JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

14 March 2007 *

In Case T-107/04,

Aluminium Silicon Mill Products GmbH, established in Zug (Switzerland), represented by A. Willems and L. Ruessmann, lawyers,

applicant,

v

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

defendant,

supported by

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

intervener,

* Language of the case: English.

ACTION for annulment of Council Regulation (EC) No 2229/2003 of 22 December 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating [in] Russia (OJ 2003 L 339, p. 3),

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 9 November 2005,

gives the following

Judgment

Background to the dispute

1 The applicant is a company incorporated under Swiss law engaged, inter alia, in the sale and marketing of semi-finished silicon products on the Community market. It purchases silicon from two producers, Sual Kremny-Ural LLC (SKU) and JSC ZAO Kremny (ZAO). These two companies are subsidiaries of OAO SUAL (SUAL). Since SUAL and the applicant are ultimately controlled by the same shareholder, SUAL International Ltd, SKU and ZAO are producers related to the applicant.

2 Silicon is a product which is marketed in the form of lumps, grains, granules or powder and manufactured in several grades, depending, in particular, on the iron content, on the calcium content, and on other trace elements. With regard to silicon of a degree of concentration of between 95 to 99.99%, the product at issue in the present case, two user groups may be identified on the Community market: chemical users mainly manufacturing silicones, and metallurgical users manufacturing aluminium.

3 Following a complaint lodged by EuroAlliages (Liaison Committee of the Ferro-Alloy Industry), the Commission initiated an anti-dumping proceeding concerning imports of silicon metal originating in Russia, in application of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as last amended by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, p. 1), ('the basic regulation'). The notice of initiation of the proceeding was published on 12 October 2002 (OJ 2002 C 246, p. 12).

4 On 10 July 2003, the Commission adopted Regulation (EC) No 1235/2003 of 10 July 2003 imposing a provisional anti-dumping duty on imports of silicon originating in Russia (OJ 2003 L 173, p. 14; 'the provisional regulation'). On the basis of its investigation of dumping practices and injury covering the period 1 October 2001 and 30 September 2002 ('the investigation period' or 'IP'), and after examining injury trends for the period from 1 January 1998 to the end of the investigation period ('the period under consideration'), it set at 25.2% the rate of provisional anti-dumping duty applicable to imports of silicon with a silicon content of less than 99.99% by weight, falling within CN Code 2804 69 00, originating in Russia, produced by SKU and ZAO.

5 The provisional regulation shows the evolution of a number of economic indicators concerning the situation in the European silicon market and those of the Russian producers-exporters and Community industry, certain data from which is set out below:

Table 1

Community consumption (based on sales volumes)

	1998	1999	2000	2001	IP
Tonnes	290 684	325 234	388 938	373 950	371 540
Index Y/Y trend	100	112 + 12%	134 + 20%	129 – 4%	128 – 1%

Table 3

Market share of the imports from Russia (based on sales volume)

	1998	1999	2000	2001	IP
% of EU market	3.7	1.9	3.6	4.5	4.8
Y/Y trend (percentage points)		– 1.8%	+ 1.7%	+ 0.9%	+ 0.3%

Table 4

Average price of dumped imports

	1998	1999	2000	2001	IP
EUR	1048	963	1131	999	929
Index Y/Y trend	100	92 – 8%	108 + 17%	95 – 12%	89 – 7%

Table 8

Sales volume (of the Community industry)

	1998	1999	2000	2001	IP
Tonnes	86 718	114 587	133 568	128 219	136 421
Index Y/Y trend	100	132 + 32%	154 + 17%	148 – 7% [– 4% see paragraph 87 below]	157 + 6%

Table 9

Community industry sale prices of silicon

	1998	1999	2000	2001	IP
Euros/Tonne	1 415	1 184	1 231	1 271	1 185
Index Y/Y trend	100	84 – 16%	87 + 4%	90 + 3%	84 – 7%

Table 10

Market share (of the Community industry)

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

Table 12

Profitability (of the Community industry)

	1998	1999	2000	2001	IP
% profit	12.6	1.8	5.0	1.7	– 2.1
Y/Y trend		– 10.8%	+ 3.2%	– 3.3%	– 3.8%

6 On 22 December 2003, the Council adopted Regulation (EC) No 2229/2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating [in] Russia (OJ 2003 L 339, p. 3; 'the contested regulation'). The contested regulation imposes anti-dumping duties of 22.7% on imports of silicon from SKU and ZAO.

Procedure and forms of order sought

7 By application lodged at the Registry of the Court of First Instance on 16 March 2004 the applicant brought this action.

8 By order of the President of the Third Chamber of the Court of First Instance of 26 January 2005, the Commission was granted leave to intervene in support of the form of order sought by the Council. However, it waived its right to submit a statement in intervention.

9 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to give written replies to a number of questions. The parties complied with that request within the time allowed.

10 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 9 November 2005.

11 The applicant claims that the Court should:

— declare the action admissible;

— annul the contested regulation in so far as it imposes duties on exports by SKU and ZAO;

— order the Council to pay the costs.

