depreciation in question was effected in circumstances of ongoing regular investments, it should be noted that that determination, which is one of economics, comes within the wide discretion enjoyed by the Community institutions in the examination of complex economic situations. The applicant has not shown that the Council's assessment in that regard was manifestly incorrect.

95 The applicant has not therefore proven that the Council infringed Article 5 or Article 11(1) of the basic regulation.

96 In the light of the foregoing, the present complaint is not well founded.

Use of the declining balance depreciation method (fourth complaint of the second limb)

— Arguments of the parties

97 The applicant submits that the Council infringed Article 7(3) of the basic regulation by using the declining balance depreciation method to calculate the amount of the

subsidy. The guidelines refer to the use of the straight-line method, as does the institutions' practice. In that regard, there is no explanation in the contested regulation as to why the Community institutions departed from their established practice, when the applicant had used the straight-line method in its accounting records.

98 The Council argues that Article 7(3) of the basic regulation does not preclude the use of a method other than the straight-line method of depreciation, even though the latter is the method that is generally used. The fact that the declining balance method of depreciation has not been used in the past is irrelevant.

— Findings of the Court

99 It is apparent from recital 45 of the contested regulation that the Community institutions determined the depreciation period by applying the declining balance method of depreciation provided for under Indian legislation for the assets in question.

100 In that respect, the applicant claims that use of the declining balance method of depreciation in itself infringes Article 7(3) of the basic regulation, as interpreted in the Commission's guidelines and applied in its previous practice.

101 It should be observed that the wording of Article 7(3) does not preclude use of the declining balance method.

102 As regards the guidelines, section F(a)(ii) thereof provides that in order to spread the amount of the subsidy, the Commission will normally use the straight-line method. On the other hand, that information does not mean that use of another method of depreciation is precluded. Moreover, according to Section A of the guidelines, the guidance they contain does not apply if special circumstances justify a different approach.

103 In the present case, the Council explained in recitals 44 and 45 of the contested regulation that use of the declining balance method of depreciation provided for under Indian legislation, which led to swifter depreciation than the straight-line method provided for under the same legislation, was more appropriate in the light of the depreciation period used by the Community industry and the special circumstances of the applicant. In those circumstances the Community institutions could lawfully adopt an approach other than that generally provided for by the guidelines.

104 As regards the applicant's argument that the declining balance method of depreciation has not been used by the Community institutions in other anti-subsidy investigations, that argument is not sufficient, in itself, to call in question the lawfulness of its use in this instance (see paragraphs 45 and 46 above).

105 Regarding the applicant's criticism that the Council applied a different method from that used in its accounting records, it should be recalled that the latter was entitled to take the view that use of the depreciation method used in those accounting records was inappropriate in this case (see paragraphs 65 to 67 and 79 above).

106 The applicant is therefore not justified in claiming that the Community institutions infringed Article 7(3) of the basic regulation merely because they departed from the approach provided for by the guidelines and used in previous anti-subsidy investigations.

107 In view of those considerations, the present complaint must be rejected as unfounded.

Allegedly arbitrary nature of the calculations (fifth complaint of the second limb)

— Arguments of the parties

108 The applicant claims that the method used by the Council in order to arrive at a period of 4.2 years is arbitrary. In particular, the institutions arbitrarily chose six years as the period over which to compare the straight-line and declining balance depreciation methods, as well as the period during which the applicant was deemed to have invested continually. If the institutions had used a different number of years, they could have produced a different result.

109 The arbitrary nature of the determination of the depreciation period in question is illustrated by the fact that the Commission proposed a period of three years in its first statement, for which a period of 4.2 years was later substituted by reference to the same available information.

110 According to the Council, the fact that it could have arrived at a different depreciation period by altering the parameters of the calculation does not prove that its approach was arbitrary. In that respect the applicant has failed to show that the Council exceeded its discretion.

111 According to the Council, the Commission was able to alter its approach during the investigation, even if that alteration was not based on new information. That does not mean that the new approach is arbitrary.

— Findings of the Court

112 By this complaint, the applicant submits that the determination of the normal depreciation period in question was not objective. It argues, first, that the Community institutions arbitrarily chose the parameters used to compare the two alternative methods provided for under Indian legislation and, secondly, that they altered the depreciation period at a late stage in the investigation and in the absence of new evidence.

113 As regards the first contention, recital 45 of the contested regulation indicates that the representative period of six years used in this case corresponded to both the average depreciation period applied by the Community industry and that resulting from the straight-line method provided for under Indian legislation, which was one of the methods which could be used. It cannot therefore be considered that the institutions made an arbitrary choice by applying that period. The applicant's argument that the result of the calculation over another period would have been different cannot call in question the earlier finding that the period applied was not arbitrary.

114 As regards the second contention, that the Commission had initially proposed a period of three years, it must be recalled that an investigation in the sphere of measures to protect trade is an ongoing process during which many findings are constantly revised. It cannot therefore be ruled out that the definitive findings made by the Community institutions will differ from the findings made at any other stage of the investigation (*Shanghai Teraoka Electronic* v *Council*, cited above, paragraph 182). The applicant cannot therefore claim that an alteration in the determination of

the depreciation period, which has an impact during the investigation, is indicative of the arbitrary nature of that determination. In addition, as stated by the Council, although not based on new evidence the alteration in the present case was made following the written and oral observations of the applicant.

115 Consequently, the applicant has not shown that the determination by the Community institutions was arbitrary. The present complaint cannot therefore be accepted.

116 In the light of all of the foregoing, the first plea must be rejected in its entirety.

Second plea: infringement of the rights of the defence and failure to state reasons in relation to the determination of the normal depreciation period for the assets

Arguments of the parties

117 The applicant claims that, in the statement of 9 April 2003, the Commission put forward a new method of calculating the depreciation period which was substantially different from the method used in its final disclosure statement of 4 March 2003. That statement was not sufficiently clear for the applicant to understand the new method. The Commission implicitly acknowledged that fact by sending a supplementary explanation on 5 May 2003.

118 Furthermore, the supplementary explanation of 5 May 2003 also did not allow the applicant to exercise its rights of defence. First, the applicant could not usefully submit its comments after 5 May 2003, because at that stage it was not possible to amend the proposal for the adoption of the contested regulation. Secondly, even the supplementary explanation failed to clarify how the Commission had determined the depreciation period of 4.2 years. In that respect, enclosing a table of the calculation figures would have sufficed, which the Commission failed to do.

119 As for the Council's argument that the applicant should have asked for an explanation of the statement of 9 April 2003, the applicant notes that that statement imposed a very short deadline for reply and that its reply, of 14 April 2003, contained a tacit invitation to provide further explanation.

