Provisional text

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

28 February 2017 (*)

(Dumping — Imports of crystalline silicon photovoltaic modules and key components (cells) originating in or consigned from China — Definitive anti-dumping duty — Undertakings — Action for annulment — Interest in bringing proceedings — Admissibility —Exporting country — Scope of the investigation — Sampling — Normal value — Definition of the product concerned — Time limit for the adoption of a decision on a market economy treatment claim — Temporal application of new provisions — Injury — Causal link)

In Case T-157/14,

JingAo Solar Co. Ltd, established in Ningjin (China), and the other applicants whose names appear in the annex, represented initially by A. Willems, S. De Knop and J. Charles, and subsequently by A. Willems and S. De Knop, lawyers,

applicants,

v

Council of the European Union, represented by B. Driessen, acting as Agent, B. O'Connor, Solicitor, and S. Gubel, lawyer,

defendant,

supported by

European Commission, represented initially by J.-F. Brakeland, T. Maxian Rusche, and A. Stobiecka-Kuik, and subsequently by J.-F. Brakeland, T. Maxian Rusche, and A. Demeneix, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for the annulment of Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 1), in so far as it applies to the applicants.

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich, President, J. Schwarcz (Rapporteur) and V. Tomljenović, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 9 June 2016,

gives the following

Judgment

Background to the dispute

The applicants, JingAo Solar Co. Ltd and the other applicants whose names appear in the annex, are all companies in the JA Solar group. JingAo Solar, Shanghai JA Solar Technology Co. Ltd, Yangzhou JA Solar Technology Co. Ltd, Hefei JA Solar Technology Co. Ltd and Shanghai JA Solar PV Technology Co. Ltd are exporting producers of crystalline silicon photovoltaic cells and modules ('cells' and 'modules' respectively). JA Solar GmbH is their associated importer in the European Union.

On 6 September 2012, the European Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China (OJ 2012 C 269, p. 5).

The JA Solar group cooperated in that proceeding.

On 20 September 2012, the applicants asked to be included in the sample under Article 17 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, 'the basic regulation').

The sample selected by the Commission consisted of seven groups of companies, including the three cooperating exporters with the largest volume of exports of modules, the two cooperating exporters with the largest volume of exports of cells and the two cooperating exporters with the largest volume of exports of wafers. The applicants were selected as one of the two groups of exporting producers that had registered with the largest volume of exports of cells.

Alongside this, on 8 November 2012, the Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-subsidy proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China (OJ 2012 C 340, p. 13).

On 12 November 2012, the applicants, which are exporting producers, submitted market economy treatment (MET) claims pursuant to Article 2(7)(b) of the basic regulation.

On 28 November 2012, the applicants submitted their replies to the anti-dumping questionnaire.

On 12 December 2012, Regulation (EU) No 1168/2012 of the European Parliament and of the Council amending the basic regulation (OJ 2012 L 344, p. 1) was adopted.

Under Article 1 of Regulation No 1168/2012:

'[The basic regulation] is hereby amended as follows:

Article 2(7) is amended as follows:

(a) in the penultimate sentence of subparagraph (c) the words "shall be made within three months of the initiation of the investigation" are replaced by the words "shall normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation";

(b) the following subparagraph is added:

"(d) When the Commission has limited its examination in accordance with Article 17, a determination pursuant to subparagraphs (b) and (c) of this paragraph shall be limited to the parties included in the examination and any producer that receives individual treatment pursuant to Article 17(3)."

in Article 9(6), the first sentence is replaced by the following:

"When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established with respect to the parties in the sample, irrespective of whether the normal value for such parties is determined on the basis of Article 2(1) to (6) or subparagraph (a) of Article 2(7)."'

Under Articles 2 and 3 of Regulation No 1168/2012, the regulation applies to all new and to all pending investigations as from 15 December 2012 and it enters into force on the day following that of its publication in the *Official Journal of the European Union*. Publication took place on 14 December 2012.

On 1 March 2013, the Commission adopted Regulation (EU) No 182/2013 making imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration (OJ 2013 L 61, p. 2).

On 15 March 2013, the Commission informed the applicants that their MET claim had been rejected.

On 4 June 2013, the Commission adopted Regulation (EU) No 513/2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation (EU) No 182/2013 (OJ 2013 L 152, p. 5, 'the provisional regulation').

On 2 August 2013, the Commission adopted Decision 2013/423/EU accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China (OJ 2013 L 209, p. 26). That undertaking was offered by a group of Chinese cooperating exporting producers listed in annex to that decision, together with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME).

On the same day, the Commission adopted Regulation (EU) No 748/2013 amending the provisional regulation (OJ 2013 L 209, p. 1) in order to take account of Decision 2013/423. In essence, subject to the fulfilment of certain conditions, Article 6 of that regulation, as amended, provides, inter alia, that imports declared for release into free circulation for products currently falling within CN code ex 3818 00 10 (TARIC codes 3818 00 10 11 and 3818 00 10 19) and CN code ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) which are invoiced by companies from which undertakings have been accepted by the Commission and whose names are listed in the annex to Decision 2013/423, are to be exempt from the provisional anti-dumping duty imposed by Article 1 of the regulation.

On 27 August 2013, the Commission disclosed the essential facts and considerations on the basis of which it intended to propose the imposition of anti-dumping duties on imports of modules and key components (cells) originating in or consigned from China.

According to recital 4 of Commission Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2013 L 325, p. 214), following the adoption

of the provisional anti-dumping measures, the Commission continued the investigation of dumping, injury and EU interest, as well as the parallel anti-subsidy proceeding. Wafers were excluded from the scope of both investigations and hence from the scope of the definitive measures.

According to recitals 7 to 10 and Article 1 of that decision, following the definitive disclosure of the anti-dumping and anti-subsidy findings, the exporting producers together with the CCCME submitted a notification to amend their initial undertaking offer. The Commission accepted the terms of the undertaking with a view also to eliminating any injurious effects of the subsidised imports. In addition, an additional number of exporting producers asked to participate in that undertaking. Furthermore, the CCCME and the exporting producers asked to revise the undertaking to take account of the exclusion of wafers from the scope of the investigation.

According to recital 5 of Implementing Decision 2013/707, the anti-dumping investigation confirmed the provisional findings of injurious dumping.

By virtue of Article 1 of Implementing Decision 2013/707, read in the light of recital 26 thereof, the amended undertaking was accepted by the Commission.

The definitive findings of the investigation are set out in Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 1, 'the contested regulation'). Article 1 imposes a specific anti-dumping duty of 51.5% on JingAo Solar, Shanghai JA Solar Technology, Yangzhou JA Solar Technology, Hefei JA Solar Technology and Shanghai JA Solar PV Technology. Subject to the fulfilment of certain conditions, Article 3 of that regulation provides, in essence, that imports declared for release into free circulation for the products currently falling within CN code ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) which are invoiced by companies from which undertakings have been accepted by the Commission, and whose names are listed in the annex to Implementing Decision 2013/707, are to be exempt from the anti-dumping duty imposed by Article 1 of the regulation.

On 2 December 2013, the Council of the European Union also adopted Implementing Regulation (EU) No 1239/2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 66).

After the date of lodging of the application, on 15 November 2016, the Commission adopted Implementing Regulation (EU) No 2016/1998 of 15 November 2016 withdrawing the acceptance of the undertaking for five exporting producers under Implementing Decision 2013/707 (OJ 2016 L 308, p. 8). Pursuant to Article 1(d) of that regulation, acceptance of the undertaking, as regards the companies JingAo Solar, Shanghai JA Solar Technology, JA Solar Technology Yangzhou, Hefei JA Solar Technology et Shanghai JA Solar PV Technology, and their associated company in the European Union, jointly covered by the additional TARIC code B794, is withdrawn. That regulation entered into force the day after its publication in the *Official Journal of the European Union*, that is to say, 17 November 2016.

Procedure and forms of order sought

By application lodged at the Court Registry on 28 February 2014, the applicants brought the present action.

By document lodged at the Court Registry on 19 May 2014, the Commission applied for leave to intervene in the present proceedings in support of the form of order sought by the Council.

By document lodged at the Court Registry on 20 May 2014, the Council requested that the present case be joined with *Yingli Energy (China) and Others* v *Council* (T-160/14) and *Canadian Solar Emea and Others* v *Council* (T-162/14), concerning actions for annulment of the contested regulation, and with *JingAo Solar and Others* v *Council* (T-158/14), *Yingli Energy (China) and Others* v *Council* (T-161/14), and *Canadian Solar Emea and Others* v *Council* (T-163/14) concerning actions for annulment of Implementing Regulation No 1239/2013.

By decision of 10 July 2014, the President of the Fifth Chamber of the Court refused that request.

By order of 14 July 2014, the President of the Fifth Chamber of the Court granted the Commission leave to intervene.

On a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure. The parties presented oral argument and their replies to the questions put by the Court at the hearing on 9 June 2016.

The applicants claim that the Court should:

declare the action admissible;

annul the contested regulation as far as it applies to them;

order the Council to pay the costs.

The Council contends that the Court should:

dismiss the action as inadmissible;

in the alternative, dismiss the action as unfounded;

in the alternative, annul Article 1 of the contested regulation, in the event that the first or second plea in law is upheld, in so far as it imposes a definitive anti-dumping duty on imports of modules and cells consigned from China and exported by the applicants, and, in the event that the sixth plea in law is upheld, in so far as it imposes an anti-dumping duty in excess of what is necessary to eliminate the injury caused by the dumped imports to the EU industry;

order the applicants to pay the costs.

The Commission contends that the Court should:

dismiss the action as inadmissible;

in the alternative, dismiss the action as unfounded;

order the applicants to pay the costs, including those of the intervener.

Law

The objections of inadmissibility raised by the institutions

In the first place, the Council and the Commission (together 'the institutions') claim, in essence, that the imposition of definitive anti-dumping duties by Article 1 of the contested regulation, on the one hand, and the undertaking offered by certain Chinese exporting producers and accepted by the Commission in Implementing Decision 2013/707, which is reflected in the exemption of imports of certain products carried out by those producers from the anti-dumping duty under Article 3 of the contested regulation, on the other hand, form a non-severable whole.

According to settled case-law, partial annulment of an EU legal act is possible only if the element the annulment of which is sought may be severed from the remainder of the act. The requirement of severability, the test for which is objective, is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (judgments of 24 May 2005, *France* v *Parliament and Council*, C-244/03, EU:C:2005:299, paragraphs 12 and 13, and of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 38).

The EU institutions maintain that they took the undertaking into account in their analysis leading to the contested regulation. In order to achieve the result that was sought by the group of exporting producers, including the applicants, when offering the undertaking, the institutions had to combine the decision relating to the undertaking — which includes a minimum import price ('the MIP') for those imports that fall within the 'annual level' and consent for payment of definitive duties for imports that exceed that level — and the contested regulation. By offering an undertaking, the applicants thus accepted that injury had been caused to the EU industry by their dumped imports and that it was in the interest of the European Union to take measures.

In the second place, the acceptance of that undertaking offer by the combination of the decision relating to the undertaking and the contested regulation is what the applicants had sought in the administrative procedure. Relying on case-law (order of 28 January 2004, *Netherlands* v *Commission*, C-164/02, EU:C:2004:54, paragraphs 18 to 25; judgments of 17 September 1992, *NBV and NVB* v *Commission*, T-138/89, EU:T:1992:95, paragraphs 30 to 35; of 22 March 2000, *Coca-Cola* v *Commission*, T-125/97 and T-127/97, EU:T:2000:84, paragraphs 77 to 109; of 30 January 2002, *Nuove Industrie Molisane* v *Commission*, T-212/00, EU:T:2002:21, and of 14 April 2005, *Sniace* v *Commission*, T-141/03, EU:T:2005:129), the institutions maintain that the applicants do not have an interest in challenging acts whose adoption they sought.