12 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The application for annulment

13 In support of its application for annulment, the applicant raises five pleas in law. The first, relating to the allegedly incorrect definition of 'similar product', alleges a manifest error of assessment and infringement of Article 1(4) and Article 6(7) of the basic regulation. The second plea in law, concerning the fixing of the export price, alleges infringement of Article 2(9) of the basic regulation and of Article 253 EC. The third plea in law, relating to determination of the existence of material injury, alleges infringement of Article 3(2) and (5) of the basic regulation, of Articles 3.1 and 3.4 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103) set out in Annex 1A to the Agreement instituting the World Trade Organisation (WTO) and of Article 253 EC. The fourth plea in law, concerning the establishment of a causal link between the imports allegedly dumped and the injury, alleges infringement of Article 3(2), (6) and (7) of the basic regulation, of Article 3.1 and 3.5 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994, a manifest error of assessment and infringement of Article 253 EC. The fifth plea in law, relating to the method used to establish the injury elimination level, alleges infringement of Article 3(3) of the basic regulation and of Article 253 EC.

14 The Court considers that it is appropriate to examine first the first part of the third plea in law, alleging infringement of the basic regulation in the establishment of material injury within the meaning of Article 3 of that regulation, and the first part of the fourth plea, alleging infringement of the basic regulation due to an allegedly incorrect finding of a causal link between the injury determined by the contested regulation and the dumped imports.

Arguments of the parties

15 The applicant points out that, according to the contested regulation, between 1998 and 2000 the injury indicators developed positively for the Community industry, then negatively between 2000 and the investigation period, in particular with regard to prices. It submits that the Community institutions failed to point out that the major price decreases of the Community industry also took place in the period between 1998 and 1999.

16 It then notes, with regard to the statement contained in recital 44 in the preamble to the contested regulation, according to which '[b]etween 2000 and the IP, nearly all indicators either rose only slightly, remained stagnant, or indeed fell', that the only indicators which developed negatively were prices, profitability and cash flow, while the other indicators showed only positive development. In that regard, it points, in particular, to the increase in production and production capacity of the Community industry. In addition, it argues that the price decreases coincide with sharp increases in the production, production capacity, sales volumes and market shares of Community undertakings. Thus, in 1999 and during the investigation period, the Community producers made gains of 32% and 6% respectively in their sales volumes.

17 With regard to the Council's argument that, apart from the three indicators mentioned above, investments and return on investments also showed negative development, the applicant counters by saying that that reflects the fact that, between 1998 and 2000, the Community industry had invested massively in order to increase its production in response to the expansion in demand and that that level of investment could not be maintained during the subsequent years which saw a contraction in demand.

18 The applicant submits that the abovementioned allegations show that the Council failed to consider certain listed factors and failed to evaluate correctly those that it did consider, which constitutes an infringement of Article 3(5) of the basic regulation.

19 Finally, at the hearing, the application pointed out that the finding in recital 46 in the preamble to the contested regulation, according to which, between 2000 and the investigation period, the market share of the Community industry decreased, is incorrect, since the data given in the provisional regulation contradict it.

20 With regard to the allegedly incorrect assessment of the causal link, the applicant submits that it was the development of silicon demand that played a decisive role in the evolution of the profitability of the Community industry. The positive development which occurred between 1998 and 2000, in particular the significant increase in production and sales, is attributable primarily to the 32% expansion of silicon demand and not to the decisions of the Community industry to invest in additional production facilities.

21 Similarly, the drop in prices (and profitability) of the Community industry between 2000 and the investigation period reflects mainly the contraction of silicon demand and the fact that the Community industry increased its market share in a contracting market by following an aggressive pricing policy. The applicant adds that the desire to increase sales volumes to metallurgical users (the sole outlet for imports of silicon from Russia; 'the Russian imports') so dramatically naturally required sharply lower sales prices and involved a price drop (of 19%) which was substantially greater than the fall in the prices of the Russian imports (11%). Thus, the sales and prices of the Community industry were not affected by the Russian imports.

22 It further points out that the growth in the Russian producers-exporters' market share between 2000 and the investigation period was only half of the increase in the market share of the Community producers. In any event, it is not conceivable that, with a market share of less than 5%, the Russian producers-exporters could have determined prices on the European market.

23 The applicant submits that, in its defence, the Council neither denies nor addresses the critical facts. Those facts are as follows: first there was, in 2001, a halt to the projected growth in chemical demand and indeed there was, over the investigation period, a material downturn in sales by Community producers to chemical users. Secondly, there was a massive increase in the volume of sales by Community producers to metallurgical users during the investigation period. That is one of the main reasons for the drop in the average price charged by the Community industry. Thirdly, there was simultaneously a reduction of about 10% in the prices charged by Community producers to metallurgical users. Fourthly, that price drop was significantly more than the drop in the prices of the Russian imports in that same period.

24 As regards the gap between the prices charged by the Russian producers-exporters and those charged by Community producers, it submits that many factors explain that difference, such as the difference in product mix and the price premium for locally sourced products.

25 With regard to the Council's argument based on the alleged cumulative effect of the decreases in the prices charged by the Russian producers-exporters between 2000 and the investigation period, the applicant replies that the Russian price level was already significantly lower than the Community industry's average price in 2000 and the Russian imports represented approximately one tenth of the market share of the Community industry, which indicates that the prices of the Russian imports were not a major competitive factor for the Community industry's prices.