120 In the alternative, the applicant submits that the contested regulation is vitiated by a failure to state reasons, in so far as it reiterates the incomplete grounds included in its statement of 9 April 2003.

121 The Council contends that the additional statement of 9 April 2003 was sufficient. If the applicant had not understood the method of calculation introduced in that statement, it should have asked for an explanation. In its reply of 14 April 2003 the applicant merely expressed its disagreement with the method applied by the Commission.

122 In addition, the fact that the Commission sent a supplementary explanation on 5 May 2003 does not mean that it acknowledged the statement of 9 April 2003 to be insufficient. That explanation was in fact confined to a response to the calculation presented by the applicant on 14 April 2003. Contrary to what the applicant pleads, it was sent in time.

123 The applicant was acquainted with the depreciation methods used by the Commission, and should not have had any difficulty calculating the amounts concerned. During the administrative procedure, it never asked to be provided with the calculation figures in the form of a table.

124 Lastly, the applicant has not in any event put forward any argument capable of showing that the possible lack of information prevented it from defending its interests.

Findings of the Court

125 It must be observed that, under Article 30(1) and (2) of the basic regulation, the exporters concerned may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures. That obligation of final disclosure is to ensure respect for the rights of the defence of the undertakings concerned (see, by analogy in relation to dumping, Case T-88/98 *Kundan and Tata* v *Council* [2002] ECR II-4897, paragraph 131).

126 Furthermore, according to settled case-law on measures to protect trade, the undertakings affected by an investigation preceding the adoption of definitive measures must be placed in a position during the administrative procedure in which they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged (see *Kundan and Tata* v *Council*, paragraph 132 and the case-law cited).

127 In that respect, the fact that final disclosure is incomplete renders the regulation imposing definitive duties unlawful only if, as a result of the omission, the parties were not in a position to defend their interests effectively (see *Shanghai Teraoka Electronic* v *Council*, paragraph 292 and the case-law cited).

128 In the light of those principles, it is necessary to examine the applicant's criticism regarding the incomplete nature of the disclosure in question.

129 The method of calculating the subsidy set out in the statement of 4 March 2003 was altered by the statement of 9 April 2003. Accordingly, so far as concerns the determination of the depreciation period applied to spread the subsidy over time, the Commission made final disclosure in its statement of 9 April 2003.

130 Paragraph 28 of that statement reads as follows:

'[I]t was considered appropriate to apply a declining balance method which takes account of the fact that it allows swifter depreciation than the straight-line method. It is noted that in circumstances of ongoing regular investments, the declining balance method of depreciation provided by the Indian Companies Act set out in recital 43 allows 30% faster depreciation than the equivalent straight-line method over a representative period of six years applicable when using the straight-line method. This corresponds to a period of 4.2 years as compared to six years for the straight-line method and this shorter period was used to allocate the benefit obtained.'

131 The applicant claims, essentially, that the final disclosure statement cited above, although it refers to circumstances of ongoing regular investments, does not show that the Commission determined the depreciation period by taking into account the investment of constant annual amounts over a six-year period.

132 In that respect, the final disclosure statement at issue relates to the comparison between the two methods of depreciation provided for under the legislation of the applicant's country and contains all the calculations as well as the result. In those circumstances, although admittedly the words 'circumstances of ongoing regular investments' do not necessarily mean that the annual amounts invested are constant throughout the period in question, any ambiguity resulting from that expression could not prevent the applicant from understanding the method applied. Even if the applicant had had doubts as to the exact meaning of the words in question, since it had available all the calculations and was acquainted with the depreciation methods involved it was in a position to verify its meaning in relation to the other calculations.

133 Furthermore, it should be pointed out that the applicant never asked the Commission about the meaning of those words. In its reply to the statement in question, of 14 April 2003, the applicant merely challenged the accuracy of the Commission's calculation by putting forward an alternative calculation. That alternative calculation shows that the applicant proposed calculating the depreciation in relation to an initial investment, rather than contemplating ongoing regular investments. That correspondence therefore shows, not that the latter was not in a position to understand the method applied, but that it disputed one of the calculations.

134 In those circumstances, the view must be taken that the applicant has not proven that the statement of 9 April 2003 was incomplete regarding the determination of the normal depreciation period for the assets in question.

135 In any event, in its letter of 5 May 2003 the Commission replied to the applicant's proposed alternative calculation by stating that the calculation by the institutions was based on investments of constant annual amounts over the whole of the representative period. Since that information was forwarded to the applicant before the date for adoption by the Commission of the proposal in respect of the contested regulation, the applicant cannot claim that it was not sent in time (see, to that effect, Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 82).

136 As regards the applicant's alternative argument relating to failure to state reasons, it should be noted that paragraph 28 of the statement of 9 April 2003 was repeated in recital 45 of the contested regulation. Considering that the applicant has failed to show that that statement was incomplete, the reasons in the contested regulation must be regarded as being sufficient in that respect.

137 In the light of the foregoing, the applicant has not shown that final disclosure was incomplete and thereby resulted in infringement of its rights of defence.

138 Consequently, the second plea cannot be accepted.

Third plea: manifest error of assessment and infringement of Article 8(2) and (6) of the basic regulation with regard to the analysis of the factors relating to the determination of injury and the causal link

Introductory observations

139 It must be recalled that the question whether the Community industry has suffered injury and whether that injury is attributable to subsidised imports involves the

assessment of complex economic matters, in respect of which the institutions enjoy a wide discretion. Judicial review of that discretion must be exercised within the limits noted in paragraph 28 above.

140 In addition, it is for the applicant to adduce evidence enabling the Court to find that the Council made a manifest error of assessment when determining the injury (*Shanghai Teraoka Electronic* v *Council*, paragraph 119 and the case-law cited).

141 In the context of this plea, the applicant claims that the analysis by the Community institutions of the economic factors relevant to the determination of the injury and the causal link was arbitrary, vitiated by manifest errors of assessment and, alternatively, by a failure to state reasons. It puts forward four complaints in that respect.

Method used to compare economic trends (first complaint)

— Arguments of the parties

142 The applicant submits that, in their analysis of the economic factors relating to the injury, the Community institutions underestimated the significance for the Community industry of the positive trends. It does not dispute the factual findings but their comparison as well as the conclusions drawn from that comparison.

143 First, the Community institutions were wrong to assess the impact of the imports on the basis of data for the period 1998 to 2000.

