Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 17 September 2015 [1]

Joined Cases C-659/13 and C-34/14

C & J Clark International Ltd (C-659/13)
v
The Commissioners for Her Majesty's Revenue & Customs(Request for a preliminary ruling from the First-tier Tribunal (Tax Chamber) (United Kingdom))
and
Puma SE (C-34/14)
v
Hauptzollamt Nürnberg(Request for a preliminary ruling

from the Finanzgericht München (Germany))

(References for a preliminary ruling — Dumping — Validity of Regulation (EC) No 1472/2006 — Imports of certain footwear with uppers of leather originating in China and Vietnam)

1. In the present cases, the Court is requested to give a ruling on whether Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam [2] must be declared invalid, *inter alia* on the ground that the European Commission did not examine the market economy treatment ('MET') claims submitted by exporting producers in China and Vietnam. The Court will also be required to rule on the consequences of such a declaration of invalidity.

I – **Legal framework**

A – *International law*

2. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO-GATT 1994) [3] is set out in Annex 1A of the Agreement establishing the World Trade Organization (WTO). [4]

1 — Original language: French.

2 — OJ 2007 L 275, p. 1, 'the regulation at issue'.

3 — OJ 1994 L 336, p. 103, 'the Anti-Dumping Agreement'.

4 — Agreement signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

3. Article 6.10 of the Anti-Dumping Agreement is worded as follows:

'The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.'

4. Article 9.2 of the Agreement provides as follows:

'When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.'

B – *EU law*

1. Customs Code

5. Article 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [5] provides as follows:

'1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220 (2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

5 — OJ 1992 L 302, p. 1, 'the Customs Code'.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.'

2. Basic regulation

6. Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community,[6] is designed to transpose the anti-dumping rules contained in the WTO Anti-Dumping Agreement. To that end it lays down rules concerning, in particular, the calculation of the margin of dumping, procedures for initiating and pursuing an investigation, the imposition of provisional and definitive measures and the duration and review of anti-dumping measures.

7. Article 1 of the basic regulation provides as follows:

'1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

2. A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

...'

8. Article 2 states as follows:

'A. Normal value

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

In order to determine whether two parties are associated account may be taken of the definition of related parties set out in Article 143 of Commission Regulation (EEC) 2454/93 of 2 July 1993 laying down provisions for the implementation of [Regulation No 2913/92[7]].

2. Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5% or more of the sales volume of the product under consideration to the Community.

However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

6 — OJ 1996 L 56, p. 1, and corrigendum OJ 2000 L 263, p. 34. Regulation as amended by Council Regulation (EC) No 2117/2005 of 21 December 2005 (OJ 2005 L 340, p. 17, 'the basic regulation').

7 — OJ 1993 L 253, p. 1.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative. A particular market situation for the product concerned within the meaning of the preceding sentence may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

The extended period of time shall normally be one year but shall in no case be less than six months, and sales below unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20% of sales being used to determine normal value.

5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration. If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilised. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this subparagraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low capacity utilisation rates, which are the result of start-up operations which take place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second subparagraph of paragraph 4. The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account where it is submitted prior to verification visits and within three months of the initiation of the investigation.

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;

(c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.

(a) In the case of imports from non-market economy countries … normal value shall 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 Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable into the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

...

(b) In anti-dumping investigations concerning imports from the People's Republic of China, Vietnam ..., normal value will 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. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms

and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation. ...'

9. Article 3 of the basic regulation provides:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

...

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

...'

10. Article 5 of the basic regulation, entitled 'Initiation of proceedings', is worded as follows:

'1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

...

4. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry.

...'

11. Article 9 of the basic regulation provides:

‘...

5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims, that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the Boards of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

6. 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 for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and de minimis margins, and margins established in the circumstances referred to in Article 18. Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, [[8]] as provided for in Article 17.’

12. The first and second subparagraphs of Article 11(8) of the basic regulation provide:

‘Notwithstanding paragraph 2, an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

In requesting a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.’

8 — Below referred to as ‘IT’.

13. Lastly, Article 17 of the regulation, concerning sampling, provides as follows:

'1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

...

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time-limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.

...'

3. The regulation at issue

14. Following an investigation initiated on 7 July 2005, the Commission adopted on 23 March 2006 Regulation (EC) No 553/2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. [9]

15. The Council of the European Union adopted the regulation at issue on 5 October 2006. The regulation imposes a definitive anti-dumping duty on imports of footwear with uppers of leather originating in China and Vietnam. The Commission applied the procedure laid down in Article 2(7) of the basic regulation and, in accordance with Article 17 of that regulation, used sampling to determine the anti-dumping duties by taking a sample of the Chinese and Vietnamese exporting producers ('the sample').

16. Pursuant to Article 1(3) of the regulation at issue, the rate of the anti-dumping duty was set at 16.5% for all companies established in China, except for Golden Step Industrial Co. Ltd ('Golden Step'), and at 10% for all companies established in Vietnam. Golden Step, which was granted MET under Article 2(7)(b) of the basic regulation, had its rate set at 9.7% .

17. Article 3 provided that the regulation at issue would apply for two years. The Council subsequently adopted Implementing Regulation (EU) No 1294/2009 [10] extending the validity of the anti-dumping duties imposed by the regulation at issue by 15 months, to the end of March 2011.