26 Finally, it submits that, by failing to present the facts in their entirety and by failing to take into consideration all the known factors injuring the Community industry, other than the dumped imports, the Community institutions infringed Article 3(2), (6) and (7) of the basic regulation.

27 With regard to establishment of material injury, the Council points out that, while it is correct that major price decreases took place between 1998 and 1999, prices subsequently recovered and then decreased again significantly between 2001 and the end of the investigation period. That second price decrease occurred in parallel with an increase in Russian imports. It also notes that, between 2000 and the investigation period, profitability and cash flow showed negative development. In addition, investments decreased by 26%, return on investment decreased by 26.1% and average wages increased at less than the rate of inflation (less than 1% per year). The same is true for the entire period under consideration.

28 With regard to the applicant's argument that negative development of investments and return on investments is the consequence of the high investments in production capacity (paragraph 17 above), the Council contends that it is unsubstantiated and wrong, since the Community industry's production capacity increased steadily until 2001.

29 The Council also points out that, contrary to the applicant's submissions, there were no massive increases in sales volume and no significant increases in market share between 2000 and the investigation period. During that period, the Community industry's sales volume increased by 2% and its market share by 2.4 percentage points. In that regard, the Council expressly accepted, at the hearing, that there was an error in recital 46 in the preamble to the contested regulation where it is stated that the market share held by the Community industry had greatly decreased, but submitted that the applicant raised that fact for the first time at the hearing, which rendered the argument out of time and, therefore, inadmissible within the meaning of Articles 44 and 46 of the Rules of Procedure of the Court of First Instance.

30 In general, the Council takes the view that the applicant's allegations of infringement of the basic regulation are unsubstantiated and that it correctly considered all the relevant injury factors in recitals 33 to 73 in the preamble to the provisional regulation and in recitals 37 to 48 in the preamble to the contested regulation.

31 Furthermore, it submits that the applicant does not say which factors the Council failed to evaluate or in what respect the Council's evaluation was inadequate. It cites in that regard the order of the Court of Justice in Case C-318/92 P *Moat* v *Commission* [1993] ECR I-481 and Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, according to which allegations must be set out precisely in the application.

32 With regard to the causal link between the injury and the dumped imports, the Council argues that the available data contradict the claim that the Community industry played a leading role in the setting of sale prices to metallurgical industry users. It points out that, between 2000 and the investigation period, the average Russian price remained consistently lower than the average Community industry price and the same would be true if sales to the metallurgical industry alone were taken into account.

33 The Council then disputes the applicant's argument that the Russian prices cannot have caused the Community industry's price decrease because Community prices decreased more than Russian prices. In that regard, it notes that Russian prices fell by 11% over the whole investigation period. Furthermore, the Council submits that, for the purpose of the causation analysis, the magnitude of the decrease in the price of the dumped imports and the Community industry prices is meaningless as long as the prices of the imports are below the Community industry prices. Since the level of the Russian prices was already significantly lower than the Community industry price level in 2000, and subsequently decreased still further, it is reasonable to assume that the price of the Russian imports caused the decrease in the Community prices.

34 The Council takes the view that the applicant's argument that the drop in the Community industry's prices and profitability between 2000 and the investigation period reflects the contraction of the market is unfounded. In that regard, it points out that the Community industry's sales volume increased slightly between 2000 and the investigation period. It deduces from that that the decrease in demand did not affect the Community industry's sales. Moreover, the slight expansion of the Community industry's market share during the abovementioned period is a logical consequence of stable sales in a contracting market. It also points out that the applicant also gained market share during the same period.

35 The Council also denies the effect of the increase of the Community industry's market share on its prices. It submits that, in recital 52 in the preamble to the provisional regulation, the Commission considered that question and took the view that, in 2001, the Community industry had lost sales volumes in the attempt to maintain its prices and, during the investigation period, had regained the lost volumes by selling at lower prices. On that basis, the Council concludes that the Community industry struggled in the face of Russian competition characterised by significant price undercutting and significant increases in sales volumes with regard to metallurgical industry users. In summary, the increase in the Community industry's sales volumes and the reduction in prices during the investigation period were defensive measures adopted in response to the reduction in volumes noted in 2001 and to the further reduction in Russian prices.

36 The Council submits that the available data support its conclusion. According to the Council, the applicant does not dispute that Russian prices were always below Community prices, even if account is taken only of the Community industry's sales to metallurgical industry users.

37 With regard to the applicant's argument that the Russian imports could not exert any real pressure on the Community industry prices because of the low Russian market share, the Council submits that it is irrelevant, since imports from Russia were always above the de minimis level between 2000 and the beginning of the investigation period.

38 The Council submits that the applicant's reasoning concerning the effect of the contraction in the demand for silicon for use in the chemical industry is also incorrect. In that regard, it points out that, as is explained in recital 63 in the preamble to the contested regulation, during the investigation period, the sales to chemical users decreased by 4 783 tonnes of silicon. That volume represented a

mere 1.3% of total Community consumption. However, during the same period the Russian imports amounted to some 18 000 tonnes or 4.8% of total Community consumption. The Council maintains that those sales and, consequently, the contraction in the demand for silicon for the chemical industry cannot affect the causal link between the dumped imports and the injury suffered by the Community industry.