In the third place, if the application had sought the annulment of the contested regulation as a whole, it would be inadmissible, in so far as it does not contain any plea or argument contesting the undertaking and the minimum import price referred to in Article 3 of the contested regulation. Accordingly, the application prevents the Council from knowing the grounds on which those articles are challenged, thus preventing the Council from defending itself.

In the fourth place, according to the Commission, the annual level of imports of the product concerned was not reached either in 2013, 2014, or 2015. Therefore, the applicants have not concluded a single import transaction that would be subject to the definitive duties. For that reason, the Commission fails to see the interest of the applicants in having the contested regulation annulled.

The applicants dispute the institutions' arguments.

It should first be borne in mind that, since the admissibility of an action must be assessed at the time when it is brought, that is to say when the application is lodged (see order of 14 February 2012, *Grasso* v *Commission*, T-319/08, not published, EU:T:2012:71, paragraph 16 and the case-law cited), withdrawal of the acceptance of an undertaking under Regulation No 2016/1998 after the application has been lodged cannot affect the admissibility of the present action.

In that regard, first, the acceptance of the offer of an undertaking neither affects the admissibility of an action brought against an act imposing an anti-dumping duty nor the assessment of the grounds relied on in support of that application, since by accepting an undertaking proposed by an interested party, the institutions merely changed the type of definitive remedy to be adopted, while the reasons for adopting a remedy in the first place remain unaffected. It follows from recital 14, Article 8(1) and (6) and Article 9(4) of the basic regulation that acceptance of an undertaking offered by exporting producers and anti-dumping duties are two forms of definitive corrective measures which presuppose a positive conclusion as regards the existence of dumping and injury, as in the present case. That conclusion is consistent with the wording of the contested regulation itself, section H of which addresses undertakings under the heading 'Form of the measures'.

Moreover, the admissibility of actions against regulations imposing definitive duties brought by interested parties whose undertaking had been accepted was, implicitly but necessarily, upheld in the judgment of 14 March 2007, *Aluminium Silicon Mill Products* v *Council* (T-107/04, EU:T:2007:85) delivered in an action brought by parties which had entered into precisely the same type of undertaking as that in question, and in the judgments of 30 April 2013, *Alumina* v *Council* (T-304/11, EU:T:2013:224, paragraph 11) and of 1 October 2014, *Council* v *Alumina* (C-393/13 P, EU:C:2014:2245). The conditions for the admissibility of an

action concern an absolute bar to proceeding with the action, which the Court must, if need be, consider of its own motion (see order of 6 October 2015, *GEA Group* v *OHIM (engineering for a better world)*, T-545/14, EU:T:2015:789, paragraph 14 and the case-law cited). Neither the General Court nor the Court of Justice found, on account of the undertaking or type of undertaking binding the applicants in those cases, that the actions for annulment they brought against 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) and Council Implementing Regulation (EU) No 464/2011 of 11 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2011 L 125, p. 1) respectively were inadmissible.

In so far as exporting producers wish to dispute findings concerning the existence of dumping and injury contained in the regulation imposing definitive duties, the EU institutions cannot rely on the definitive form of the measure, which they adopted themselves, in order to exempt that regulation from judicial review.

The fact that the undertaking in question includes, in addition to the MIP, an annual limit above which anti-dumping duties become payable, and the parties concerned are unable to choose for themselves whether to sell the product concerned in accordance with the MIP or whether to set the price freely while paying a duty, is not capable of calling that analysis into question. It is merely a particular form of definitive remedy whose protective effect on the EU industry must be equivalent to the anti-dumping duties. That fact cannot affect the admissibility of an action for annulment of the contested regulation. As regards the institutions' view that acceptance of that type of undertaking also requires the adoption of a definitive regulation imposing anti-dumping duties, it is sufficient to note that that was precisely the situation in the cases giving rise to the judgments of 14 March 2007, *Aluminium Silicon Mill Products* v *Council* (T-107/04, EU:T:2007:85), of 30 April 2013, *Alumina* v *Council* (T-304/11, EU:T:2013:224, paragraph 11) and of 1 October 2014, *Council* v *Alumina* (C-393/13 P, EU:C:2014:2245), and it did not have any effect on the admissibility of the action.

Moreover, the applicants have sought annulment of that regulation in its entirety, in so far as it applies to them. In that regard, an error capable of invalidating the assessments made by the institutions leading to the adoption of Article 1 of the contested regulation would alter the very substance of that regulation. Article 3 of the contested regulation would automatically lapse, in so far as it sets out an exemption from the payment of the anti-dumping duties established by virtue of Article 1 of that regulation. It follows, also from point 9.1 of the undertaking offer, that that undertaking is only valid while the contested regulation is in force.

It is also incorrect to maintain, as the Commission does, that by seeking annulment of the contested regulation, the applicants are in fact seeking annulment of a measure whose adoption they requested. It is obvious that the applicants did not wish to be subject to the definitive measures laid down in the basic regulation, whether relating to anti-dumping duties or the application of a minimum price by virtue of an undertaking. Such measures hinder the economic freedom of the applicants. In particular, the companies would not be able to sell the product concerned on the EU market below a certain price and would have to fulfil many administrative requirements. Accordingly, the undertaking offer merely expressed a preference for one type of those definitive measures, in the event that the conditions for adopting those measures were fulfilled.

Finally, as regards the Commission's argument concerning the applicants' interest in bringing proceedings (see paragraph 39 above), it must be noted, as the applicants correctly claim, although subject to the Court's findings in respect of the first three pleas in law (see paragraphs 75 and 84 below), that their interest in bringing proceedings in the light of the form of order sought in the application consists, in any event, of the fact that in the event of annulment of the contested regulation — in so far as it concerns the categories of products exported by the applicants during the investigation period and at the time of lodging of the application — all the definitive measures adopted by the Council would have no legal basis, and consequently the applicants would no longer be required to pay any anti-dumping duties on products not covered by the undertaking or exceeding the annual level or to adhere to the minimum price set out in the undertaking (see paragraph 46 above), which would be capable of boosting the competitiveness of their products on the EU market.

It follows that the objection of inadmissibility raised by the institutions must be dismissed.

Substance

In support of their action, the applicants raise six pleas in law, alleging, first, infringement of Article 5(10) and (11) of the basic regulation, secondly, infringement of Articles 1 and 17 of the basic regulation, thirdly, infringement of Article 2 of the basic regulation, fourthly, infringement of Article 1(4) of the basic regulation, fifthly, infringement of Article 2(7)(c) of the basic regulation, and, sixthly, infringement of Article 3 and Article 9(4) of the basic regulation.

The first and second pleas in law, alleging infringement of Article 1(1), Article 5(10) and (11) and Article 17 of the basic regulation

The applicants claim that anti-dumping duties were imposed in respect of cells originating in third countries but shipped from China, modules originating in third countries but consigned from China and modules originating in China but consigned from third countries, without their being investigated and even without the institutions selecting a representative sample of those products and, as far as the first two categories of those products are concerned, without being referred to in the notice of initiation. They maintain, in essence, that anti-dumping duties can be imposed only on the import of products which are explicitly identified in the notice of initiation and which have been investigated. The initiation of an anti-dumping investigation is conditional upon the publication of a notice of initiation, which is intended to inform interested parties of their procedural rights and of the scope of the investigation by reference to the targeted product types and

countries. Without that information, interested parties are not given the opportunity to cooperate in the investigation, which leads the institutions to rely on partial evidence to reach their findings of dumping and injury.

In the present case, the applicants submit that the notice of initiation of the procedure leading to the adoption of the contested regulation referred exclusively to imports of modules and key components originating in China. However, the institutions first registered and then imposed anti-dumping measures on imports of modules and key components both originating in and consigned from China.

The applicants claim, in the first place, that a full reading of point 5 of the notice of initiation shows that at that stage the institutions' intention was not to investigate the product concerned consigned from China but merely to address the origin rules applicable to modules and key components. This interpretation is confirmed by (i) the reasoning contained in recital 275 of the provisional regulation, but not maintained in the contested regulation, and (ii) the fact that the institutions ultimately defined specific origin rules for modules in Commission Implementing Regulation (EU) No 1357/2013 of 17 December 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2013 L 341, p. 47). Consequently, contrary to what the institutions claim, exporting producers shipping goods from China were informed that special origin rules could be adopted for modules and key components but they were not given the opportunity to cooperate in the investigation.

In the second place, the applicants submit that Annex A to the notice of initiation limited its scope to modules and key components originating in China since, in accordance with that annex, exporting producers must indicate the turnover for sales of modules and key components 'as defined in the notice of initiation', which explicitly refers to modules and key components originating in China. Therefore, only exporting producers of modules and key components originating in China were requested to declare information in Annex A to the notice of initiation.

In the third place, the applicants claim that Annex A concerned only exporting producers of modules and key components originating in China. Thus, with reference to the judgments of 12 May 1989, *Continentale Produkten-Gesellschaft* (246/87, EU:C:1989:194, paragraph 12); of 11 July 1990, *Sermes* (C-323/88, EU:C:1990:299, paragraph 29 et seq.), and of 30 March 2000, *Miwon* v *Council* (T-51/96, EU:T:2000:92, paragraph 52), the applicants assert that the sample thus selected could not be representative of exporting producers of both modules and key components originating in and consigned from China, since the sample's representativeness must be assessed on the date it is established. It is on the basis of the data provided by the sampled exporting producers, and the resulting findings of dumping, that the institutions applied both provisional (recital 272 of the provisional regulation) and definitive (recital 416 of the contested regulation) anti-dumping measures on imports of modules and components originating in or consigned from China. It is also clear from recital 416 that all individual company anti-dumping duty rates, on the basis of which the residual duty rate is defined for cooperating companies not included in the sample, are exclusively applicable to imports of products originating in China and produced by the sampled exporting producers.

In the fourth place, the scope of the investigation was defined by the notice of initiation and the fact that the questionnaire designated China as 'country concerned' and not 'country of origin' is of no relevance, contrary to the statement made in recital 54 of the contested regulation. The anti-dumping questionnaire was provided only to the sampled exporting producers. In addition, it is standard practice for the institutions to refer to the country of origin targeted by an anti-dumping investigation as the 'country concerned' in the anti-dumping questionnaires for exporting producers.

In the fifth place, after noting that, under the non-preferential origin rules, the place of production of cells determines their customs origin and that the customs origin of modules is established by reference to the origin of the majority of their component cells, the applicants claim that the investigation conducted by the Commission did not cover cells originating in third countries but consigned from China, modules consigned from China but originating in third countries and modules consigned from third countries but originating in China. Nor were those products represented in the sample.

The Commission did not even advise exporting producers, representative organisations and governments in other countries of the initiation of this investigation. The investigation was thus limited to modules and key components originating in and consigned from China, as can also be seen from recital 416 of the contested regulation.

Lastly, the applicants maintain that if these two pleas in law were considered to be well founded, the contested regulation would have to be annulled in its entirety.

The institutions dispute the applicants' arguments.

First of all, it is necessary to bear in mind the rules for determining the origin and provenance of the goods concerned during the investigation. As regards cells, it is the place of their manufacture that determined their customs origin. The customs origin of the majority of the cells, in turn, determined the customs origin of the modules.

That rule, based on the application of the general rule that goods whose production involved more than one country are to be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture, laid down in Article 24 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended, was given specific expression, in the field of the product concerned, in Implementing Regulation No 1357/2013, adopted after the adoption of the contested regulation (see paragraph 53 above).