144 In that regard, first, the Community institutions erred in taking into account the data of the Statistical Office of the European Communities (Eurostat) for 1998. The information set out in the table in recital 62 of the contested regulation shows that the applicant, the only Indian exporting producer of the product concerned, started exporting in its 1999/2000 financial year.

145 Secondly, the data from Eurostat for the years 1998 to 2000 are not reliable. The relevant category of the nomenclature determined for the statistics includes several products other than CD-Rs, imported in a variety of packaging, and the quantity is stated in tonnes, so that a mathematical formula had to be applied to the Eurostat data in order to estimate the number of imported CD-Rs. Given the very small quantities, such a formula is statistically unreliable.

146 Third, it is apparent from recitals 55 to 64 of the contested regulation that from 1998 to 2000 imports from India did not exceed the threshold of 1% of the Community market. They are thus negligible within the meaning of Article 14(4) of the basic regulation.

147 Fourthly, the fact that the imports were small in the first three years of the period under consideration was not taken into account sufficiently when assessing the state of the Community industry. Consequently, the Community institutions compared the data for 1998 and the investigation period and concluded that the Community

industry had gained 3.7 percentage points of the Community market, whereas a comparison between 2000, the first year in which imports ceased to be negligible, and the investigation period would have shown a larger gain of five percentage points.

148 Secondly, the Community institutions erred in basing their conclusions on the comparison of periods which overlap.

149 First, the comparison between calendar years on the one hand and the investigation period on the other was wrong. The year 2001 and the investigation period, from April 2001 to March 2002, overlap by nine months, which means that seasonal changes cannot be taken into account in that comparison.

150 Secondly, the Council wrongly compared the trends relating to several consecutive years prior to 2001 with those found between that year and the investigation period or during the investigation period. For example, in the comparison of the increase in Community production in recital 73 of the contested regulation the conclusion that the increase slowed down during the investigation period is wrong, since the figure stated relates to a much shorter period than the period to which the other figures used in the comparison relate. The same applies to the findings as to the fall in prices, the limited increase in capacity, and the slow increase in sales volumes, in recitals 59, 74 and 76 of the contested regulation respectively.

151 The Council states as a preliminary point that, according to the practice of the Community institutions, the determination of injury is based on an assessment of economic indicators over an injury investigation period of four to five years ending

with the investigation period. In the present case the Community institutions looked at the development of the injury factors during the period 1998 to 2001 and during the investigation period.

152 In the first place, the applicant is wrong to claim that that investigation should have left out the years 1998, 1999 and 2000, during which the level of imports was low.

153 First, it is irrelevant that the applicant did not export to the Community in 1998, since the Community institutions have to analyse the data relating to the country concerned, not the individual exporter.

154 Secondly, the applicant has not shown that the Eurostat data for the years in question was wrong. In any event, the Community institutions also examined the development of import indicators on the basis of figures supplied by the applicant and obtained comparable results to those derived from the Eurostat data.

155 Thirdly, the comparison of information relating to the years in question does not conflict with Article 14(3) and (4) of the basic regulation, which covers cases where imports were negligible during the investigation period.

156 Fourthly, the Council took into account the fact that import levels were low from 1998 to 2000. Regarding the applicant's argument in relation to the increase in the market share of the Community industry, the development of that indicator was considered to be positive and the applicant does not show how the additional analysis called for could have influenced the assessment of injury.

157 In the second place, the applicant is wrong to claim that the comparison of trends relating to periods which overlap could lead to an error of assessment.

158 First, regarding the comparison made between the calendar year 2001 and the investigation period, in accordance with Article 5 of the basic regulation the Community institutions normally take the exporter's last accounting year as the investigation period, which may not be the same as the calendar year. Nothing prevents the Community institutions in such a case from comparing trends during the investigation period with trends in the previous year which partly overlaps with the investigation period. Moreover, the applicant has not shown that the import of CD-Rs is subject to seasonal variations which make it inappropriate to compare the two periods concerned.

159 Secondly, the applicant does not allege any factual error in the data used or in the analysis undertaken by the institutions. Specifically, it does not dispute the factual findings in recitals 59, 73, 74 and 76 of the contested regulation. Furthermore, the applicant does not explain how the alleged faults in the comparison of the data affected the overall injury assessment.

— Findings of the Court

160 In its first complaint, the applicant challenges, essentially, the taking into account of data relating to different periods to compare the development of economic trends.

161 It is settled case-law that the Community institutions have wide discretion in determining what period is to be considered for the purpose of determining injury (see *Shanghai Teraoka Electronic* v *Council*, paragraph 277 and the case-law cited).

162 It should also be noted that the Community institutions may determine injury over a period longer than that covered by the investigation. That possibility is justified by the fact that the study of economic trends must be carried out over a sufficiently long period (*Nakajima* v *Council*, paragraph 87).

163 In this case, according to recital 10 of the contested regulation the investigation period extended from 1 April 2001 to 31 March 2002 and corresponded to the applicant's last financial year. The period considered for the determination of injury covered the investigation period and the four previous calendar years, and was thus from 1 January 1998 to 31 March 2002.

164 The applicant states that it does not dispute the choice of the period considered as such. On the other hand, it submits first that the Community institutions could not base their findings on the data in respect of 1998, 1999 and 2000, during which the level of imports was very low.

165 Recitals 55 and 57 of the contested regulation show that imports were very small in terms of volume and market share from 1998 to 1999, and that they only reached 1% of the Community market in 2000.

166 It must be examined whether the Community institutions took that fact into account in their analysis of the factors relating to injury.

167 In that respect, first, the applicant states that it was the only Indian exporter and that it started exporting to the Community from April 1999.

168 It should be noted, first of all, that the existence of injury must be assessed as a whole and it is not necessary to define separately the effect of the imports carried out by each of the companies responsible (see, by analogy in relation to dumping, *Shanghai Teraoka Electronic* v *Council*, paragraph 163 and the case-law cited). The case-law also makes clear that the Community institutions do not commit a manifest error in that assessment where they base their findings on the information reasonably available to them (see *Shanghai Teraoka Electronic* v *Council*, paragraphs 229 and 230 and the case-law cited).

169 Further, in this case even if the data submitted to the Commission by the applicant, according to which the latter started exporting from 1 April 1999, could have called in question the representative nature of the Eurostat data in respect of 1998 and the beginning of 1999, it should be noted that the Community institutions pointed out in recital 64 of the contested regulation that the assessment of the indicators relating to imports focused on a period beginning in 2000, during which the applicant actually exported to the Community.

170 Secondly, the applicant submits that the small volume of imports affected the representativeness of Eurostat's statistical data in respect of the years 1998 to 2000.