39 With regard, in general, to infringement of the basic regulation, the Council contends that the applicant's reading of that document is erroneous. In its view, Article 3(2) of the basic regulation does not require the institutions to present the facts in their entirety. That provision obliges the institutions to examine the facts objectively, which is what they did both in the contested regulation and the provisional regulation. It also takes the view that the applicant fails to state with sufficient precision what facts the institutions failed to present.

40 The Commission supports the Council's arguments.

Findings of the Court

The first part of the third plea in law, alleging infringement of the basic regulation by reason of incorrect assessment of the injury indicators by the contested regulation

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

'A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect

of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.'

42 With regard to the examination of the impact of the dumped imports on the Community industry concerned, Article 3(5) of the basic regulation provides:

'[That examination] shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, ... the magnitude of the actual margin of dumping, 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. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.'

43 According to well-established case-law, determination of injury involves the assessment of complex economic matters. In that respect the Community institutions enjoy a wide discretion (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86, and Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 131). The Community judicature must restrict its review to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based are accurate or whether there has been a manifest error of assessment or a misuse of powers (see *Ferchimex* v *Council*, paragraph 67, and Case T-210/95 *EFMA* v *Council* [1999] ECR II-3291, paragraph 57).

44 In the present case, it is therefore appropriate to examine whether, in the context of the contested regulation, the Council exceeded its wide discretion in the finding of material injury to the Community industry.

45 Recital 44 in the preamble to the contested regulation, which recapitulates recital 71 in the preamble to the provisional regulation, states:

'... for the injury indicators, ... the main positive developments for the Community industry took place between 1998 and 2000. Between 2000 and the IP, nearly all indicators either rose only slightly, remained stagnant, or indeed fell. It is during this period that the material injury suffered by the Community industry is most apparent'.

46 Recital 45 in the preamble to the contested regulation states:

'... the relatively good [performance] of the Community industry up to 2000 was directly attributed to decisions taken by the Community industry to invest in additional Community production facilities. Indeed, during that period the Community industry production, production capacity, sales volume, market share, employment and productivity increased'.

47 For the following period, that is to say the period between 2000 and the investigation period, the Council, in recital 46 in the preamble to the contested regulation, states:

'... mirroring the increased presence of low-priced dumped imports from Russia, the situation of the Community industry deteriorated. Market share, cash flow, investments, and return on investments saw important decreases'.

48 Furthermore, in recital 47 in the preamble to the contested regulation, the Council points out that '[m]oreover, the trend of other injury indicators, and in particular the decrease in profitability and sales prices suffered by the Community industry over the period under consideration led to the conclusion that the Community industry suffered material injury'.

49 It concludes, in recital 48 in the preamble to the contested regulation, that 'the Community industry suffered material injury during the IP, in particular for prices and profitability', and that '[t]he findings and conclusion set out in recitals 71 to 73 in the preamble to the provisional regulation are confirmed'.

50 The applicant complains, firstly, that the Council failed to acknowledge that the Community industry dropped its prices not only between 2000 and the investigation period but also between 1998 and 1999.

51 In that regard, it should be noted that, according to the data provided by the provisional regulation, the price charged by the Community industry first dropped by 16% in 1999, rose by 4% in 2000 and by 3% in 2001, then dropped by 7% during the investigation period. Thus, during the investigation period, the sales price merely fell to the 1999 level (see Table 9 in paragraph 5 above).

52 It is apparent from those figures that the main drop in the prices charged by the Community industry took place in 1999 and not between 2000 and the investigation period. The Council took the view, in recital 44 in the preamble to the contested regulation, that the main positive developments for the Community industry took place between 1998 and 2000. That finding illustrates the fact that the price charged by the Community industry is one factor among others which must be taken into consideration in the assessment of the injury and that it is not by itself decisive in that regard, since other factors may not only compensate for that deterioration but also enable the Council to conclude that the Community industry's situation had improved. Thus it cannot be concluded from the absence of any indication, in the contested regulation, that the main drop in the price charged by the Community industry took place in 1999 that that regulation is vitiated by unlawfulness, when account is also taken of the fact that it is clear from the provisional regulation that, between 2000 and the investigation period, that price also dropped.

53 However, since the Council concluded that the Community industry had suffered material injury during the investigation period, in particular with regard to prices and profitability, it thus necessarily took the view that, as opposed to the period between 1998 and 2000, other injury factors could not compensate for the drop in prices and profitability noted during the investigation period. It is therefore for the Court to determine whether, as the applicant claims, the Council thereby made a manifest error of assessment.

54 In that respect, with regard to the period between 2000 and the investigation period, which corresponds to the second half of the period under consideration, the Council points out that 'nearly all indicators either rose only slightly, remained stagnant, or indeed fell', and that '[i]t is during this period that the material injury suffered by the Community industry is most apparent'. It is clear from that assertion that the Council is not weighing up the different injury factors, certain of which, however, it admits were favourable, so that that assertion can in no way prove that material injury was suffered by the Community industry between 2000 and the investigation period.

55 It is true, however, that the Council took the view, in recital 46 in the preamble to the contested regulation, that, between 2000 and the investigation period, the situation of the Community industry had deteriorated, since 'market share, cash flow, investments, and return on investments saw important decreases'. The Council, after also pointing out, in recital 47 in the preamble to the contested regulation, the trend of other injury indicators, and in particular the decrease in profitability and sales prices suffered by the Community industry over the period under consideration, came to the conclusion that the Community industry had suffered material injury.