Therefore, if cells are made in China and shipped to the European Union from China, it is a case of an import both originating in and consigned from China. If cells are produced in a third country, such as Malaysia, but exported to the European Union from China, such products are of Malaysian origin but consigned from

China. The same is true where such a cell is subject in China to non-substantial processing or working within the meaning of Article 24 of Regulation No 2913/92, as amended. As regards modules comprising a majority of cells originating in China and shipped to the European Union from China, this is a case of a product which both originates in and is consigned from China. Modules manufactured (or assembled) in China, but in which the majority of cells are from a third country, are considered to be products originating in a third country, but consigned from China. Finally, a module is of Chinese origin, but is consigned from a third country, if the majority of the cells from which it is composed originate in China, but it was assembled in a third country.

In that regard, it is important to ascertain, as the Council requests, whether the applicants are entitled to claim that, first, the notice of initiation did not announce the initiation of an investigation with regard to the product concerned consigned from China, but originating in a third country, and, secondly, the product concerned consigned from China, but originating in a third country, and the modules of Chinese origin, but consigned from a third country, were subject to an anti-dumping duty, even though the investigation was not carried out with regard to them. The admissibility of those grounds should therefore be examined (see, to that effect, judgment of 15 March 1973, *Marcato* v *Commission*, 37/72, EU:C:1973:33, paragraphs 7 and 8).

In that regard, according to settled case law concerning an interest in bringing proceedings, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55 and the case-law cited).

An applicant's interest in bringing proceedings must be vested and current. It may not concern a future and hypothetical situation (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 56 and the case-law cited).

That interest must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible, and continue until the final decision, failing which there will be no need to adjudicate (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 57 and the case-law cited).

The applicant must prove that he has an interest bringing proceedings, which is an essential and fundamental prerequisite for any such proceedings. In particular, in order for an action for annulment of an act, submitted by a natural or legal person, to be admissible, the applicant must justify in a relevant manner his interest in the annulment of that act (see judgment of 4 June 2015, *Andechser Molkerei Scheitz* v *Commission*, C-682/13 P, not published, EU:C:2015:356, paragraphs 27 and 28 and the case-law cited; see, to that effect, judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 58 and the case-law cited).

By analogy, the same is true of an interest in raising a plea in law.

First, the applicants have not indicated anywhere in their pleadings what interest they might derive from the potential annulment of the contested regulation on the basis of the first two pleas in law. It is not apparent from those pleadings that, during the investigation and at the time when the action was lodged, they were producing and exporting to the European Union, or importing into the European Union, the product concerned originating in a third country, but consigned from China, or the modules originating in China, but consigned from a third country. Nor do those pleadings refer to any document in the annex which would be such as to demonstrate such a circumstance.

When questioned at the hearing, the applicants submitted that they were indeed producing and exporting to the European Union the product concerned originating in a third country, but consigned from China, and modules originating in China but consigned from a third country (see paragraph 63 above). However, they were not able to identify in their pleadings or in the annexes thereto the slightest evidence to that effect. They also acknowledged that they had not expressly specified in the application that they exported the two categories of the product concerned in question to the European Union. Accordingly, they have not proved their interest in challenging the establishment of an anti-dumping duty on imports of those categories of the product concerned. Therefore, the applicants have not in any way justified their interest in making an application to that effect, even if the burden of proof lay with them (see paragraph 68 above).

Consequently, the applicants have not demonstrated that they have an interest in claiming that, first, the notice of initiation did not announce the initiation of an investigation with regard to the product concerned consigned from China but originating in a third country and that, secondly, the product concerned consigned from China, but originating in a third country, and the modules of Chinese origin, but consigned from a third country, were subject to an anti-dumping duty, even though the investigation was not carried out with regard to them.

In any event, the applicants have provided no evidence at all before the Court that they duly drew the institutions' attention during the administrative procedure to the fact that they were producing and exporting to the European Union, or importing into the European Union, the product concerned originating in a third country, but consigned from China, and modules originating in China, but consigned from a third country, during the investigation period and at the time when the application was lodged. Although the applicants claim, in essence, that they correctly informed the institutions in the light of the wording of the notice of initiation, it must be noted that point 5 of that notice states that companies which ship the product concerned from China but consider that part or even all of those exports do not have their customs origin in China are invited to come forward in the investigation and to furnish all relevant information, and that the

origin of the product under investigation exported from the country concerned will be examined in the light of that and other information gathered in this investigation. That assessment is an integral part of the investigation.

Secondly, the applicants' arguments seeking, in essence, to justify their interest in raising those two pleas in law by the fact that, in the future, they might export both categories in question of the product concerned to the European Union must be rejected, on the basis of the case-law cited in paragraphs 66 and 67 above, as referring to a hypothetical situation.

The first and second pleas in law must therefore be rejected as inadmissible.

The third plea in law, alleging infringement of Article 2 of the basic regulation

By their third plea in law, the applicants assert, in essence, that the contested regulation was adopted in breach of Article 2 of the basic regulation in so far as it imposes anti-dumping measures calculated on the basis of a non-market economy methodology on products from market economies.

The basic regulation explicitly limits, in Article 2(7), recourse to the methodology for non-market economy countries to goods produced in those countries. For all other imports, the normal value must be calculated in accordance with the rules set out in Article 2(1) to (6) of the basic regulation.

The institutions calculated dumping margins only for cells and modules originating in and consigned from China. Thus, they did not calculate separate dumping margins for cells originating in third countries but consigned from China, modules originating in third countries but produced in China or modules originating in China but produced in third countries. Accordingly, the contested regulation applied the non-market economy methodology to calculate the normal value of products originating in China but produced in market economy countries.

If the institutions were to argue that the country of origin, rather than the country of production, defines the methodology to be used for calculating the normal value, the contested regulation would still have been adopted in breach of the basic regulation since it imposes anti-dumping measures on modules and cells that originate in market economy countries but are consigned from China, based on a normal value that was calculated using a non-market economy methodology.

The applicants assert, in that regard, that if the institutions choose to rely on the prices of an intermediate country rather than on those of the country of origin, they must do so for all the imports concerned by the investigation, which is uncontroversial and confirmed by the Commission's consistent past practice.

The institutions dispute the applicants' arguments.

It is common ground between the parties that the institutions used only the methodology provided for in Article 2(7)(a) of the basic regulation in order to establish the normal value for all the categories of the product concerned. Thus, they relied on the prices in a third analogous market economy country, namely India.

Nevertheless, it must, first of all, be ascertained whether the applicants are entitled to complain that the institutions did not calculate separate dumping margins for cells originating in third countries but consigned from China, modules originating in third countries, but consigned from China, or modules originating in China but produced in third countries.

For the reasons set out in paragraphs 64 to 74 above, it is necessary to consider that the applicants are not entitled to rely on that third plea in law.

Moreover, the applicants submit, in essence, that the institutions can make use of data from an analogous market economy country only in order to replace data from countries of production with no market economy. They also claim that if the institutions choose to rely on the prices of an intermediate country rather than on those of the country of origin, they must do the same for all the imports concerned by the investigation.

In that regard, in accordance with Article 1(2) of the basic regulation, a product is regarded as dumped if its export price to the European Union is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country. Article 1(3) allows not only the country of origin but also an intermediate country to be regarded as the exporting country, except where, for example, the products are transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country. The intermediate country must therefore be a place where non-substantial processing or working within the meaning of Article 24 of Regulation No 2913/92, as amended, is carried out, that is to say an activity which does not confer origin.

In order to ensure that Article 1(3) of the basic regulation has practical effect, it is necessary to interpret Article 2(7)(a) of that regulation, which provides, inter alia, that in the case of imports from non-market economy countries, normal value is to be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the European Union, in the light of that provision.

Whether the institutions may have recourse to a market-economy third country in order to determine the normal value of the product concerned in the exporting country thus depends on whether the exporting country as so established has no market economy.

By using, in Article 2(7)(a) of the basic regulation, the expression 'in the case of imports from non-market economy countries', the legislature did not intend to limit the use of data of market-economy third countries to countries where the latest, even non-substantial, processing or working took place, before export to the European Union, which the applicants appear to refer to under the term 'country of manufacture', namely the country of origin. By that expression, its intention was to refer to the 'exporting country', in accordance with Article 1(2) and (3) of the basic regulation.

That conclusion is borne out by recital 6 of the basic regulation, according to which when determining normal value for non-market economy countries, it appears prudent to set out rules for choosing the appropriate market-economy third country to be used for such purpose. That recital clearly refers to the

country referred to in Article 1(2) and (3) of the basic regulation, namely the exporting country, whose normal value must be determined using the data of a market-economy third country.

Contrary to the applicants' claim, it is not apparent from Article 1(3) of the basic regulation that the exporting country must be defined in the same way for all categories of the product concerned, irrespective of their origin. If the legislature had wished to lay down such a rule, it would have clearly stated it. In the absence of such a manifestation of its intention, the institutions must be entitled to a wide margin of discretion when determining the normal value (see, to that effect, judgment of 22 May 2014, *Guangdong Kito Ceramics and Others* v Council, T-633/11, not published, EU:T:2014:271, paragraph 41 and the case-law cited).

It is not therefore contrary to Article 1(3) of the basic regulation to regard, first, — for cells and modules originating in and consigned from China and for modules originating in China but consigned from third countries — the exporting country as the country of origin, regardless of whether non-substantial processing or working took place in a third country from which the product was shipped to the European Union, and, secondly, the intermediate country as the exporting country for modules consigned from China but originating in a third country.

The institutions' choice may be justified by their objective of examining the existence of potential dumping practices in China, and not in another country, which also falls within the scope of their broad discretion.

That finding cannot be called into question by the other arguments raised by the applicants.

First, the fact that Article 2(7)(c) of the basic regulation is addressed to producers does not prove the applicants' claims in any way. A producer who wishes to show that he operates under market economy conditions may be established both in the country of origin and in an intermediate country. In the light of Article 1(3) of the basic regulation, this may be a producer which only carries out non-substantial processing or working.

Secondly, the applicants cannot successfully rely on the case-law of the Dispute Settlement Body of the World Trade Organization (WTO) relating to the second additional provision of Article VI(1) of the General Agreement on Tariffs and Trade (GATT), which constitutes, in the context of the WTO, the provision authorising recourse to the methodology corresponding to a non-market economy. It follows from the judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 48 to 53) that Article 2(7) of the basic regulation is the expression of the EU legislature's intention to adopt in that sphere an approach specific to the EU legal order. As is apparent from the preamble to Council Regulation (EC) No 2238/2000 of 9 October 2000 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community (OJ 2000 L 257, p. 2), the rules laid down in Article 2(7) of the basic regulation and applicable to imports from non-market economy countries which are members of the WTO are based on the emergence, in those countries, following the economic reforms adopted, of firms for which market-economy conditions prevail. In so far as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103) ('the anti-dumping agreement), which appears in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 3), contains no specific rules relating to such a category of countries, a correlation cannot be established between, on the one hand, the rules in Article 2(7) of the basic regulation directed at the imports from non-market economy WTO member countries and, on the other, the rules set out in Article 2 of the anti-dumping agreement. It follows that that provision of the basic regulation cannot be considered to be a measure intended to ensure the implementation in the EU legal order of a particular obligation assumed in the context of the WTO. Article 2.7 of the anti-dumping agreement, read in conjunction with the second supplementary provision to paragraph 1 of Article VI of GATT, in Annex I thereto, to which Article 2.7 refers, cannot call such a finding into question. In addition to the fact that that second supplementary provision does not lay down any specific rule governing the calculation of normal value, it is directed only at cases where a country has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State. Nor is the finding called in question by the fact that recital 5 of the basic regulation states that the rules of the anti-dumping agreement should be brought into EU legislation 'as far as possible'. That expression must be understood as meaning that, even if the EU legislature intended to take into account the rules of the anti-dumping agreement when adopting the basic regulation, it did not, however, show the intention of transposing all those rules in that regulation. The conclusion that the purpose of Article 2(7) of the basic regulation is to implement the particular obligations created by Article 2 of the anti-dumping agreement cannot therefore in any event rely in isolation on the wording of recital 5 of the basic regulation. In such circumstances, it must be held that the EU legislature exercised its regulatory competence, as regards the calculation of normal value in respect of imports from non-market economy countries which are members of the WTO, by taking an approach specific to the EU legal order and, therefore, it cannot be established that it was the EU legislature's intention, by the adoption of Article 2(7) of the basic regulation, to implement the particular obligations created by Article 2 of the anti-dumping agreement.