171 In that respect, the applicant has not adduced any evidence in support of its contention that the statistical formula applied by Eurostat to compile the data at issue is unreliable for small quantities. In those circumstances, the argument

connected with the small volume of imports during the period in question is not sufficient to show that the Eurostat data relating thereto is unreliable. In any event, it is apparent from recitals 61 and 62 of the contested regulation that the Community institutions compared the Eurostat data with the figures provided by the applicant and reached similar conclusions for the period concerned.

172 The view must therefore be taken that the Council could take into account the Eurostat data for 1998, 1999 and 2000 without making a manifest error of assessment.

173 Thirdly, the applicant submits that taking into account the data for the years in question was precluded by Articles 10(11) and 14(3) and (4) of the basic regulation, since the imports were negligible in those years.

174 Under Articles 10(11) and 14(3) and (4) of the basic regulation, anti-subsidy proceedings are not to be initiated or are to be immediately terminated where it is determined that the injury is negligible or where the market share of the imports is below 1%.

175 In the present case, the applicant does not submit that the market share of the imports was below the aforementioned 1% at any time in the investigation period, from 1 April 2001 to 31 March 2002. The fact that the market share of those imports was below the threshold at the beginning of the longer period which was taken into consideration to assess economic trends is immaterial with regard to the abovementioned provisions. The applicant's argument relying on those provisions is therefore irrelevant.

176 Finally, in respect, fourthly, of the applicant's argument regarding assessment of the economic indicators relating to the state of the Community industry in the period 1998 to 2000, in order to carry out a study of economic trends the Community institutions may lawfully take into account developments observed in respect of the Community industry during the whole period considered, including the years in which imports were still below significant levels.

177 In the present case, the applicant has not shown that the choice of the starting date of the period considered resulted in inaccurate presentation of economic trends so far as concerns the coincidence of entry on the market of the imports in question with negative developments in the Community industry. Although, following the example given by the applicant, the Community industry gained a greater market share between 2000 and the investigation period than between 1998 and the investigation period, it should be observed that that indicator was, in any event, considered to be positive. In that regard, the applicant has not shown how the Council's findings regarding injury and a causal link would have been affected if 2000 had been the beginning of the period considered.

178 The applicant's arguments regarding the taking into account of the data in respect of 1998, 1999 and 2000 must therefore be rejected.

179 In the second place, the applicant criticises the assessment of the data in respect of periods which overlap in part.

180 In that regard, it maintains, first, that the Community institutions made a manifest error of assessment by comparing the data relating to calendar years, in particular 1998 and 2001, with those of the investigation period which overlap by nine months in 2001.

181 In that connection, the investigation period chosen in this case is one year. The comparison between the data in respect of the calendar years and that period, of the same length, could not therefore have resulted in inaccurate presentation of economic trends unless it were proven that there were seasonal changes on the CD-R market. The applicant does not state, however, that there were such changes on the CD-R market.

182 Secondly, the applicant complains that the Council compared developments from one year to another with those found between 2001 and the investigation period. That criticism relates to the assessment of production, price levels, capacities and volumes of Community sales, made in recitals 59, 73, 74 and 76 of the contested regulation respectively.

183 It should be noted that the developments which took place between the consecutive calendar years examined are not directly comparable with those appearing between 2001 and the end of the investigation period, since the latter relate to a period of a different length.

184 However, an analysis of recitals 59, 73, 74 and 76 of the contested regulation does not show that the findings regarding the development of the indicators in question were based on trends appearing between 2001 and the end of the investigation period. Although the Council stated in recitals 73, 74 and 76 that the increase in Community production 'slowed down during the [investigation period]', that the increase in its capacity as from 2001 'was limited' and that the increase in the volume of sales of the Community industry 'increased only by 6% in the [investigation period] as compared to 2001', it did not infer from those findings that the state of the Community industry revealed by those indicators had worsened. As regards recital 59, although the Council stated that the import price increased by 17% between 2001 and the investigation period, it nevertheless based its conclusions on injury in recital 102 on the decrease by 59% in overall prices between 2000 and the end of the investigation period. It should be noted that the applicant does not dispute any of those factual findings.

185 In addition, although the applicant criticises the fact that the Community institutions did not extrapolate the data in respect of 2002, it does not show how, in the absence of such extrapolation, the Council gave an inaccurate picture of the development of the indicators concerned. Accordingly, the applicant does not prove that such an alleged omission in the presentation of the data resulted in an error in the assessment of those indicators.

186 In any event, the applicant does not state what impact the error allegedly made by the Council in the comparison of the data in question could have had on the conclusions regarding existence of injury and a causal link (see, to that effect, *Shanghai Teraoka Electronic* v *Council*, paragraph 167 and the case-law cited). It does not even state how those conclusions could significantly have been modified if the Council had taken into account the data extrapolated in respect of 2002.

187 The view must therefore be taken that the applicant has not shown that the Council was in error as to the facts or made a manifest error in its assessment of the indicators in question.

188 Finally, under the present complaint the applicant relies on Article 8(2) and (6) of the basic regulation, claiming that the Community institutions did not carry out an objective analysis of the data in respect of the different periods.

189 Since the applicant has not shown that there is an error of fact or a manifest error in the assessment of the data in question, it cannot claim that the periods compared were chosen arbitrarily. The argument as to lack of objectivity in that connection cannot therefore succeed.

190 Accordingly, the present complaint must be rejected as unfounded.

Assessment of stock levels (second complaint)

— Arguments of the parties

191 The applicant states that the Community institutions made a manifest error in concluding in recital 103 of the contested regulation that the development of stock levels of the Community industry was one of the indicators which worsened dramatically. The Community industry's stocks declined between 2000 and the investigation period, demonstrating, on the contrary, a positive trend. That error alone could result in the annulment of the contested regulation.

192 The Council claims that the stock assessment in recital 103 of the contested regulation is accurate, given that it refers to the worsening of that factor during the injury investigation period, between 1998 and the investigation period, rather than to the situation during the investigation period. Stock levels were not, in any event, decisive in terms of the injury. Any possible error cannot therefore result in the annulment of the contested regulation, since it does not affect the outcome of the investigation of the injury.

— Findings of the Court

193 Under this complaint, the applicant maintains that the assessment of the development of stocks of the Community industry is manifestly incorrect. It does

not dispute the detailed figures in that regard in recital 80 of the contested regulation. Nevertheless it observes that the Council was not able to conclude in recital 103 of the contested regulation, on the basis of that data, that the indicator of stocks had dramatically worsened during the period considered.