56 Nevertheless, the Court agrees with the applicant that, on the one hand, by reasoning in that way, the Council completely omitted any reference to the fact that, over the whole period under consideration, much progress, sometimes substantial, was recorded with regard to production volumes (+ 34%), capacity (+ 30%), use of capacity (+ 3 percentage points), Community sales volume (+ 57%), market share (+ 23% or + 6.9 percentage points), stocks (– 29%), employment (+ 16%) and productivity (+ 15%). On the other hand, even with regard to the single period between 2000 and the investigation period, the Council has omitted to point out that certain not inconsiderable factors showed a positive development. Thus, as well as the slight improvement in the situation with regard to employment and salaries, it should be noted, in particular, that the Community industry's sales volume increased by 2% to reach a record level of 136 421 tonnes during the investigation period and production capacity showed growth of 2.5%.

57 It is appropriate to recall, secondly, that the Council asserts in recital 46 in the preamble to the contested regulation that, between 2000 and the investigation period, 'market share, cash flow, investments, and return on investments saw important decreases'.

58 In that regard, the applicant pointed out, however, at the hearing, that the contested regulation was wrong in finding, in recital 46 in the preamble thereto, that the Community industry market share had greatly decreased.

59 The Council accepted that this was an error but takes the view that that argument was raised out of time and therefore cannot be taken into consideration by the Court.

60 It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (see, to that effect, Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25; Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38; and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 142, and case-law cited).

61 In the present case, it should be noted that the applicant had already raised in its application the fact that the contested regulation infringed the basic regulation, in particular by reason of incorrect assessment of the economic indicators in determining the injury (first part of the third plea in law). More particularly, the applicant submitted in its application that 'the [contested] regulation ignore[d] the fact that the price decreases ... coincide[d] with ... significant increases in the market share of the Community industry'. Consequently, the observation in question submitted by the applicant is connected to the third plea raised in the originating application and therefore constitutes a clarification closely linked to the arguments which it uses in the context of that plea.

62 Consequently, that argument is admissible.

63 As the Council agrees, the assertion in the contested regulation that the 'market share [of the Community industry] saw important decreases' is clearly incorrect and contrary to the data set out in the provisional regulation, the correctness of which is not in dispute between the parties. It is apparent from the provisional regulation that the market share did not decrease, and certainly did not decrease greatly, but, on the contrary, significantly increased, rising from 34.3% to 36.7%, that is to say by 2.4 percentage points, between 2000 and the investigation period (see Table 10 in paragraph 5 above).

64 Accordingly, it must be determined whether that error should lead to the annulment of the contested regulation.

65 In that regard, it cannot be disputed that the development of the Community industry's market share constitutes a significant factor for an assessment of the existence of material injury to that industry. Furthermore, it is clear that, by describing that factor as having greatly decreased, the Council not only presented a picture of the development of that factor that was contrary to the facts but necessarily attributed to that element some not inconsiderable importance in its conclusion relating to the existence of material injury suffered by the Community industry.

66 In those circumstances, without its being necessary to determine whether the facts set out in paragraphs 54 to 56 above are alone sufficient to permit the conclusion that the Council committed a manifest error of assessment in the establishment of that material injury, the Court finds that, by committing an error of fact with regard

to the development of the Community industry's market share during the period between 2000 and the investigation period, which it regards as the period during which the injury suffered was most apparent, it was on a manifestly incorrect premiss that the Council based its finding of the existence of that injury, which should have been the result of a weighing up of the developments, both positive and negative, of the factors which it considered pertinent. Since, firstly, the Court may not substitute its assessment of the situation for that of the Council and, secondly, it cannot be ruled out that, without that error, the Council would not have concluded that there was material injury, the contested regulation must be annulled on that ground alone (see, to that effect, Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraph 115).

67 However, the Court considers that it is also appropriate to examine the first part of the fourth plea in law, relating to the causal link between the drop in the Community industry's sale price and the Russian imports.

The first part of the fourth plea in law, alleging infringement of the basic regulation by reason of the incorrect establishment of a causal link between the material injury alleged to have been suffered by the Community industry and the dumped imports

68 Pursuant to Article 3(3) of the basic regulation, '[w]ith regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree'.

69 Article 3(6) provides:

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

70 Finally, Article 3(7) provides as follows:

'Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include ... contraction in demand or changes in the patterns of consumption ...'

71 It is clear from the case-law cited in paragraph 43 above that establishment of a causal link between material injury suffered by the Community industry and the dumped imports involves the assessment of complex economic matters. In that respect the Community institutions enjoy a wide discretion and the Community judicature must restrict its review to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based are accurate or whether there has been a manifest error of assessment or a misuse of powers.

72 Nevertheless, in determining injury, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves (Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, paragraph 16).

73 In the present case, in recital 46 in the preamble to the contested regulation, with regard to the period between 2000 and the investigation period, the Council states as follows:

'[M]irroring the increased presence of low-priced dumped imports from Russia, the situation of the Community industry deteriorated. Market share, cash flow, investments, and return on investments saw important decreases.'