It follows that the third plea in law must be rejected.

The fourth plea in law, alleging infringement of Article 1(4) of the basic regulation

According to the applicants, the anti-dumping investigation may cover only one product or one group of closely resembling products. In the present case, the institutions did not regard cells and modules as a single product.

The applicants claim that case-law has defined a set of factors that determine whether different product types can be considered to form one single like product, in particular the physical, technical and chemical characteristics of the products; their end use; their interchangeability; the consumer perception; the

distribution channels; and their manufacturing processes and costs of production) (judgments of 13 September 2010, *Whirlpool Europe* v *Council*, T-314/06, EU:T:2010:390, paragraph 138; of 17 December 2010 in *EWRIA and Others* v *Commission*, T-369/08, EU:T:2010:549, paragraph 82, and of 10 October 2012 in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 59).

According to the Court's case law, a claim that the product concerned is ill defined must be based on arguments which show that either the institutions erred in their assessment with regard to the factors they held to be relevant or that the application of other more relevant factors required that the definition of the product concerned be restricted (judgment of 13 September 2010, *Whirlpool Europe* v *Council*, T-314/06, EU:T:2010:390, paragraph 141).

The applicants observe in this regard that although the institutions claim that cells and modules form one single product, it is clear from recitals 50 to 98 of the provisional regulation and from recitals 76 to 216 of the contested regulation that they conducted separate standing, dumping and injury analyses for modules and cells. In addition, while the average sales price of a cell in the European Union ranges from EUR 0.95 to EUR 2.37, the average sales price of a module ranges from EUR 103 to EUR 361.

Furthermore, the institutions manifestly erred in their assessment with regard to the factors they held to be relevant in determining the product concerned. Contrary to the statements made by the contested regulation in recitals 32 to 34, 36, 37, 45 and 48, cells and modules do not share the same basic physical, technical and chemical characteristics, namely the ability to generate electricity from sunlight, or the same end use, namely potential sale for integration into solar photovoltaic systems.

First, with regard to physical characteristics, the applicants submit that cells and modules differ in their size, weight, thickness, mass, density or colour.

Secondly, the main chemical component of cells, namely polysilicon, accounts for a mere 20% of a module's cost structure. The applicants claim that it is apparent from the institutions' practice in that field that a common raw material is irrelevant in determining whether different products share the same physical, chemical, and technical characteristics.

Thirdly, according to the applicants, the principal technical characteristic of a module is to generate and transmit electricity, while a cell cannot transmit electricity. In any event, whether cells and modules both have the ability to generate electricity from sunlight cannot be deemed a decisive factor in the determination of the product concerned since the institutions initially excluded three products from the investigation which all have the ability to generate electricity from sunlight, namely solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries; thin-film photovoltaic products; and products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where those electrical goods consume the electricity generated by the integrated cells.

Fourthly, the applicants maintain that two products do not share the same end use where switching from one to another constitutes a technical and economic deterrent. Switching from a cell to a module constitutes a technical deterrent in so far as a cell is just one of numerous inputs used to manufacture a module. This also constitutes an economic deterrent because, as acknowledged in recital 40 of the contested regulation, these inputs amount to 40% of the total cost of a module.

Lastly, the application of other more relevant factors required that cells and modules be considered two distinct products. In the present case, the institutions acknowledged that cells and modules have different consumer perception (recital 39 of the provisional regulation), different distribution channels (recital 37 of the provisional regulation), different manufacturing processes and different costs of production (recital 32 of the provisional regulation). Furthermore, it is common knowledge that cells and modules are not interchangeable.

While the institutions contend that those factors are not relevant since the main criteria to define a single like product are the physical, chemical and technical characteristics and end uses (recitals 37, 39 and 46 of the provisional regulation and recital 42 of the contested regulation), the Court has already ruled that the physical, technical, and chemical characteristics of the product, although important factors, do not have priority over other factors (judgment of 13 September 2010, *Whirlpool Europe v Council*, T-314/06, EU:T:2010:390, paragraph 141).

The institutions dispute the applicants' arguments.

In that regard, it must be noted that the basic regulation does not specify how the product or range of products which may be subject to an anti-dumping investigation is to be defined; nor does it require an intricate classification to be made (see, to that effect, judgment of 25 September 1997, *Shanghai Bicycle* v *Council*, T-170/94, EU:T:1997:134, paragraph 61).

According to settled case-law, to which the parties both refer, the purpose of the definition of the product concerned in an anti-dumping investigation is to assist in drawing up the list of the products which will, if necessary, be subject to the imposition of anti-dumping duties. For the purposes of that process, the institutions may take account of a number of factors, such as, inter alia, the physical, technical and chemical characteristics of the products, their use, interchangeability, consumer perception, distribution channels, manufacturing process, costs of production and quality (judgment of 13 September 2010, *Whirlpool Europe* v *Council*, T-314/06, EU:T:2010:390, paragraph 138, and of 17 December 2010 in *EWRIA and Others* v *Commission*, T-369/08, EU:T:2010:549, paragraph 82).

It necessarily follows that products which are not identical may be grouped together under the same definition of the product concerned and, together, be subject to an anti-dumping investigation (judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 60) .

In those circumstances, the examination of whether a specific product has been validly included in the list of products which will, if necessary, be subject to the imposition of anti-dumping duties must be carried out in the light of the characteristics of the product concerned as defined by the institutions, not in the light of the characteristics of the products comprising the product concerned or its sub-categories (judgment of 18 November 2014, *Photo USA Electronic Graphic* v *Council*, T-394/13, not published, EU:T:2014:964, paragraph 30).

Moreover, in the light of the indicative nature of the criteria referred to in paragraph 111 above, the institutions are not under any obligation to determine the product concerned using all of those criteria. Nor is it necessary for the analysis of each of those criteria to be capable of leading to the same result (see, to that effect, judgment of 18 November 2014, *Photo USA Electronic Graphic* v *Council*, T-394/13, not published, EU:T:2014:964, paragraph 51).

It is necessary to ascertain, taking into account the above factors, whether the applicants are in a position to show either that the institutions made an error of assessment with regard to the factors which they decided were relevant, or that the application of other, more relevant factors would have required the exclusion of a product from the definition of the product concerned (see, to that effect, judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 61).

In that review, account must be taken of the fact that, in the sphere of measures to protect trade, the EU institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine and that, consequently, review by the Courts of the European Union 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. In that regard, since it has already been held that the determination of the like product fell within the exercise of the wide discretion given to the institutions and was therefore subject to limited review (judgment of 25 September 1997, *Shanghai Bicycle* v *Council*, T-170/94, EU:T:1997:134, paragraph 63), the same approach must be adopted when reviewing the merits of the definition of the product concerned (judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 62; see, to that effect, judgment of 17 March 2016, *Portmeirion Group*, C-232/14, EU:C:2016:180, paragraph 47).

In the present case, first, as regards the nature of the criteria chosen by the institutions, at the outset, it follows from recitals 22 to 25 and 48 of the provisional regulation, and from recitals 45 and 48 of the contested regulation, that the product concerned was defined in relation to its capacity to convert solar energy into electricity, which presupposes, in terms of end use, its installation in photovoltaic systems.

Next, it follows, in particular from recitals 32, 37, 42 and 48 of the contested regulation, that the criteria, on which the institutions rely, are physical, chemical and technical characteristics and the corresponding end use.

While the Council wrongly contends that some of the criteria referred to in paragraph 111 above, that is to say, those used, are in principle more decisive than others (judgment of 18 November 2014, *Photo USA Electronic Graphic* v *Council*, T-394/13, not published, EU:T:2014:964, paragraph 41), it does not necessarily follow that the decision to rely on those criteria in the present case is vitiated by a manifest error of assessment.

It must be noted that the definition of the product concerned by its capacity to convert solar energy into electricity, which presupposes an end use of integration in photovoltaic systems, is objective and the applicants have neither claimed nor demonstrated that that criterion is arbitrary or that the institutions committed a manifest error of assessment in using that definition. In addition, it follows from the judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 65) that the institutions may include products under the definition of the product concerned on the ground that they have, inter alia, the same basic function.

That basic criterion was moreover applied by the institutions in a consistent manner, since wafers were excluded from the definition of the product concerned as a result of the conclusion that, they do not convert, as such, solar energy into electricity.

Having regard to the decision, which was not challenged, to investigate products capable of converting solar energy to electricity, it was not manifestly unreasonable for the institutions to rely principally on the physical, chemical and technical characteristics and end use of the products. On the contrary, those criteria appear to be particularly relevant.

Furthermore, it is apparent both from the provisional regulation and the contested regulation that the institutions did not disregard the other criteria. Those criteria raised by the interested parties which participated in the administrative investigation were evaluated, but their assessment was not such as to modify the institutions' conclusions as regards the determination of the product concerned.

Secondly, as regards the question whether the institutions committed a manifest error of assessment of the criteria they deemed relevant, it must be noted that while the applicants rightly claim that cells and modules are different in terms of physical characteristics, size, weight, thickness, mass, density, and indeed colour, that fact must be analysed in the light of the fact that cells are fundamental components of modules and that the characteristics of modules are broadly

determined by the characteristics of the cells of which they are composed. The applicants' arguments cannot therefore give reason to believe that the products are different, but rather that they are similar.

As regards the chemical characteristics of cells and modules, the parties do not dispute that the main chemical component, that is to say, the component conferring the essential technical characteristics is polysilicon. Even if that component accounts for a mere 20% of the price of a module, that fact, if it were established by the applicants, has no bearing on the conclusion relating to the similarity of the chemical characteristics of cells and modules. As has been stated, it is necessary to assess, in the present case, principally whether the two product categories contain the same essential component, that is to say a component conferring their essential technical characteristics. While the applicants claim that the Commission's position as regards the relevance of the raw material was different in other investigations, it suffices to note that it is settled case-law that, where the institutions use the discretion conferred upon them by the basic regulation, they are not required to explain in detail and in advance the criteria that they intend to apply in every situation, even in cases where they create new policy options. Nor are economic operators justified in having a legitimate expectation that the criterion initially selected, which is capable of being altered by the EU institutions in the exercise of their discretion, will be maintained. Therefore, there is no need to rule on the earlier practice alleged by the applicant, as the existence of such a practice did not in itself deprive the institutions of the possibility of changing it subsequently (see, to that effect, judgments of 7 May 1987, *Nippon Seiko* v *Council*, 258/84, EU:C:1987:205, paragraphs 34 and 35, of 10 March 1992, *Canon* v *Council*, C-171/87, EU:C:1992:106, paragraph 41, and of 17 July 1998, *Thai Bicycle* v *Council*, T-118/96, EU:T:1998:184, paragraphs 68 and 69 and the case-law cited).

The relevance of the raw material depends principally on the basic criterion used by the institutions. In the present case, it is indisputable that the qualities of polysilicon are decisive both for cells and modules and that in their absence they cannot fulfil their function of converting solar energy into electricity.

Therefore, the applicants' argument relating to chemical properties cannot succeed.