194 It should be noted that the period considered in this case was from 1998 to the end of the investigation period. The data undisputed by the applicant shows that during the whole of that period the stocks of the Community industry increased significantly.

195 The applicant has not shown that the improvement in the indicator relating to the stocks expressed as a percentage of production from 2000 was such as to reverse the negative trend observed over the entire period considered. It is apparent from recital 80 of the contested regulation that stocks remained at high levels throughout the whole of the period considered, increasing in absolute terms towards the end of 2001, which therefore coincided with the increase in the volume of imports, and representing, in relative terms, a high level of production — 15% — during the investigation period.

196 The present complaint is therefore without substance.

Assessment of import prices (third complaint)

— Arguments of the parties

197 The applicant submits that the Community institutions based their claim that import prices had decreased on the data for 1998, 1999 and 2000, which were

neither relevant nor reliable. The only reliable feature of the trends in import prices is the fact that they increased by 15% between 2001 and the investigation period. In fact that increase is even greater, since the two periods overlap.

198 The fact that import prices were analysed also on the basis of figures provided by the applicant adds nothing in that regard. Furthermore, the data in question were not properly presented by the Community institutions. The data relating to the applicant's financial years were attributed entirely to the most recent calendar years. Thus, the prices for the financial year 1999/2000, which covered only three months of 2000, were attributed to the year 2000 rather than to the year 1999 in which the bulk of the revenue was generated.

199 The Council argues that the applicant is wrong to state that the analysis of the price level of imports should have covered the period from 2001 to the investigation period and not the whole of the injury investigation period. The fact that the level of imports does not exceed the threshold of 1% of the Community market at the outset is not relevant.

200 The Community institutions admitted that the Eurostat prices for 1998 and 1999 were not representative owing to the small quantities of imports. Consequently, in recital 59 of the contested regulation, they compared price development between 2000 and the investigation period. In addition, they carried out a further analysis of the prices based on the data provided by the applicant in respect of the period from its financial year 1999/2000 to the investigation period. The results were comparable.

— Findings of the Court

201 The assessment of the price levels of imports was, in this case, the main factor on which the finding of undercutting of Community prices and thus of injury was based. The Community institutions analysed that indicator in recitals 58 to 64 of the contested regulation on the basis of the Eurostat data and the figures provided by the applicant.

202 As regards the Eurostat data, the institutions concluded, primarily, that there was a significant price fall — 59% — between 2000 and the end of the investigation period. The applicant challenges the taking into account of the data for 2000, arguing that imports were still negligible. That argument has already been examined and rejected in paragraphs 170 to 175 above.

203 Concerning the analysis of the figures provided by the applicant, it should be noted that that led to results very similar to those based on the Eurostat data, that is to say a price fall of 54%. The applicant submits nevertheless that the presentation of those figures is inaccurate.

204 The table in recital 62 of the contested regulation shows that the 54% relates to price development between the two financial years of the applicant. Even if recital 63 is not sufficiently precise when it states that that percentage concerns development between 2000 and the investigation period, that lack of precision is also not an error. The table preceding the recital in question shows clearly that the development is that between the 2000 financial year and the investigation period. The applicant has not therefore shown that the figures which it provided were presented inaccurately.

205 In addition, even if the data provided by the applicant relate to the period beginning on 1 April 1999, whereas the Eurostat data concern the period commencing on 1 January 2000, that fact alone does not mean that the Council's finding that the Eurostat figures and those of the applicant show similar trends is inaccurate. The applicant does not state that the taking into account of another starting date for its data could have resulted in different conclusions regarding import prices.

206 Consequently, the applicant has not shown that there is a factual error or a manifest error of assessment in respect of the analysis of import prices.

207 The present complaint must therefore be rejected as unfounded.

Assessment of positive and negative trends (fourth complaint)

— Arguments of the parties

208 The applicant claims that the Community institutions did not balance the positive and negative indicators of injury, in breach of Article 8(2) and (5) of the basic regulation. The overall assessment set out in recitals 104 and 105 of the contested regulation does not include all the positive and negative indicators. The Council found, in essence, that the undercutting of import prices had an effect on the ability of the Community industry to raise capital, which was illustrated by the negative developments in investment returns, profitability and cash flow. Thus, its overall assessment was based on a small number of closely related indicators, to the exclusion of positive factors.

209 Although the period considered extended from 1998 to the investigation period, the institutions should have taken account of the fact that imports prior to 2000 had been negligible. They did not explain why a number of positive trends between 2000 and the investigation period, namely the respective increases in Community production, Community industry sales volumes, its market share and its productivity, and at the same time the reduction in production costs, were offset by negative trends.

210 The Council recalls that the injury investigation period started in 1998. Thus the trends cited by the applicant which relate to the period after 2000 are of limited value. In addition, the Community institutions never denied the existence of positive trends. Nevertheless, they cannot be counted against or offset by the negative trends, but must be assessed as a whole in the circumstances of the case.

211 In the present case, the Community institutions' finding of injury was based on factors associated with the industry's ability to raise capital. They took into account, first, the negative development of the Community industry in terms of prices, profitability and cash-flow, involving a significant reduction in investments, and secondly, the fact that the industry had been prevented from benefiting from its cost reductions. The positive, essentially growth-related, trends were considered less important in the light of a strong increase in Community consumption. The increase in sales and the reduction in costs of the Community industry were not sufficient to compensate for the price fall and thus lead to the positive development of its profitability. The Community institutions were therefore justified in concluding that the positive trends were offset by the negative ones.

212 Weighing the various factors in that analysis falls within the discretion of the Community institutions, and the applicant has not shown that there was a manifest error in that regard.

— Findings of the Court

213 It is settled case-law that the injury investigation must relate a set of factors, any one of which cannot alone be the basis for a conclusive decision. The positive development of a factor does not preclude a finding of significant injury, provided that that finding is based on various factors which the basic regulation requires to be taken into consideration (see, to that effect, Case T-51/96 *Miwon* v *Council* [2000] ECR II-1841, paragraph 105 and the case-law cited).

214 In its conclusions on the injury caused in this case, in particular in recitals 103 to 105 of the contested regulation, the Council took into consideration positive trends in the state of the Community industry. It also explained the reasons for which other indicators, which developed negatively, nevertheless resulted in material injury.

215 The applicant has not cast doubt on any of the factual findings relating to that assessment or shown that there was a manifest error in assessing the different factors of injury. Under this complaint it submits, however, that the Community institutions did not correctly examine the different positive and negative indicators.