74 Further, in recital 66 in the preamble to the contested regulation, the Council asserts as follows:

'[T]he price difference between the silicon produced in the Community and the silicon imported from Russia, [was] 11% on average during the IP ... despite Community industry price falls of 7% between 2001 and the IP. This is seen as a clear indication of the effect that Russian prices had on those of the Community industry.'

75 In that regard, it should be noted that, according to the data set out in the provisional regulation (see Tables 4 and 9 in paragraph 5 above), the difference between the Russian prices and those charged by the Community industry between 1998 and 2000 and the difference existing between 2000 and the investigation period were similar in magnitude.

76 However, in neither the contested regulation nor the procedural documents do the Council and Commission claim expressly that the decrease in the Community industry price in 1999 (the only decrease during the period between 1998 and 2000) was the consequence of undercutting by the Russian prices. In the contested regulation, the Council even describes the period between 1998 and 2000 as a period during which the Community industry's performance was relatively good. It should also be noted that the significant growth in the difference between the average price of the Russian imports and that charged by the Community industry between 2000 and 2001 did not prevent the Community industry from increasing its average price between 2000 and 2001 (see Tables 4 and 9 in paragraph 5 above).

77 Thus, the reasoning in the contested regulation and the data set out in the provisional regulation show that the difference in price is merely one factor among others to be taken into consideration in the examination of the causal link between the Russian imports and the alleged injury, and, by itself, its existence can certainly not permit the conclusion that the decrease in the Community industry price during the investigation period was solely or mainly due to the Russian imports.

78 The Council and the Commission contend that the injury was caused by the dumped imports in the following manner: in 2001 the Community industry lost sales volumes in an attempt to maintain prices in the face of falling prices of silicon from Russia. During the investigation period the Community industry was finally forced to react to price pressures in order to maintain sales volumes, and therefore greatly reduced its prices, which led to a loss of profitability (recital 52 in the preamble to the provisional regulation).

79 The applicant takes the view that the Community institutions incorrectly attributed the Community industry's loss of sales volumes in 2001 and the drop in its prices during the investigation period to the Russian imports. They ignored the effects, firstly, of the contraction in demand in the silicon market, secondly, of the increase

in the Community industry's market share and, thirdly, of the fact that a large part of the volume sold by the Community industry to chemical users moved to metallurgical users during the investigation period.

80 It is therefore appropriate to examine whether the applicant's allegations are founded and whether they are such as to show that the Council exceeded the wide discretion which it enjoys according to the case-law cited in paragraph 43 above.

— The contraction in demand from all users

81 At the hearing, the Council submitted that, in its written pleadings, the applicant raised no arguments regarding the contraction in demand in general but merely regarding the contraction in demand from chemical users. Accordingly, this fact was raised by the applicant out of time and is therefore inadmissible.

82 The fact remains that the applicant, in paragraph 44 of its application, stated that 'the drop in prices (and profitability) of the Community industry between 2000 and the investigation period reflects primarily the contraction in silicon demand'.

83 It follows that the Council's observation concerning the admissibility of the arguments regarding the contraction in demand is entirely without foundation.

84 With regard to substance, it must be pointed out that the contested regulation does not contain any analysis of the development of demand and the Council merely confirms, in recital 48 in the preamble to that regulation, the conclusions in the provisional regulation concerning injury.

85 It is apparent from the provisional regulation (see Table 1 in paragraph 5 above) that consumption of silicon in the European Union decreased by 4% in 2001 then by 1% during the investigation period.

86 Again, it should be noted that the starting point for the Council's thesis deducing injury caused by the Russian imports for the period between 2000 and the investigation period is that, in 2001, the Community industry lost sales volumes when it tried to maintain its prices in the face of the Russian producers-exporters' decreasing prices, which forced the Community industry to lower its prices in order to maintain or recover its sales volumes subsequently during the investigation period. Accordingly, the question to be considered is whether the reduction in the Community industry's sales volumes in 2001 could be attributed by the Council, without its committing a manifest error of assessment, solely to the Russian imports, despite the fact that Community consumption was in a contracting phase in 2001.

87 In that regard, it must be noted from the outset that Table 8 in the provisional regulation (see paragraph 5 above) contains a calculation error, admitted by the Council in answer to a written question put by the Court, and that it is apparent from that table, after correction, that, in 2001, the Community industry's sales volume decreased by only 4% and not by 7% as indicated in the original table.

88 That correction indicates that the measure of the decrease in the Community industry's sales volume in 2001 (– 4%) exactly reflects that of the contraction in demand (– 4%) and, accordingly, it appears that the level of the Community

industry's sales merely followed precisely the general development of Community consumption. That fact casts doubt on the Council's assertion that the decrease in the Community industry's sales volumes in 2001 is due to price undercutting by the Russian producers-exporters, since a reasonable explanation for that decrease could be the contraction in Community demand. Clearly, that decisive element was not taken into consideration by the Council.

89 Moreover, it must be noted that, in 2001, the Community industry conserved its market share despite the increase of 3% in its prices, whilst the average price of the Russian imports had decreased by 12%, which goes to reveal the lack of any major impact of the price of the Russian imports on the Community industry's situation.

90 It follows that the development in the indicators in question does not lend credibility to the Council's thesis that the decrease in the volume sold by the Community industry in 2001 was solely the consequence of the Russian imports, but supports the applicant's assertion that that decrease in sales volume was mainly the result of the contraction in demand in 2001.