As regards technical characteristics, it is apparent from the provisional and contested regulations that the specific feature of cells and modules is their capacity to convert solar energy to electricity. There is no requirement in the basic regulation that other technical functionalities should be the same for all categories of products which fall within the definition of the product concerned. If that were so, all products covered by the definition of the product concerned would have to be practically identical, which the basic regulation does not require. Furthermore, as regards the applicants' argument that three other products capable of converting solar energy into electricity were excluded from the investigation, it suffices to note that the applicants have not put forward any argument capable of demonstrating that the institutions would be obliged to investigate all products corresponding to the criteria they adopted, or to impose definitive measures with regard to them. It follows that the applicants' arguments relating to technical characteristics must be rejected.

As regards the applicants claim that two products do not share the same purpose or the same use where switching from one to another constitutes a deterrent, it suffices to note that both the cells and modules are intended to be installed in photovoltaic systems (recital 28 of the provisional regulation and recitals 45 and 48 of the contested regulation), which the applicants do not deny. In the present case, it is also significant that neither of the two product categories has any use other than integration in those systems for the purposes of producing electricity. The applicants' arguments seeking to show that cells and modules differ in terms of their purpose, or use, must therefore be rejected.

It is therefore necessary to conclude that the applicants have failed to show that the institutions committed any manifest error of assessment of the factors which they applied.

Thirdly, as regards the question whether the application of other more relevant criteria than those applied by the institutions would have led to the exclusion of a product type from the definition of the product concerned, it is necessary, at the outset, to point out that the application of those other criteria could call into question the conclusions drawn by the institutions in the light of the criteria applied, only if the applicants demonstrate first that those other criteria are manifestly more relevant. It must however be noted that the applicants have adduced no evidence to that effect in the present case. That is sufficient, in the light of the assessment of the earlier arguments, to reject the present plea in law.

In any event, as regards, first, the perception of consumers, recital 39 of the provisional regulation, to which the applicants, in essence, refer, indicates that the main criteria used to define a single product are the same physical, chemical and technical characteristics and the end uses of the product in question, and that, in accordance with those criteria, it was concluded, on the basis of recitals 27 to 29 of that regulation, that different perceptions on the part of consumers were not considered to be a decisive factor. The applicants have not explained why that finding should be regarded as manifestly incorrect. Nor have they explained how that criterion is more relevant than those applied by the institutions (see paragraph 131 above). It is for the applicants to adduce evidence to that effect. Furthermore, it does not follow either from the basic regulation or from case-law that the assessment of the similarity of the products in the light of each of the criteria must necessarily produce the same result each time (see paragraph 114 above). The applicants' argument must therefore be rejected.

Secondly, as regards distribution channels, the applicants have not shown how that criterion was relevant in the light of the institutions' decision to investigate products capable of converting solar energy into electricity, or manifestly more relevant than those applied by the institutions (see paragraph 131 above). In any event, the applicants are wrong to claim that, in recital 37 of the provisional regulation, the Commission acknowledged that cells and modules necessarily have different distribution channels. That recital indicates that the investigation showed that those channels are sometimes different and sometimes similar. The

applicants have not analysed that fact in any way nor shown how it is manifestly such as to invalidate the institutions finding that the distribution channels had no effect on the definition of the product concerned in the present case. Consequently, their argument must be rejected.

Thirdly, the applicants have submitted no analysis, on the one hand, capable of substantiating the claim that the production costs of cells and modules are different and, on the other hand, concerning the potential consequences of such a circumstance in respect of the inclusion of cells and modules in the definition of the product concerned. Nor have the applicants proved that that criterion would be more relevant than those applied by the institutions (see paragraph 131 above). In any event, that argument has no basis in fact, since recital 32 of the provisional regulation indicates that the production of cells is the most sophisticated part of the production process and that, since the three production stages are linked, the added value does not derive from a particular stage. The question of production costs was not therefore addressed in the passage of the recital in question.

Fourthly, as is rightly stated in recital 36 of the provisional regulation, modules and cells, which are essential components of modules, both derive from the same production process, with the result that the question of interchangeability is not relevant in the present case. In any event, assuming that the lack of interchangeability is proved, the applicants have not shown that that was a more relevant criterion than those applied by the institutions in respect of their decision to carry out the investigation of devices capable of converting solar energy into electricity (see paragraph 131 above).

It follows that the applicants' arguments seeking to demonstrate that other more relevant criteria than those applied by the institutions would have led to the conclusion that cells and modules would not be part of the same definition of the product concerned must be rejected.

In the fourth place, that finding cannot be called into question by the argument that the institutions carried out separate investigations for the two types of products. As the Council contends, the institutions carried out an investigation taking into account indicators on the basis of categories of products, which indeed corresponds to their established practice. Accordingly, the Commission compiled a single sample of exporting producers, which took into account the largest exporters in terms of volume of wafers, cells and modules, in order to ensure that the sample was representative. The institutions thus established a weighted average normal value and a weighted average export price for each sub-group, in such a way that differences between the product types were taken into account.

The argument must therefore be rejected.

As regards the argument alleging different prices, it is true that cells cost less than modules because they are their main components. However, it must also be noted that according to recital 40 of the contested regulation, which is not disputed by the applicants, cells account for 66% of the cost of a module. Likewise, it follows from recital 34 of the provisional regulation that there is a close correlation between the prices of cells and modules which depends on the prices of polysilicon. That argument cannot therefore succeed, since those circumstances tend instead to support the conclusion that cells and modules belong to the same definition of the product concerned. In any event, the applicants have not submitted any analysis of the relevance of that criterion.

Finally, it should be observed that it is the processing of wafers into cells and not cells to modules that constitutes the last substantial processing or working resulting in a new product or representing an important stage of manufacture, within the meaning of Article 24 of Regulation No 2913/92, as amended. That constitutes an additional and significant indication that cells and modules fall within the same definition of the product concerned.

It follows that the fourth plea in law must be rejected.

The fifth plea in law, alleging infringement of Article 2(7)(c) of the basic regulation

According to the applicants, Article 2(7)(c) of the basic regulation provided, at the 'material time', that the MET determination had to be made within three months of the initiation of the investigation. The Court has repeatedly held that that deadline was intended, in particular, to ensure that MET determinations are not decided on the basis of their potential effect on the calculation of the dumping margin (judgments of 14 November 2006, *Nanjing Metalink* v *Council*, T-138/02, EU:T:2006:343, paragraphs 43 and 44, and of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraphs 128 and 138) and the Court of Justice has confirmed that compliance with that deadline is an essential procedural right, 'the infringement of which vitiates the MET determination' (judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraphs 24, 39, 40 and 67, and of 15 November 2012, *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, not published, EU:C:2012:710, paragraph 31).

As the investigation was initiated on 6 September 2012, it follows that the deadline for making the MET determinations expired on 6 December 2012. It was by decision of 15 March 2013 that the institutions denied MET status to the applicants.

The applicants claim that the institutions' reasoning in recitals 76 to 79 of the contested regulation, according to which they were not bound by the three-month deadline in view of Regulation No 1168/2012, which extended the deadline to make the MET determination to eight months for all new and to all pending investigations as from 15 December 2012, is erroneous. In their view, that regulation applies only to future investigations and to pending investigations where the deadline for making the MET determination has not yet expired. Any other interpretation would lead to an unlawful retroactive application of Regulation No 1168/2012.

According to the judgments of 9 January 1990, *SAFA* (C-331/88, EU:C:1990:1, paragraph 12), of 13 November 1990, *Fédesa and Others* (C-331/88, EU:C:990:391, paragraph 45), and of 29 June 2000, *Medici Grimm* v *Council* (T-7/99, EU:T:2000:175, paragraphs 90 to 92), the principle of legal certainty

precludes an EU act from having retroactive effect unless the legitimate expectations of the parties affected are respected. The applicants assert in that regard, with reference to the judgment of 15 February 1996, *Duff and Others* (C-63/93, EU:C:1996:51, paragraphs 2 and 20), that that principle requires public authorities to exercise their powers to ensure that situations and relationships lawfully created are not affected in a manner which could not have been foreseen by a diligent person.

Interpreting Regulation No 1168/2012 as applying to pending investigations in which the parties concerned have a vested right to have their MET claim examined within three months would infringe the legitimate expectations of interested parties. In this case, Regulation No 1168/2012 cannot therefore apply to the applicants' MET determination, with the result that only the version of the basic regulation as in force at the time of the expiry of the time limit referred to in Article 2(7)(c) is relevant in order to establish whether their material rights have been infringed.

The applicants provided the Commission with their reply to the anti-dumping questionnaire on 5 December 2012. The MET determination was adopted more than three months later. Consequently, the applicants assert that it cannot be ruled out that the MET determinations in respect of the applicants were decided on the basis of their potential effect on the calculation of their dumping margin. Therefore, the institutions irrevocably infringed their material rights, as protected by Article 2(7)(c) of the basic regulation. The applicants maintain, with reference to the judgments of 29 October 1980, *van Landewyck and Others* v *Commission* (209/78 to 215/78 and 218/78, not published, EU:C:1980:248, paragraph 47); of 23 April 1986, *Bernardi* v *Parliament* (150/84, EU:C:1986:167, paragraph 28) and of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council* (T-299/05, EU:T:2009:72, paragraph 138), that the contested regulation might have been substantively different in the absence of the alleged error.

As regards the Council's argument that the applicants may not rely on the principle of protection of legitimate expectations, since they should have been fully aware of the upcoming amendments to Article 2(7) of the basic regulation, in so far as the proposal for Regulation No 1168/2012 was published by the Commission on 8 July 2012 and no precise, unconditional and consistent information indicating that their MET claim was to be examined had been provided to them, the applicants argue that in the judgment of 24 March 2011, *ISD Polska and Others* (C-369/09 P, EU:C:2011:175, paragraphs 123 and 124), the Court of Justice ruled that legitimate expectations are primarily based on the applicable legal framework, not on legislative proposals.

The institutions dispute the applicants' arguments.

As the Council rightly maintains, the applicants' arguments do not seek to show that the legal basis of the decision refusing to grant MET, namely Regulation No 1168/2012, was unlawful but that the institutions interpreted that regulation incorrectly, in so far as they applied it to investigations in progress for which the three-month time limit provided for in Article 2(7)(c) of the basic regulation, in the version prior to that regulation, had already expired. In particular, the applicants ask that that regulation be interpreted in the light of the principle of non-retroactivity of EU acts, in conjunction with the principles of legal certainty and protection of legitimate expectations, so that it would not apply to anti-dumping investigations for which that time limit had already expired at the time of the entry into force of Regulation No 1168/2012.

In that regard, it is settled case-law that, when secondary EU law is to be interpreted, preference should be given as far as possible to an interpretation which is in conformity with the Treaty. An implementing regulation must also be given, if possible, an interpretation consistent with the basic regulation. However, that case-law does not apply in the case of a provision of an implementing regulation whose meaning is clear and unambiguous and therefore requires no interpretation (see judgment of 25 November 2009, *Germany* v *Commission*, T-376/07, EU:T:2009:467, paragraph 22 and the case-law cited). The same necessarily applies to all acts of secondary legislation.

Furthermore, as the institutions also maintain, a conforming interpretation of secondary EU law cannot serve as the basis for an interpretation of that law that is *contra legem* (order of 17 July 2015, *EEB* v *Commission*, T-685/14, not published, EU:T:2015:560, paragraph 31 and the case-law cited). It therefore follows in particular from the case-law cited in the above paragraph, that an interpretation in conformity with EU law may be made only if such an interpretation is possible.