216 It should be observed in that respect that in a dispute concerning the overall assessment of injury an applicant cannot merely propose its interpretation of the different economic factors but must state the reasons for which the Council should have reached a different conclusion on injury on the basis of those factors (see, to that effect, *Miwon* v *Council*, paragraph 103).

217 In this case, although the applicant states that certain indicators relating to the state of the Community industry were positive, inter alia the respective increases in production, sales volumes, market share and productivity of that industry, as well as the reduction in production costs, that fact is not sufficient to show that the industry concerned did not suffer material injury consisting in particular, according to the Council, in negative development in profitability and substantial financial losses observed during the investigation period, resulting in a slowing down of investments.

218 The applicant does not pursue any argument which may show that the Council was wrong to conclude that the industry had suffered the injury referred to in the above paragraph, in the light of the overall analysis of the relevant factors.

219 Further, as regards the applicant's argument as to the starting date of the period considered, that has already been examined and rejected in paragraphs 176 and 177 above.

220 Consequently, the present complaint, regarding the overall assessment of the indicators of injury, cannot be accepted.

221 The third plea must therefore be rejected as unfounded.

Fourth plea: manifest error of assessment in the application of Article 8(6) and (7) of the basic regulation with regard to the analysis of the effects of imports from Taiwan

Arguments of the parties

222 The applicant states that in the contested regulation the Council examined whether the injury to the Community industry was attributable to factors other than the Indian imports, in particular to the dumped imports from Taiwan in respect of which a provisional anti-dumping duty was imposed in December 2001.

223 Before that duty was imposed, Taiwanese imports had a market share of 62% and their average price was considerably lower than that of the Indian imports. During the investigation period, that 27.5% price difference was higher than the anti-dumping duty imposed on the Taiwanese exporters, with the exception of Princo Corp and the non-cooperating exporters. The injury caused during that period could not therefore be attributed to the Indian imports.

224 In order to dismiss the effects of the Taiwanese imports, the Council's assessment could only have been based on an analysis of the three-and-a-half-month period from the imposition of the provisional anti-dumping duty to the end of the investigation period. However, the Council was unable to show that the Community industry had faced price pressure exerted by Indian imports during that period. Between 2001 and the investigation period, Taiwanese imports lost 6% of the market, whereas the Community and Indian producers and those of other third countries each gained 2%. During the investigation period the volume of Indian imports

increased by 16 187 000 units, in the region of 0.73% of market share. Those factors were not sufficient to support the conclusion that the Indian imports could individually cause material injury.

225 Moreover, in the same period, the growth in imports from other third countries, namely Hong Kong, Switzerland and China, was higher than in Indian imports, and the prices of those imports were lower than Indian prices.

226 The Council claims that a causal link between the imports at issue and the injury continues to exist even if those imports are part of a wider set of factors, provided that those other factors do not break the causal link between those imports and the injury.

227 In this case, the Council concluded that the injury caused by Taiwanese imports was not such as to break that causal link. First of all, Indian producers gained a market share of more than 8% between 2000 and the investigation period, before the anti-dumping measures in respect of Taiwan came into force. Secondly, after the imposition of the anti-dumping measures, Indian producers could have taken over part of the market share lost by the Taiwanese exporters. Thirdly, the low prices of Indian imports significantly undercut Community prices.

228 The applicant's argument relies, wrongly, on splitting the investigation period into two parts — before and after the introduction of an anti-dumping duty on Taiwan. Further, the applicant's allegations in relation to the investigation stage following the imposition of measures against Taiwan are irrelevant. The applicant claims that the effect of the Indian imports is confined to a market share gain resulting from an increase in the volume of imports of 16 187 000 units and thus to a hypothetical loss

of that part of the market by the Community industry. However, the injury in the present case did not consist of a loss of market share but of financial losses by the Community industry which affected its ability to invest. In that respect, the undercutting of prices by Indian imports in the amount of 9% of the market had a significant effect on those financial losses.

229 As regards the applicant's observations concerning imports from Hong Kong, Switzerland and China, the market share that they represented was too small to influence Community prices.

Findings of the Court

230 Article 8(7) of the basic regulation provides for the obligation to examine known factors which are injuring the Community industry at the same time as the subsidised imports. That examination must enable the possibility that the injury caused by those other factors is attributable to the imports in question to be ruled out. Those factors include, inter alia, the volume and prices of non-subsidised imports.

231 According to recital 116 of the contested regulation, in this case during the period considered the Community industry concerned was faced with dumped imports from Taiwan which caused it material injury between 1997 and 2000. It was also possible that the negative effects of those imports continued until the imposition of provisional measures in December 2001 by Commission Regulation (EC) No 2479/2001 of 17 December 2001 imposing a provisional anti-dumping duty on imports of recordable compact discs originating in Taiwan (OJ 2001 L 334, p. 8).

232 In the light of that known factor, the Community institutions were required, in determining the injury caused by the Indian imports, to examine whether the effect of the Taiwanese imports was such as to break the causal link between the Indian imports and the injury caused to the Community industry (see, to that effect, Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraph 81; Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 98; and Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, paragraph 176).

233 It must be pointed out that the Council in fact examined the effects of the Taiwanese imports in recitals 116 to 118 of the contested regulation and reached the conclusion that, although they influenced the Community market during the period considered, that influence was nevertheless not such as to break the causal link.

234 The applicant complains that the Community institutions made a manifest error in connection with that analysis.

235 It must be observed, first of all, that in its arguments the applicant makes a distinction between the periods before and after the imposition of provisional measures in respect of the Taiwanese imports, implying that the Community institutions were required to examine the two periods separately. However, under Article 11(1) of the basic regulation the injury to be determined is that suffered during the investigation period. Thus although the Council had to take into account the imposition of provisional measures during the investigation period, which it did, in particular, in recitals 116 and 117 of the contested regulation, its conclusions on injury and the causal link relate, with good reason, to the whole of that period.

236 Next, it is common ground that the Taiwanese imports may have contributed to the injury caused to the Community industry during a part of the period considered. The applicant wrongly submits that that fact alone precludes the possibility that the Indian imports also caused material injury in the same period.

237 According to case-law, it is possible to attribute to the imports considered responsibility for injury even if their effects are merely part of more extensive injury attributable to other factors (see to that effect Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 62). The possibility that injury may be caused simultaneously by several factors, each of which taken in isolation amounts to the cause of material injury, cannot therefore be excluded from the outset.

238 Accordingly, the presence of a significant external factor, such as the Taiwanese imports in this case, does not automatically break the causal link between the imports in dispute and the injury caused to the Community industry. It should, however, be examined whether the Community institutions were entitled to find that, despite that external factor, the subsidised imports caused material injury.