91 With regard to the investigation period, it should be recalled that the demand for silicon decreased further by 1%. The Community industry's sales volume and market share increased, however, by 6% and 2.4 percentage points respectively and reached a record level.

92 Nevertheless, the Council takes the view that the decrease in demand did not affect the Community industry's sales, given that they increased, and that the increase in the Community industry's market share between 2000 and the investigation period is a logical consequence of the stability of sales in a contracting market.

93 That thesis of the Council cannot succeed. In a transparent and competitive market, such as that in silicon according to the contested regulation, decreased demand exerts pressure on prices. An economic operator faced with a decrease in demand must choose between decreasing its sales volume and reducing its prices.

94 It is, moreover, to be noted that the Council did not put forward any argument relating to specific circumstances which would have enabled the Community industry to maintain and even to increase its sales volume whilst preserving the level of its prices in the face of the drop in demand during the investigation period.

95 In the light of the foregoing, it must be concluded that the contested regulation is vitiated by a manifest error of assessment inasmuch as the Council disregarded the effect of the contraction in demand on the Community industry's situation.

— The expansion of the Community industry's market share and sales volume

96 The applicant takes the view that the institutions also committed an error of assessment in disregarding the logical relationship between the decrease in the Community industry's prices during the investigation period and the increase in its sales and market share.

97 In that regard, it must be recalled that the market share held by the Community industry increased from 29.8% to 36.7% during the period under consideration, that is to say by 6.9 percentage points. It was between 2000 and the investigation period, when the injury was, according to the Council, most apparent, that the Community industry increased its sales volume by 2% and its market share by 2.4 percentage points, in a contracting market (see Table 10 in paragraph 5 above).

98 According to the Council, the improvement in sales volume during the investigation period was slight and constituted a defensive measure, by which the Community industry regained the volumes it had lost in 2001 by trying to maintain its prices in the face of the Russian imports (– 4%). The increase in sales volume and market share during the investigation period did not require any decrease in price, such decrease being solely the result of the undercutting by the Russian prices.

99 First of all, it is clear from the corrected data in Table 8 of the provisional regulation (see paragraph 87 above) that during the investigation period the Community industry not only regained the sales volume lost in 2001 (– 4%), but, by making a gain of 6% in volume, reached a record level for the entire period under consideration.

100 Similarly, with regard to the Community industry's market share, which remained stable in 2001, this registered an improvement of 2.4 percentage points (from 34.3% to 36.7%) during the investigation period and also reached a record level.

101 In the present case, the Community industry therefore increased its sales in a contracting market and extended its market share between 2000 and the investigation period by the equivalent of half of the total market share of the Russian producers-exporters.

102 The Council denies that the decrease in the Community industry's price constituted a competitive advantage which enabled it to achieve that result. The decrease in price, in the Council's view, was solely a defensive measure against the undercutting by the Russian prices in order to avoid losses in sales volume. However, neither the

Council nor the Commission has put forward any argument to explain how it was possible for the Community industry to increase its market share by 2.4 percentage points between 2000 and the investigation period, in a contracting market, without reducing its prices.

103 It should be recalled that the Council bases its arguments on the thesis, firstly, that in 2001, the Community industry lost sales volumes by reason of the undercutting by the Russian prices and, secondly, that during the investigation period it was then forced to reduce its prices drastically in order to avoid losing more sales volume, or else to regain sales volumes lost in 2001.

104 As has been shown in paragraphs 88 et seq., the starting point for that thesis is incorrect, given that the Council did not take into account the plausible explanation that the loss of volumes in 2001 (– 4%) was solely or mainly attributable to the contraction in demand (– 4%); nor has it put forward valid arguments to refute that explanation.

105 What is more, given that the Council's reasoning is based on the hypothesis that the Community industry adopted a defensive attitude with a view to maintaining its sales volume, it is invalid in the light of the increase of 6% during the investigation period, which cannot be described as mere maintenance of volume. That increase more than compensated for the loss of 4% in 2001, so that, between 2000 and the investigation period, the Community industry showed a gain in sales volume of more than 2%.

106 Accordingly, it must be established that the Council and the Commission do not put forward any valid argument to show that the significant increase in the Community industry's market share, in a contracting market, during the investigation period would have been possible without the competitive advantage given by the reduction in its prices.

107 With regard to the analysis of the impact of the increase in sales volume and market share between 2000 and the investigation period on the Community industry's situation, the Council merely asserts, in recital 46 in the preamble to the contested regulation, as follows:

'[M]irroring the increased presence of low-priced dumped imports from Russia, the situation of the Community industry deteriorated. [Its] market share ... saw important decreases.'

108 In the light of the fact that, between 2000 and the investigation period, the Community industry's market share significantly increased and did not suffer 'important decreases', it is clear that, in the contested regulation, the Council not only omitted to deal with the question of whether the decrease in price was a necessary condition for the increase in sales volume and market share, and, therefore, with regard to the decrease in price, whether what was involved was injury resulting from the conduct of the Community industry itself within the meaning of the judgment in *Extramet Industrie* v *Council*, cited in paragraph 72 above, but in that context imputes to the Russian imports a non-existent injury factor.