In the present case, it follows clearly from the wording of Article 1 of Regulation No 1168/2012, applicable, by virtue of Article 2, to all new and to all pending investigations as from 15 December 2012, that is to say, as from the entry into force of that regulation, that the time limit of three months as from the initiation of the investigation, provided for in the second subparagraph of Article 2(7)(c) of the basic regulation, was extended to a time limit, in principle, of seven months but, in any event, of eight months at most. Since that regulation does not provide for any exception as regards investigations in progress for which the time limit for deciding whether to grant MET by virtue of the second subparagraph of Article 2(7)(c) of the basic regulation in the version applicable before 15 December 2012 had already expired, it therefore applied to the Commission decision of 15 March 2013 refusing to grant their MET claim submitted by the applicants.

The interpretation of Regulation No 1168/2012 advocated by the applicants would accordingly lead to a result contrary to its wording and the intention of the legislature. It cannot, therefore, be accepted.

Moreover, the present plea in law must be rejected, even if it were to be understood as meaning that the applicants claim that Regulation No 1168/2012 is unlawful, in so far as it also applies to investigations in progress for which the time limit for deciding to grant MET, by virtue of the second subparagraph of Article 2(7)(c) of the basic regulation in its version applicable before 15 December 2012, had already expired.

In that regard, the principle of legal certainty precludes an EU act from being applied retroactively — that is to say, it may not take effect from a point in time before its publication, and therefore apply to a situation established before its entry into force, irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, save where, exceptionally, the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (see to that effect, judgment of 13 November 1990, *Fédesa and Others*, C-331/88, EU:C:1990:391, paragraph 45; of 22 December 2010, *Bayerischer Brauerbund*, C-120/08, EU:C:2010:798, paragraph 40; of 3 September 2015, A2A, C-89/14, EU:C:2015:537, paragraph 37; and of 7 October 2015, *Zentralverband des Deutschen Bäckerhandwerks* v *Commission*, T-49/14, not published, EU:T:2015:755, paragraph 26).

It should also be borne in mind that a new legal rule also applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise — subject to the principle of the non-retroactivity of legal acts — only if the new rule is accompanied by special provisions which specifically lay down the conditions of its temporal application (judgment of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 32).

In particular, according to settled case-law, procedural rules are generally taken to apply from the date on which they enter into force, as opposed to substantive rules, which are usually interpreted as applying to situations established before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them (see judgment of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraphs 33).

The Court of Justice has also held that the provision which forms the legal basis of an act and empowers an EU institution to adopt the act must be in force on the date on which the act is adopted (see judgment of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 34).

In the present case, first, it suffices to notes that it follows from the case-law that the second subparagraph of Article 2(7)(c) of the basic regulation provides for a procedural time limit (judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 138), within which the Commission is required to decide upon any MET claims. That provision therefore sets out a procedural rule.

Accordingly, in accordance with the case-law referred to in paragraph 158 above, Regulation No 1168/2012, in so far as it amends that time limit by extending it, in principle to seven or, in any event, at most to eight months from the initiation of the investigation, applied immediately to the investigation in question. It was therefore possible for the Commission Decision of 15 March 2013 to be validly based on that regulation.

In the second place, and in any event, the Commission's failure to comply with the time limit provided for in the second subparagraph of Article 2(7)(c) of the basic regulation, in its version prior to the entry into force of Regulation No 1168/2012, did not create, as the institutions rightly contend, a definitive situation within the meaning of the case-law referred to in paragraphs 156 to 158 above, so that that regulation did not have any retroactive effect.

In the present case, it suffices to note that the procedure for reaching a decision to impose an anti-dumping duty in accordance with the basic regulation and the anti-dumping agreement follows a step-by-step approach (Opinion of Advocate General Sharpston in *Council* v *Gul Ahmed Textile Mills*, C-638/11 P, EU:C:2013:277, paragraph 36) and that the applicant's situation was definitively determined, as the institutions rightly submit, only upon the entry into force of the contested regulation, by which the competent authority, namely the Council, adopted the Commission's proposal. Until the contested regulation was adopted, the applicants had no certainty as regards their potential rights and obligations stemming from the application of the basic regulation (see, to that effect, judgment of 14 March 1990, *Nashua Corporation and Others* v *Commission and Council*, C-133/87 and C-150/87, EU:C:1990:115, paragraph 8).

Secondly, while the applicants claim that by the expiry of the time limit provided for in the second subparagraph of Article 2(7)(c) of the basic regulation they had acquired the right to have their MET claims examined within three months, it must be noted that that argument is contradictory. In fact, it amounts to a claim that it is on the day when the three-month time limit expired that they definitively acquired the right to have their request examined by that same day. It also amounts to imposing an impossible obligation on the Commission.

Thirdly, to the extent that the applicants submit that the failure to comply with that time limit affects the lawfulness of the decision on the MET claim, and accordingly the lawfulness of the contested regulation, which Regulation No 1168/2012 allegedly retroactively amended, it must be noted that that failure to comply did not, in itself, have any automatic impact on the lawfulness of the decision on a MET claim, nor does it constitute implied granting of that status.

While the applicants refer to the judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53), and of 15 November 2012, *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, not published, EU:C:2012:710) in support of their position that such a failure to comply with the time limit automatically renders unlawful the definitive regulation adopted subsequently, the Court of Justice has already held that no indication was given in those judgments as to the consequences of failure to comply with the three-month time limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation, in its version prior to the entry into force of Regulation No 1168/2012 (judgment of 27 February 2014, *Ningbo Yonghong Fasteners* v *Council*, C-601/12 P, not published, EU:C:2014:115, paragraph 35). Those judgments are therefore irrelevant in the present case.

It is apparent from the case-law that, while, as a rule, any MET decision should, in accordance with the wording of the second subparagraph of Article 2(7)(c) of the basic regulation in its version preceding the entry into force of Regulation No 1168/2012, be taken within three months of the initiation of the investigation,

the fact nevertheless remains that the adoption of a decision outside that period does not, by virtue of that fact alone, entail the annulment of the regulation imposing an anti-dumping duty (judgment of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 167).

To the extent that the applicants claim that the fact that the Commission made a decision in respect of their MET claims after the three-month time limit had expired, or after more than three months following the receipt of the applicants' answers to the anti-dumping questionnaire undermined their right to have their MET claim examined, without the Commission being in possession of the elements enabling calculation of their anti-dumping margins, that is to say, their right that that claim should not be examined in accordance with the potential effect on the calculation of their dumping margins, it must be noted that, in accordance with Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from China, normal value is to be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned (judgment of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 158).

Accordingly, failure to comply with the time limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation can entail annulment of the contested regulation only if the applicants show that, in the absence of such failure, the Council might have adopted a different regulation more favourable to their interests (see, to that effect, judgments of 27 February 2014, *Ningbo Yonghong Fasteners* v *Council*, C-601/12 P, not published, EU:C:2014:115, paragraphs 34 and 40 to 42; of 4 February 2016, *C & J Clark International*, C-659/13 and C-34/14, EU:C:2016:74, paragraphs 140 and 141, and of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraphs 138 and 139).

There is no immediate link between the three-month time limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation and any knowledge on the part of the Commission of the effect of a MET decision on an undertaking's dumping margin. Moreover, the basic regulation does not require that the MET decision be adopted at a time when the Commission does not possess information enabling it to ascertain the effect of a MET decision on an undertaking's dumping margin. In that regard, even where that time limit has not in any way been exceeded at the time the MET decision is adopted, the Commission might take such a decision, notwithstanding the fact that it is already in possession of information enabling it to calculate its effect on the dumping margin of the undertaking concerned (judgment of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 165).

Although the Commission's decision on the MET claim was in fact adopted after the expiry of the three-month time limit as from the initiation of the investigation, and over three months after the applicants' replies to the anti-dumping questionnaire were obtained, it suffices to note that the applicants do not indicate which aspects of that decision could have been assessed differently if the Commission's decision had been taken within the three-month time limit or in the absence of any purported knowledge of the effect of that decision on its dumping margin (judgment of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 173).

It follows that the applicants have failed to show that the contested regulation could have been substantially different if the Commission's decision on its MET claim had been adopted within the three-month period laid down in Article 2(7)(c) of the basic regulation, in its version in force before 15 December 2012, or in the absence of any knowledge on the part of the Commission enabling it to calculate its dumping margin.

Fourthly, while Article 2(7)(c) of the basic regulation provides that the MET determination is to remain in force throughout the investigation, it follows from the judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598 paragraphs 111 and 112) that on the basis of the principles of compliance with the law and sound administration, and provided that the procedural safeguards provided for in the basic regulation are observed, the Court of Justice favours the correct application of the substantive criteria provided for in Article 2(7)(c) of the basic regulation over a requirement that a MET decision be unalterable, or that there be no knowledge of the effect of a MET decision on an undertaking's dumping margin at the time when such a decision is adopted. The Court held in that judgment that Article 2(7)(c) of the basic regulation cannot be interpreted in such a manner as to oblige the Commission to propose to the Council definitive measures which would perpetuate an error made in the original assessment of the substantive criteria set out in that provision to the detriment of the undertaking concerned. Accordingly, if the Commission realises in the course of the investigation that, contrary to its original assessment, an undertaking meets the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation, it must take appropriate action, while at the same time ensuring that the procedural safeguards provided for in the basic regulation are observed (judgment of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 166). The same applies in the opposite case, where the party concerned is revealed, in the course of the investigation and possibly after the imposition of provisional measures, not to be operating under market-economy conditions within the meaning of Article 2(7)(c) of the basic regulation, contrary to what the Commission's view might have been in its initial MET decision (judgment of 14 November 2006, *Nanjing Metalink* v *Council*, T-138/02, EU:T:2006:343, paragraph 45).

It follows that the applicants have not proved in any way that the failure to comply with the three-month time limit as from the initiation of the investigation created a definitively established situation or that as a result of that time limit being exceeded they had any acquired right.

On 15 December 2012, at the time of the entry into force of Regulation No 1168/2012, the applicants were, therefore, indisputably in a provisional situation, so that by applying that regulation immediately to the investigation in question, the Commission did not, by its decision of 15 March 2013, infringe either the

principle of the non-retroactivity, or the principles of legal certainty or protection of legitimate expectations.

It also follows that the applicants cannot properly rely in the present case on the principles of the protection of legitimate expectations and of legal certainty, since those principles concern situations established before the entry into force of new provisions (see, to that effect, judgment of 18 November 2004, *Ferriere Nord* v *Commission*, T-176/01, EU:T:2004:336, paragraph 139).

In the third place, and in any event, the applicants are not justified in claiming that Regulation No 1168/2012 was adopted in breach of the principles of protection of legitimate expectations and legal certainty. In so far as they rely in support of that claim on the unforeseeable nature of a change to their rights, it should be noted that, at the time of the initiation of the investigation, they could and should have foreseen the adoption of Regulation No 1168/2012. As found in the judgment of 14 March 2013, *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169, paragraph 26), if a prudent and alert economic operator can foresee the adoption of an EU measure likely to affect his interests, he cannot plead the principle of protection of legitimate expectations if the measure is adopted. As the applicants also agree, the proposal for amending Article 2(7) of the basic regulation was published by the Commission on 8 July 2012, before the initiation of the investigation leading to the adoption of the contested regulation. Interested parties, including the applicants who were represented in the administrative procedure by a legal adviser should have been aware of the intention to amend Article 2(7) of the basic regulation by extending the three-month period.

Moreover, in the judgment of 24 March 2011, *ISD Polska and Others* (C-369/09 P, EU:C:2011:175, paragraph 124), the Court of Justice held that a proposal for a decision from the Commission submitted to the Council cannot provide the foundation for any legitimate expectation that the aid in question will comply with the legal rules of the European Union. It follows, as the Council maintains, that a legitimate expectation claim cannot be based on a proposal, but that does not mean that a party cannot use a Commission proposal to contest the application of the principle of protection of legitimate expectations, as in the present case.

It follows that the fifth plea in law must be rejected.