239 In that regard, first, the applicant maintains that the Taiwanese imports had a market share of 62% and that their average price was considerably lower than that of the Indian imports. In the light of the volume and price of those imports, no injury was attributable to the Indian imports, since they had just 9% of the market and were priced at a considerably higher level.

240 First of all, assuming that the applicant is thus touching on the fact that it was forced to align its prices with those of the dumped Taiwanese imports, that fact does not preclude the possibility that its imports caused material injury to the Community industry.

241 Secondly, the applicant does not deny that the Indian imports had a significant market share, that their prices were lower than Community prices and that they competed with the Taiwanese producers. In the light of those circumstances, its contention that the Taiwanese imports, which were much greater and made at lower prices, ruled out any possibility of undercutting on its part is unfounded. It cannot be ruled out at the outset that material injury involving losses caused by undercutting of Community prices is the result of imports from various countries, each of which may have a different effect.

242 Finally, the Community institutions explained the reasons for which the presence of the Taiwanese imports, even at very low prices and in large volumes, did not rule out the possibility that the Indian imports taken in isolation exerted pressure on Community prices. According to recital 117 of the contested regulation, Indian imports were able not only to face up to the Taiwanese competition but also to gain more than 8% market share between 2000 and the investigation period and to take over part of the market share lost by Taiwanese exporters between 2001 and the investigation period. Those considerations, which are not disputed by the applicant, enabled the Council correctly to conclude in the same recital that the low prices of Indian imports had a significant influence on Community prices.

243 Consequently, the applicant is wrong to maintain that, in the light of the volumes and prices of the Taiwanese imports, no injury was attributable to its imports.

244 Secondly, the applicant states that the fact that the Indian imports were able to gain, at the same time as Community production, part of the market lost by Taiwanese exporters following the imposition of the provisional measures does not suffice to conclude that they had a significant influence on the Community market.

245 It should be pointed out in that regard that the Council's findings, set out in recital 117 of the contested regulation, are not based only on the consideration that the Indian imports were able to take over part of the market share lost by Taiwanese exporters, but also on the fact that they were able, faced with Taiwanese competition, to gain a significant part of the Community market and that their low prices affected Community prices.

246 The fact that other participants in the market, including the Community producers, also took over part of the market lost by Taiwanese exporters cannot call in question the Council's conclusion that the Indian imports taken in isolation caused material injury to Community producers during the investigation period.

247 In the light of all those considerations, the applicant has not shown that the Community institutions made a manifest error of assessment by finding that the imports originating in Taiwan were not such as to break the causal link in this case.

248 The applicant also observes that the cumulative increase in imports from Hong Kong, Switzerland and China was higher, and that those imports were priced at a lower level than Indian imports.

249 In that regard, the Council's conclusions are not based only on the consideration that the Indian imports were able to take over significant market share lost by Taiwanese exporters. In any event, the applicant accepts that the share taken over by the Indian imports was comparable to that gained, respectively, by Community producers and all the producers from other third countries.

250 In addition, although the applicant's observation must be interpreted as meaning that the institutions did not examine sufficiently the effects of the imports from Hong Kong, Switzerland and China, that contention likewise cannot succeed. According to recital 121 of the contested regulation, not challenged by the applicant, the volume of imports originating in India was five to six times larger than the volume of imports from each of the three countries in question, which individually held a market share of 2% during the investigation period, whereas the share held by the Indian producer was 9%. The Council was therefore able in any event to take the view that the imports from those third countries were not significant enough to break the causal link in this case.

251 Consequently, the fourth plea cannot be accepted.

The fifth plea: infringement of Article 8(6) and (7) of the basic regulation with regard to the analysis of the effects of anti-competitive behaviour by a patent holder

Arguments of the parties

252 The applicant states that, in the context of the administrative procedure, the Community industry claimed that a holder of CD-R patents was abusing its dominant position by charging excessively high royalties. By dismissing that allegation in recital 135 of the contested regulation solely on the ground that it had not been confirmed by a formal decision of the competition authorities, the Community institutions infringed Article 8(6) and (7) of the basic regulation, as interpreted in Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813 and Case T-58/99 *Mukand and Others* v *Council* [2001] ECR II-2521.

253 The Commission was aware of that allegation of abuse of a dominant position since, as is apparent from its press release of 3 August 2003, at the time of adoption of the contested regulation the investigation in relation to that infringement of the competition rules was in its final stages.

254 As to the assessment of the effects of royalties in recital 134 of the contested regulation, it is not sufficient to dismiss the effects of the alleged abuse of dominant position or, in particular, the effects of excessive royalties. First of all, the possibility that the Indian exporter may also have suffered injury as a result of excessive royalties is not relevant to the assessment of the injury suffered by the Community industry. Secondly, although the Community industry's profitability was at its highest in 1999, at the time when the royalties already applied, that does not preclude those royalties from having contributed to the injury during the investigation period. Thirdly, the Council's observation that downward pressure on prices prevented the Community industry from passing on royalties to consumers is irrelevant. The Community institutions should have examined whether in the absence of excessive royalties the Community industry would still have suffered injury. Further, if the Community industry's costs were artificially high due to the excessive royalties, the analysis of price undercutting in the present case is not accurate.

255 The Council contends that it examined in detail the impact of the royalties and thus the alleged anti-competitive behaviour in recitals 134 and 135 of the contested regulation, even though that behaviour was never confirmed. The applicant's allegation that the Council dismissed that point because of the absence of a formal decision is therefore based on a misreading of the contested regulation.

256 The allegations of anti-competitive behaviour concerned the pricing of royalties. In that respect, since the royalties were paid by both Community and Indian producers, their payment cannot be the reason for the difference in price. Moreover the Community industry had to pay the royalties in 1999, the year in which its

profitability was at its highest, as well as in 2000 and during the investigation period, when its profitability was negative. Thus, contrary to the applicant's claims, the question whether the Community industry suffered injury owing to the allegedly excessive royalties is irrelevant to the assessment of the causal link in the present case, since a single cost factor, which is the same for all participants in the market, cannot have broken the causal link. Nevertheless, the Council explained in recital 135 that the allegation of anti-competitive behaviour had not been confirmed by any formal decision.

257 The Council notes that the circumstances of the case are different from those in *Mukand* v *Council*, cited above. The facts relating to the behaviour in question here have never been established, there is no automatic link between the behaviour alleged and the prices of the product at issue, and the exporter concerned is also affected by that behaviour.