109 Accordingly, it must be concluded that the Council committed a manifest error of assessment, in the context of the contested regulation, when examining the connection between the increase in the Community industry's market share and sales volume and the reduction in its prices.

— The move of Community industry sales from chemical users to metallurgical users

110 The applicant submits that in the contested regulation the Council took the view, incorrectly, that the decrease in purchases of silicon by the chemical industry had

not contributed to the injury suffered by the Community industry and that that regulation therefore wrongly attributed the effects of that decrease to the imports from Russia.

111 As a preliminary point, it should be noted that recitals 63 and 64 in the preamble to the contested regulation state:

'During the period between 2000 and the IP, when the injury trend showed a particular downturn in respect of prices and profitability, sales to chemical users fell by around five thousand tonnes (– 7.0%), but average prices increased by EUR 14 per tonne (+ 1.1%). For all sales the comparable figures show an increase of around three thousand tonnes (+ 2.1%) whilst average prices fell by EUR 46 per tonne (– 3.7%).

Therefore, there are no reasons to believe that the injury suffered by the Community industry was caused by a downturn in sales to chemical customers. In fact, given the nature of the injury suffered, the reverse is true.'

112 It is apparent from the data given in recital 61 in the preamble to the contested regulation and in Table 8 of the provisional regulation (see paragraph 5 above) that Community industry sales to chemical users, who mainly use high-quality silicon, slightly decreased in 2001 (– 0.6%, or – 445 tonnes) and decreased significantly during the investigation period (– 6.4%, or – 4 783 tonnes). In contrast, sales to metallurgical users, who mainly consume standard or low-quality silicon, firstly decreased in 2001 (– 8.4%, or – 4 904 tonnes), then, during the investigation period, showed a very significant increase (+ 24.1%, or + 12 985 tonnes). Consequently, the

proportion of the Community industry's sales volume to chemical users in relation to the total Community sales volume of silicon went from 58% in 2001 to 51% during the investigation period, and the proportion of its sales to metallurgical industry users went from 42% to 49%.

113 It is common ground that the average price for silicon sold by the Community industry to those two types of user is different and, during the investigation period, amounted to EUR 1 301 per tonne for silicon sold to chemical users and EUR 1 063 per tonne for silicon sold to metallurgical users, as is clear from the sources mentioned in paragraph 112 above. It follows that the substantial development described in that paragraph of the proportion of Community industry sales of silicon to chemical users, on the one hand, and to metallurgical users, on the other hand, in relation to total sales of silicon, necessarily had a downward effect on the calculation of the average price, during the investigation period, of all the silicon it sold.

114 According to the applicant's assertions during the administrative procedure, which the Council did not dispute, that change in sales pattern was entirely independent of the imports coming from Russia. Furthermore, the proceedings before the Court revealed that the sole example of Russian sales to chemical users brought to the attention of the institutions was a sample of 200 tonnes, a negligible quantity compared with the Community industry's sales volume to that group of users (69 652 tonnes during the investigation period). Moreover, the Council does not deny that the reason for the loss of sales volume to chemical users was the contraction in demand from them.

115 It follows that the Council committed a manifest error of assessment in the contested regulation in the analysis of the impact on the average price charged by the Community industry of the contraction in demand from the chemical users, the corollary reduction in sales to that group of users and the simultaneous increase in sales to metallurgical users.

116 It follows from all the foregoing that, when carrying out the analysis which led to the finding of a causal link between the Russian imports and the injury allegedly suffered by the Community industry, the Council committed manifest errors of assessment by failing to take into consideration the necessary impact, firstly, of the contraction in demand on the Community industry's sales volume between 2000 and the investigation period, secondly, of the increase in its market share and its sales volume between 2001 and the investigation period on the level of its prices and, thirdly, of the change in the structure of its sales between 2001 and the investigation period on the magnitude of the decrease in its average sales price. In so doing, it necessarily then attributed to the Russian imports harmful effects for the Community industry, the origin of which was entirely independent of those imports.

117 Furthermore, it must be noted, firstly, that the abovementioned errors undermine the institutions' main thesis on which the establishment of the causal link is founded and, secondly, that the basic regulation expressly mentions contraction in demand and changes in the patterns of consumption as factors whose effect on the injury is to be considered in order to avoid their being attributed to dumped imports.

118 In the light of the foregoing, even if the Community industry did suffer the material injury claimed by the Council, the view must be taken that the manifest errors of assessment committed by the Council in the contested regulation in the analysis of causal link constitute an infringement of the basic regulation.

119 It follows from all the foregoing considerations that the third and fourth pleas in law must be accepted. Accordingly the contested regulation must be annulled in so far as it concerns the applicant, without there being any need to consider the other pleas in law and arguments raised by the applicant.

Costs

120 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(4) of those Rules, institutions which intervened in the proceedings are to bear their own costs. Since the Council has been unsuccessful, it must be ordered to bear its own costs and pay the applicant's costs. The Commission is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls Article 1 of Council Regulation (EC) No 2229/2003 of 22 December 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating [in] Russia in so far as it imposes an anti-dumping duty on the applicant;**

2. **Orders the Council to bear its own costs and pay those of the applicant;**

3. Orders the Commission to bear its own costs.

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 14 March 2007.

E. Coulon M. Jaeger

Registrar President