The sixth plea in law, alleging infringement of Article 3(1) and Article 9(4) of the basic regulation

The applicants claim that the contested regulation was adopted in breach of Article 3 of the basic regulation since the injury caused by the dumped imports and that caused by other known factors were not examined separately. Consequently, that regulation was also adopted in breach of Article 9(4) of that regulation, since the level of duty imposed is in excess of what is necessary to remove the injury caused by dumped imports. Relying in particular on the judgment of 23 May 1985, *Allied Corporation and Others* v *Council* (53/83, EU:C:1985:227, paragraph 18), they argue that that illegality should result in the annulment of the contested regulation in its entirety.

They submit that it is settled case-law that Article 3(2) and (7) of the basic regulation requires that the institutions (i) examine and quantify separately the injurious effects of the dumped imports and the injurious effects of other known factors; (ii) ensure that the injury on which they intend to base their conclusions derives only from the dumped imports; and (iii) disregard any injury deriving from other factors. Failing such examination, there is no means of knowing whether injury ascribed to dumped imports was, in reality, caused by factors other than the dumped imports and whether the level of the anti-dumping measures imposed under Article 9(4) of the basic regulation does not go beyond what is necessary to offset the injury caused by the dumped imports (judgments of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraphs 16, 17, and 20; of 28 February 2008, *AGST Draht- und Biegetechnik*, C-398/05, EU:C:2008:126, paragraph 35; of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraphs 87 and 88; and of 25 October 2011, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, T-192/08, EU:T:2011:619, paragraphs 31 and 116 to 120).

In the present case, the institutions identified five factors, other than the allegedly dumped imports, causing injury to the EU industry, namely imports of cells from Taiwan, the reduction in Member State support schemes, including feed-in tariffs (FIT), raw material prices, imports of wafers, cells or modules from China by EU producers, and the financial crisis.

Nevertheless, the institutions failed to quantify and properly separate and distinguish the effects of those factors from the effects of the dumped imports. They merely assessed whether that injury was sufficient to break the causal link between the dumped imports and the injury suffered by the EU industry. In doing so, the institutions imposed duties at the level deemed necessary to remove all injury suffered by the EU industry, including the injury caused by the other factors. That duty was therefore in excess of what was necessary to remove the injury to the EU industry caused by dumped imports alone.

In reply to the Council's argument that, for the purpose of the injury margin determination, the institutions make their calculation on the basis of prices, profits and cost of production of the EU industry, without taking into account known factors other than the dumped imports that might have contributed to the injury of the EU industry, as those known factors have relevance only at the stage of the application of Article 3(7) of the basic regulation, and not Article 9(4) of that regulation, the applicants contend, in essence, that it is not possible that the abovementioned factors could have caused injury to the EU industry without affecting the EU industry's prices, profits and cost of production. The Council's reasoning is therefore inconsistent.

The institutions dispute the applicants' arguments.

In that regard, Article 1(1) of the basic regulation provides that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the European Union causes injury. Injury is defined in Article 3(1) of that regulation as material injury caused to the EU industry, threat of material injury to

the EU industry or material retardation of the establishment of an EU industry.

In accordance with Article 3(2) of the basic regulation, a determination of injury is to be based on positive evidence and is to involve an objective examination of, in particular, the volume of the dumped imports (judgment of 6 September 2013, *Godrej Industries and VVF* v *Council*, T-6/12, EU:T:2013:408, paragraph 61).

Article 3(5) of the basic regulation states that the examination of the impact of dumped imports on the EU industry concerned is to include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. That provision contains a list of factors which may be taken into account and states that that list is not exhaustive and that decisive guidance is not necessarily given by any one or more of those factors (see judgments of 28 November 2013, *CHEMK and KF* v *Council*, C-13/12 P, not published, EU:C:2013:780, paragraph 56, of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 20, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 32).

By virtue of Article 3(6) and (7), the institutions are, first, under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports. That is what is known as the 'attribution analysis'. Secondly, they must disregard any injury deriving from other factors, in order to ensure that the injury caused by those other factors is not attributed to the dumped imports. That is what is known as the 'non-attribution analysis'(judgments of 28 February 2008, *AGST Draht- und Biegetechnik*, C-398/05, EU:C:2008:126, paragraph 35, of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 23, and of 6 September 2013, *Godrej Industries and VVF* v *Council*, T-6/12, EU:T:2013:408, paragraph 76).

In that regard, it is for the institutions to ascertain, in the first place, whether the effects of those other factors were not such as to break the causal link between the imports in question and the injury suffered by the EU industry (see judgment of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 24 and the case-law cited).

If the EU institutions find that, despite such factors, the injury caused by the dumped imports is material, pursuant to Article 3(1) of the basic regulation, the causal link between those imports and the injury suffered by the EU industry can consequently be established (judgment of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 25; see, also, by analogy, judgments of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraphs 91, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 37).

The EU institutions may attribute responsibility for injury to the dumped imports, even if their effects are only a part of wider injury attributable to other factors. The fact that an EU producer is facing difficulties, whether or not attributable in part to causes other than dumping, is not a reason for depriving that producer of all protection against the injury caused by the dumped imports. That is why it is possible to impose anti-dumping duties, even if they leave intact problems posed for the EU industry by other factors (see, to that effect, judgments of 5 October 1988, *Brother Industries* v *Council*, 250/85, EU:C:1988:464, paragraph 42; of 5 October 1988, *Canon and Others* v *Council*, 277/85, EU:C:1988:467, paragraphs 62 and 63, and of 29 January 1998, *Sinochem* v *Council*, T-97/95, EU:T:1998:9, paragraphs 99 and 100 to 103).

In the second place, the EU institutions must also verify that the injury attributable to those other factors is not taken into account in the determination of injury within the meaning of Article 3(7) of the basic regulation and, consequently, that the anti-dumping duty imposed does not go beyond what is necessary to offset the injury caused by the dumped imports. Even if another factor is such as to break the causal link between the imports examined and the injury suffered by the EU industry, it may cause the EU industry separate injury (see, to that effect, judgment of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraph 88; see, also, judgment of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 24 and the case-law cited; judgments of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 36, and of 17 December 2008, *HEG and Graphite India* v *Council*, T-462/04, EU:T:2008:586, paragraph 145). The institutions must take into account the findings in that regard when determining the level of any anti-dumping duty (Opinions of Advocate General Trstenjak in *Moser Baer India* v *Council*, C-535/06 P, EU:C:2008:532, paragraph 171, and of Advocate General Sharpston in *Council* v *Gul Ahmed Textile Mills*, C-638/11 P, EU:C:2013:277, paragraph 36).

As the Courts of the European Union have already held, the objective of Article 3(6) and (7) of the basic regulation is, first, to ensure that the EU institutions separate and distinguish the injurious effects of the dumped imports from the injurious effects of other known factors, since if they do not separate and distinguish the impact of the various factors, they cannot legitimately conclude that dumped imports caused injury to the EU industry. The purpose of those rules is, second, to avoid granting the EU industry protection beyond that which is necessary (see, to that effect, judgments of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraph 90; of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 39, and of 6 September 2013, *Godrej Industries and VVF* v *Council*, T-6/12, EU:T:2013:408, paragraph 63).

However, it is not necessary in this context that the precise effects of the factor at issue should be set out, or quantified or monetised (see, to that effect, judgment of 4 October 2006, *Moser Baer India* v *Council*, T-300/03, EU:T:2006:289, paragraph 269, and Opinion of Advocate General Trstenjak in *Moser Baer India* v *Council*, C-535/06 P, EU:C:2008:532, paragraph 160).

It must again be recalled that it is for the parties pleading the illegality of the regulation at issue to adduce evidence to show that those factors could have had such an impact that the existence of injury caused to the EU industry and of the causal link between that injury and the dumped imports was no longer reliable in terms of the obligation of those institutions to disregard any injury resulting from other factors (judgments of 28 November 2013, *CHEMK and KF* v *Council*, C-13/12 P, not published, EU:C:2013:780, paragraph 75, and of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 28).

As regards the determination of the definitive anti-dumping duty, Article 9(4) of the basic regulation provided at the time of the adoption of the contested regulation that 'where the facts as finally established show that there is dumping and injury caused thereby, and the [EU] interest calls for intervention ..., a definitive anti-dumping duty shall be imposed by the Council ... The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the [EU] industry'. It follows clearly from that provision, read in the light of Article 3(7) of the basic regulation, as interpreted by the Courts of the European Union, and of Article 8(1) of that regulation, that the reference to injury in the last sentence must be understood as a reference to injury arising from dumping, as specified in the first sentence of that provision. That conclusion is supported by Article 21(1) of the basic regulation, according to which in the context of examining the EU interest, particular attention is to be paid to the need to eliminate the trade distorting effects of injurious dumping.

In so far as the anti-dumping duty imposed pursuant to Article 9(4) of the basic regulation may not in any case exceed the dumping margin or what is necessary to counter the harmful effects of the dumped imports (see paragraphs 193 and 194 above), that provision balances the interests of the exporting producers, importers, industry and consumers of the European Union and expresses, in respect of EU trade defence measures, the general principle of proportionality (judgments of 29 September 2000, *International Potash Company* v *Council*, T-87/98, EU:T:2000:221, paragraphs 39, 40 and 42; of 9 September 2010, *Usha Martin* v *Council and Commission*, T-119/06, EU:T:2010:369, paragraphs 44 and 53; and Opinion of Advocate General Trstenjak in *Moser Baer India* v *Council*, C-535/06 P, EU:C:2008:532, paragraph 170,).

While, with the exception of the limits regarding the maximum rate referred to in paragraphs 197 and 198 above, Article 9(4) of the basic regulation does not indicate a specific calculation of the anti-dumping duty, and does not impose any specific methodology on the institutions in order to ensure that the anti-dumping duty does not exceed what is necessary to counter the injurious effects of the dumped imports of the product concerned (see, to that effect, judgment of 6 September 2013, *Godrej Industries and VVF* v *Council*, T-6/12, EU:T:2013:408, paragraph 81), it must be recalled (see paragraphs 193 and 194 above) that those institutions must, in that context, take into account the conclusions they reached as regards attribution and non-attribution analyses (see paragraph 189 above).

If that were not so, there would be a risk of the trade defence measures in question going beyond what is necessary in the light of their objective, that is to say, in the case in point, removal of the injurious effects of dumping, so that they may also confer protection against the negative effects of factors other than dumped imports.

Moreover, contrary to what the Council claims in the present case, it follows from the institutions' decision-making practice that they do in fact take account of the findings concerning attribution and non-attribution analyses when determining the rate of an anti-dumping duty or accepting a price undertaking (see, inter alia, Commission Decision 91/392/EEC of 21 June 1991 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of certain asbestos cement pipes originating in Turkey, and terminating the investigation (OJ 1991 L 209, p. 37), recitals 26 to 29; Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the people's Republic of China, the Republic of Korea, Singapore and Thailand (OJ 1994 L 255, p. 50), recital 141; Council Regulation (EC) No 710/95 of 27 March 1995 imposing a definitive anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand and collecting definitively the provisional duty imposed (OJ 1995 L 73, p. 3), recital 49, and Council Regulation (EC) No 1331/2007 of 13 November 2007 imposing a definitive anti-dumping duty on imports of dicyandiamide originating in the People's Republic of China (OJ 2007 L 296, p. 1), recitals 128 to 134). That conclusion was, moreover, confirmed by the Commission at the hearing.

Furthermore, Articles 1, 8 and 15 of Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (OJ 2009 L 188, p. 93) are worded in a similar way to Articles 1, 3 and 9 of the basic regulation. Accordingly, the Court's interpretation of those provisions concerning subsidies is to apply *mutatis mutandis* to the area of anti-dumping (see, to that effect, judgments of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 28; and of 17 December 2008, *HEG and Graphite India* v *Council*, T-462/04, EU:T:2008:586, paragraph 119).