258 As regards the Commission's press release which is annexed to the reply, the Council points out that the applicant has not explained why it was not produced with the application in accordance with Article 48(1) of the Rules of Procedure of the Court of First Instance. Furthermore, that press release mentions pre-recorded CDs, not CD-Rs, and indeed concerns neither abuse of a dominant position nor the payments of excessive royalties alleged by the applicant.

259 CECMA argues that the institutions are not required to examine the allegation in question pursuant to Article 8(7) of the basic regulation. First, the alleged behaviour affects Community producers and producers worldwide in the same way. It is not therefore capable of affecting competition between third-country and Community producers. Secondly, the alleged anti-competitive behaviour is not a known factor.

Findings of the Court

260 It is settled case-law that in determining injury, the Community institutions are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from anti-competitive behaviour involving Community producers themselves (*Extramet Industrie* v *Council*, paragraph 16, and *Mukand* v *Council*, paragraphs 39 and 40).

261 In this case, according to the case-file the Community industry making the allegation stated, in a submission of 7 January 2003, that a company holding CD-R patents was abusing its dominant position by charging excessively high royalties and that a European producer had withdrawn from the market following a dispute with that company. The industry made that observation to counter the applicant's allegation that the degree of support for the complaint within the meaning of Article 10(8) of the basic regulation had fallen below the threshold required to proceed with the case. The applicant made the same observation during the investigation, claiming that the effects of the alleged anti-competitive behaviour, involving the excessive pricing of royalties, was a factor to be examined in the determination of the injury.

262 Under the present plea, the applicant submits that the Council failed to examine that factor, simply stating in recital 135 of the contested regulation that the allegation in question had not been confirmed by any formal decision further to an investigation led by the competition authorities.

263 It should be pointed out in that respect that it is not apparent from recital 135 of the contested regulation that the Community institutions in fact examined the question whether the injury on which they base their conclusions derived from the anti-competitive behaviour alleged.

264 Although that recital does not suffice to dismiss the effects of the factor pleaded by the applicant, it should be pointed out that the question whether the Council failed to take into account those effects must nevertheless be considered by reference to the whole of the reasoning adopted in the contested regulation (see, to that effect, *Koyo Seiko* v *Council*, paragraph 79).

265 The Council contends that it took that factor into account in recital 134 of the contested regulation. It is apparent from that recital that the Council examined in general the effects of royalty payments in respect of patents, finding that that factor was not such as to break the causal link in this case. The Council contends that by making that finding it also dealt with the allegation that those royalties were excessive and constituted anti-competitive conduct.

266 In that respect, although recitals 134 and 135 appear under different subheadings, namely 'Royalties' and 'Other factors', the arguments of the parties show that nevertheless they both concern the same material in the file relating to the payment of royalties. Moreover, those two recitals follow each other, so that the structure of the contested regulation demands they be read in conjunction.

267 Account should therefore be taken of the findings made in recital 134 to examine whether the Council disregarded any injury resulting from the anti-competitive behaviour pleaded by the applicant.

268 First, the applicant disputes the relevance of those findings, claiming that the institutions should have assessed the effects of the royalties specifically and thus should have concluded that even in the absence of excessive royalties the Community industry would have suffered injury.

269 In that regard, in order to disregard the effects resulting from an external factor, the Community institutions are required to examine whether those effects were such as to break the causal link between the imports at issue and the injury caused to the Community industry (see paragraph 232 above). That examination does not necessarily entail a determination of the precise effects of the factor at issue. It suffices for the Community institutions to find that, despite such an external factor, the injury caused by the imports in question was material.

270 In this case, the Council maintained that the Indian imports had caused material injury to the Community industry, resulting in particular in undercutting of Community prices. It explained that, even if the royalties had had a negative influence on the profits of the Community industry, that factor, which affected all the producers on the market, was already present in 1999, before the imports became significant. The negative development in the situation of Community producers from 1999 was not therefore attributable to that factor. In the light of those elements, it was not unreasonable for the Council to take the view that the payment of royalties could not have had an effect on the injury caused by the subsidised imports.

271 The Council rightly states that the examination of the question whether the royalties were excessive owing to anti-competitive behaviour on the part of a patent holder cannot, in any event, call in question its conclusion referred to in the preceding paragraph.

272 It should also be observed that, unlike the situations obtaining in the cases giving rise to the judgments in *Extramet* and *Mukand*, the anti-competitive practice alleged is not attributable to the behaviour of Community producers. In order to assess the effects of that factor in this case, the Community institutions were not therefore required to examine whether or not the Community industry had itself contributed to the injury suffered.

273 Secondly, the applicant submits, in reliance on *Mukand*, cited above, that the injury determined by the undercutting of prices was not accurately assessed if Community prices were artificially high due to the excessive royalties.

274 The facts of the case which gave rise to the judgment in *Mukand* concerned conduct affecting Community prices, not import prices. In this case, the Council found that the royalties in question had to be paid by all producers, including the applicant. The applicant did not dispute that fact.

275 Accordingly, the Council was able to take the view in recital 134 of the contested regulation that the external factor at issue could not explain the difference between the Community prices and the Indian prices and that it therefore had no bearing on the factors taken into account to calculate the level of undercutting. Even if the royalties were excessive owing to anti-competitive behaviour, that factor cannot affect that assessment.

276 In the light of those factors, the view must be taken that the applicant has not shown that, in the determination of injury, the Council failed to disregard the effects resulting from alleged anti-competitive behaviour.

277 In those circumstances, it is not necessary to rule on the admissibility of the factual evidence put forward by the applicant in its reply, namely the Commission's press release of 3 August 2003 referring to an investigation on the application of Articles 81 EC and 82 EC to a standard agreement concerning patents for certain types of CD. It is apparent from the applicant's arguments that that element was put forward to substantiate its contention that the factor in question was known to the Community institutions. On the other hand, it did not explain how that press release could support the argument that that factor was such as to break the causal link in this case.

278 Accordingly, the fifth plea cannot be accepted.

279 It follows from all the foregoing that the action must be dismissed in its entirety. Consequently, there is no need to rule on the Council's alternative claims.

Costs

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

281 The Commission shall bear its own costs pursuant to Article 87(4) of those Rules of Procedure.

282 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than the Member States and the institutions to bear its own costs. In the circumstances of this case, and in particular in view of the fact that the observations of CECMA, which intervened in its capacity of an association defending the interests of the Community industry concerned, did not add anything decisive to the Council's arguments, the Court deems it fair that the latter bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those incurred by the defendant;**

3. **Orders the interveners to bear their own costs.**

Legal Lindh Vadapalas

Delivered in open court in Luxembourg on 4 October 2006.

E. Coulon H. Legal

Registrar President

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