It should also be recalled that, it is settled case-law that, in the sphere of measures to protect trade, the EU institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine. It follows that review by the Court of the assessments made by the institutions must be confined to ascertaining whether the procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers. While the Court of Justice has expressly recognised that that is the case as regards the determination of factors causing injury to the EU industry in the context of an anti-dumping investigation, the same must be true for the same reasons as regards the determination of final measures. However, where the EU institutions have a wide power of appraisal, respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see judgment of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council*, T-633/11, not published, EU:T:2014:271, paragraphs 41 to 43 and the case-law cited; see, also, to that effect, judgment of 28 February 2008, *AGST Draht- und Biegetechnik*, C-398/05, EU:C:2008:126, paragraph 34).

The merits of the applicants' arguments must be examined in the light of those principles.

In the present case, having established that there is a causal link between the injury suffered by the EU industry and the dumped imports from China (recitals 161 to 163 of the provisional regulation, and recitals 228 to 235 of the contested regulation), the institutions assessed in a detailed and comprehensive manner other possible causes of injury, such as imports from third countries, including Taiwan (recitals 164 to 167 of the provisional regulation, and recitals 236 to 238 of the contested regulation), the development of consumption in the European Union (recitals 168 and 169 of the provisional regulation, and recitals 239 to 244 of the contested regulation), FITs (recitals 170 to 182 of the provisional regulation, and recitals 245 to 265 of the contested regulation), other financial support granted to the EU industry (recitals 183 and 184 of the provisional regulation, and recital 266 of the contested regulation), overcapacity (recitals 185 to 190 of the provisional regulation, and recitals 267 to 274 of the contested regulation), the impact of raw material prices (recitals 191 to 194 of the provisional regulation, and recitals 275 to 283 of the contested regulation), self-inflicted injury, including imports of the product concerned by the EU industry (recitals 204 to 210 of the provisional regulation, and recitals 284 to 294 of the contested regulation), competition from thin film products (recitals 207 to 210 of the provisional regulation, and recitals 295 to 300 of the contested regulation), the financial crisis and its effects (recitals 211 to 213 of the provisional regulation, and recitals 301 to 306 of the contested regulation), export performance of the EU industry (recitals 213 to 215 of the provisional regulation, and recital 305 of the contested regulation), the discovery of shale gas deposits in the European Union (recitals 216 et 217 of the provisional regulation, and recital 308 of the contested regulation), management decisions (recitals 220 and 221 of the provisional regulation, and recitals 310 and 311 of the contested regulation), the European Union's Emissions Trading Scheme (recitals 218 and 219 of the provisional regulation, and recital 309 of the contested regulation), other government policies (recital 222 of the provisional regulation, and recital 312 of the contested regulation), and the forerunner disadvantage.

The effects of those factors on the situation of the EU industry were duly distinguished and separated from the injurious effects of the dumped imports.

None of those factors was considered capable of breaking the causal link established between the dumped imports from China and the material injury suffered by the EU industry.

That finding is not disputed by the applicants, who claim rather, in essence, that the effects of the five other factors to which they referred should have been quantified or monetised, failing which they might have been taken into account in determining the injury within the meaning of Article 3(7) of the basic regulation and led, as a consequence, to an increase in the anti-dumping duty in excess of what was necessary to eliminate the injury caused by the dumped imports.

In that regard, in the first place, it must be recalled that, on the one hand, neither the basic regulation nor the case-law envisage an obligation, on the part of the institutions, to set out in detail, or to quantify or to monetise, the effects of the factor at issue (see, to that effect, judgment of 4 October 2006, *Moser Baer India* v *Council*, T-300/03, EU:T:2006:289, paragraph 269 and Opinion of Advocate General Trstenjak in *Moser Baer India* v *Council*, C-535/06 P, EU:C:2008:532, paragraph 160,).

On the other hand, the Council indicated in recital 220 of the contested regulation that it was not even possible to quantify the effects of other known factors. That assertion has not been disputed, let alone proved to be incorrect, by the applicants.

Moreover, when the applicants put forward their argument, during the administrative procedure, that the effects of other factors were not quantified, if it was their view that such quantification of other factors was possible, they ought then to have proposed, at least in general terms, an appropriate method. The applicants have not asserted that they proposed any such method.

In so far as the present plea in law is essentially based on the institutions' alleged failure to fulfil their obligation to quantify the effects of other factors, it must be rejected.

In the second place, and in addition, as regards whether the applicants have proved that other factors were taken into account in determining the injury within the meaning of Article 3(7) of the basic regulation and that, consequently, the anti-dumping duty was imposed at a rate in excess of what was necessary to eliminate the injury caused by the dumped imports, contrary to what settled case-law requires in the matter (see paragraph 196 above), the applicants have not put forward any argument before the Court, or any evidence, capable of showing that the factors to which they referred had an effect of such significance that

the existence of injury caused to the EU industry, and that of the causal link between that injury and the dumped imports, were no longer reliable in terms of the obligation of those institutions to disregard any injury resulting from other factors. In particular, they did not submit any analysis of the findings relating to the causal link in the definitive regulation.

In the third place, and in any event, examination of the relevant passages of the provisional and contested regulations does not reveal that factors other than dumped imports were taken into account in determining the injury. This is reinforced by the fact that the applicants have not invoked any manifest error of assessment in so far as concerns the analysis of those factors.

As regards the claim of self-inflicted injury on account of the purchase of the product concerned by the EU producers for resale on the EU market as their own, the Council considered in recital 290 of the contested regulation that those imports were complementary in nature as well as limited in terms of volume when compared to the total EU production and therefore their effect, if any, would only be marginal and could not be considered as breaking the causal link between the dumped imports and the injury suffered by the EU industry.

As regards the four other factors referred to by the applicants, the Council sets out in recitals 315 to 320 of the contested regulation, a cumulative assessment of their effects on the injury to the EU industry, along with its conclusions concerning the causal link.

While those recitals state, first, that those four factors contributed (recital 318 of the contested regulation) or could have contributed (recital 319 of the contested regulation) to the injury suffered by the EU industry, it also follows from them that the injurious effects of imports from Taiwan and raw-material supply contracts were simply hypothetical, or at most marginal, and that access to capital was rendered difficult not on account of the financial crisis, but rather on account of the dumped imports (recitals 315 to 318 of the contested regulation). According to the Council, the FIT levels were not so low that they would have prevented EU producers from selling the product concerned at non-injurious prices. The institutions take the view that reductions in FIT levels may explain reduced demand, as investments in certain locations were no longer viable. However, that reduction was not, according to the Council, capable of breaking the causal link, even together with other factors which could have contributed to the injury. Consequently, the cumulative effect of those four factors which possibly contributed to the injury, could not have broken the causal link between the dumping and injury.

Under those circumstances, it is important to recall that different conclusions set out in a definitive regulation cannot be interpreted alone, but in the light of all the reasoning developed therein (see, to that effect, judgments of 14 July 1995, *Koyo Seiko* v *Council*, T-166/94, EU:T:1995:140, paragraph 79, and of 4 October 2006, *Moser Baer India* v *Council*, T-300/03, EU:T:2006:289, paragraph 264).

As regards imports of the product concerned from Taiwan, it is clear from recitals 164 to 167 of the provisional regulation and recitals 236 to 238 of the definitive regulation that their effects were considered random, and at most marginal.

The FIT cutbacks, according to the Council, contributed to the decline in demand and profitability of the EU industry (see, inter alia, recitals 246, 254 and 259 of the contested regulation), but it appears, on the one hand, that the contribution of that factor to the injury suffered by the EU industry was not found to be absolutely certain, as, first, on the basis of information collected from Germany and Italy, which together account for approximately 75% of the EU market in 2011, the reduction in the average sales price was greater than the FIT cutbacks during the investigation period, secondly, the data collected show that, in certain countries such as Italy, even when the FITs were very high, the EU industry had to significantly lower its prices, third, during the investigation period, the EU producers had to sell at prices below their cost of production, which was mainly a consequence of the fact that the Chinese exporting producers had 80% of the EU market and therefore the power to influence the price-setting mechanism, fourthly, FIT cutbacks may also have been the result of the decreasing prices and not vice versa, and fifthly, current installations depend less and less on the FITs as photovoltaic grid parity is likely to have been reached for certain types of installations in several regions in Europe (see, inter alia, recitals 246, 247 and 260 of the contested regulation). On the other hand, even though those effects were established, they were considered limited. It was mainly the dumped imports from China that caused the prices to fall to unsustainable levels (see, inter alia, recital 249 of the contested regulation).

As regards the impact of raw material prices, the Council explained that it could only be rather marginal as any effect on the cost of production of cells and modules was diluted through the value chain. Furthermore, the EU industry was capable of renegotiating not only the prices provided for in the long-term contracts, but also the relevant contractual penalties (see, inter alia, recitals 276 and 279 of the contested regulation). Thus, as is apparent from recital 194 of the provisional regulation, confirmed by recital 283 of the contested regulation, even if some specific EU producers may have been affected by long term contracts for the supply of polysilicon, the EU industry, overall, did not suffer from these long term contracts and was able to fully benefit from the price decrease in polysilicon prices. The long-term contracts were therefore not found to contribute to the material injury suffered by the EU industry. The impact of that factor was, at most, minimal (recital 279 of the contested regulation).

Finally, as regards the financial crisis, it follows from recitals 302 to 305 of the contested regulation, which refers to recital 212 of the provisional regulation, that the ability of the EU industry to raise capital decreased significantly during the period considered. While the economic recession had a certain impact on the situation of the EU industry, the investigation showed that, despite the growth observed on the EU market between 2009 and 2011, the situation of the EU industry deteriorated as a result of the dumped imports from China heavily undercutting the EU industry's sales prices. It was therefore concluded that the potential effects of the financial crisis were aggravated by the increase of dumped imports from China, the limited access to finance was largely a consequence of

the negative market climate, and that the situation and prospects of the EU industry a consequence of the dumped imports. Therefore, while the financial crises had a certain impact on the situation of the EU industry, it could not break the causal link between the dumped imports and the injury suffered by the EU industry. Thus, the dumped imports were considered to be the cause of the EU industry's financial difficulties, rather than the financial crisis itself.

It follows that while the influence of certain factors was deemed hypothetical, no factor had, in any event, any more than limited effect on the injury to the EU industry. It also follows from recital 220 of the contested regulation that 'the effects of other factors on the Union's industry's negative development were considered to be limited'.

Therefore, it is not apparent from the contested regulation that those factors were the source of any significant injury that the institutions would have had to ensure were not attributed to the imports examined (judgment of 17 December 2008, *HEG and Graphite India* v *Council*, T-462/04, EU:T:2008:586, paragraph 157).

It also follows from the case-law that the failure to take into account an insignificant factor cannot call into question the institutions' findings in their examination under Article 3(7) of the basic regulation (see, to that effect, judgment of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraphs 27 to 29). Consequently, the same applies to the assessment under Article 9(4) of that regulation.

It follows that the sixth plea in law must be rejected.

Consequently, the action must be dismissed in its entirety.

Costs

Under Article 134(1) 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. In accordance with Article 138(1) of those rules, institutions which have intervened in the proceedings are to bear their own costs.

As the applicants have been unsuccessful, they must be ordered to bear their own costs and pay those incurred by the Council in accordance with the form of order sought by the Council. The Commission is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

Dismisses the action;

Orders JingAo Solar Co. Ltd, and the other applicants whose names appear in the annex to bear their own costs and to pay those incurred by the Council of the European Union;

Orders the European Commission to bear its own costs.

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 28 February 2017.

Registrar President

E. Coulon H. Kanninen

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* Language of the case: English.