II – **Facts in the main proceedings**

18. Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co., Ltd (together 'Brosmann and Others') lodged an appeal against the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67), in which the General Court of the European Union dismissed their application for partial annulment of the regulation at issue. Zhejiang Aokang Shoes Co., Ltd ('Zhejiang Aokang') also

9 — OJ 2006 L 98, p. 3, 'the provisional regulation'.

10 — Council Regulation of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear **with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96 (OJ 2009 L 352, p. 1, 'the extending Regulation**').

lodged an appeal with the Court of Justice against the judgment in *Zhejiang Aokang Shoes* v *Council* (T-407/06 and T-408/06, EU:T:2010:68), in which the General Court dismissed its application for partial annulment of the same regulation. Brosmann and Others and Zhejiang Aokang both essentially requested the Court to annul those judgments and the regulation at issue in so far as it concerned them.

19. The Court granted their appeal, setting aside the judgments and annulling the regulation at issue in so far as it concerned Brosmann and Others [11] and Zhejiang Aokang. [12]

20. In those judgments, the Court held, inter alia, that even where the Commission uses sampling 'the obligation on the Commission to adjudicate upon a claim from a trader wishing to claim MET is clear from the very wording of Article 2(7)(b) of the basic regulation. That provision lays down the obligation to determine the normal value in accordance with Article 2(1) to (6), if it is shown, on the basis of properly substantiated claims by one or more producers, that market economy conditions prevail for those producers. Such an obligation concerning the recognition of the economic conditions under which each producer operates, in respect of the manufacture and sale of the like product concerned, is not affected by the manner in which the dumping margin is to be calculated'. [13]

A – *Case C-659/13*

21. From 1 May 2007 to 31 August 2010 C & J Clark International Ltd ('C & J Clark') imported leather footwear from China and Vietnam. Those imports were subject to an anti-dumping duty under the provisions of the regulation at issue.

22. On 30 June 2010 C & J Clark lodged a provisional claim seeking repayment, under Article 236 of the Customs Code, of GBP 42592829.52 by way of anti-dumping duties paid on those imports. The claim was based on the fact that the cases which led to the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710) were pending before the Court of Justice at the time and, according to C & J Clark, if those appeals were successful, it would be entitled to reimbursement of the anti-dumping duties which it had paid.

23. Following delivery of the judgments in those cases, C & J Clark repeated its application for reimbursement of the anti-dumping duties it had paid, taking the view that the judgments also applied to its suppliers. On 13 March 2013, the Commissioners for Her Majesty's Revenue & Customs rejected the application on the ground that none of the goods imported by C & J Clark came from the exporting producers named in those judgments.

24. On 11 April 2013, C & J Clark brought an action against that decision before the First-tier Tribunal (Tax Chamber) (United Kingdom), challenging the validity of the regulation at issue.

11 — See judgment in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53).

12 — See judgment in *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710).

13 — See judgment in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53, paragraph 38). See also judgment in *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710, paragraphs 28- 30).

B – *Case C-34/14*

25. Puma SE ('Puma') imported footwear with uppers of leather originating from China and Vietnam into the European Union from 2006 to 2011. Under the provisions of the regulation at issue it paid anti-dumping duties totalling EUR 5059386.70 on those imports. Its suppliers were Chinese companies and companies related to them, and Vietnamese companies and companies related to them.

26. Some of those suppliers were included in the sample during the investigation and underwent on-site checks. Puma's other suppliers, which were prepared to cooperate, were not taken into account in the sample.

27. On 21 December 2011 and 20 January 2012, Puma applied to the Hauptzollamt Nürnberg (Customs Office, Nuremberg) for repayment of anti-dumping duties totalling EUR 5100983.90 paid during the period from 7 April 2006 to 1 April 2011 under Article 236 of the Customs Code. At the same time Puma applied for the time-limit for reimbursement of import duties to be extended to cover the whole of the period in question, and therefore to apply retroactively from 7 April 2006.

28. By a decision of 5 July 2012 the Hauptzollamt Nürnberg rejected Puma's application on the ground that the Court of Justice had annulled the regulation at issue only in respect of certain producers, which did not include its supplier.

29. Puma lodged a complaint on 18 July 2012 against that decision, at the same time amending the amount it was seeking to have repaid, which was now EUR 5059386.70. The Hauptzollamt Nürnberg rejected that complaint by a decision of 13 November 2012.

30. Puma therefore brought an action against the latter decision before the Finanzgericht München (Finance Court, Munich) (Germany).

III – **The questions referred**

31. The First Tier Tribunal (Tax Chamber) and the Finanzgericht München two referring courts have doubts as to the validity of the regulation at issue. They have therefore decided to stay proceedings and to refer questions to the Court for a preliminary ruling.

A – *Case C-659/13*

32. The First-tier Tribunal (Tax Chamber) has referred the following questions to the Court for a preliminary ruling:

'(1) Is [the regulation at issue] invalid in so far as it violates Articles 2(7)(b) and 9(5) of the basic anti-dumping regulation given that the Commission did not examine the [MET] and [IT] claims submitted by exporting producers in China and Vietnam that were not sampled in accordance with Article 17 of the [basic regulation?

(2) Is [the regulation at issue] invalid in so far as it violates Article 2(7)(c) of the basic anti-dumping regulation given that the Commission did not make a determination within three months of the initiation of the investigation of the market economy treatment claims submitted by exporting producers in China and Vietnam that were not sampled pursuant to Article 17 of the [basic regulation]?

(3) Is [the regulation at issue] invalid in so far as it violates Article 2(7)(c) of the [basic regulation] given that the Commission did not make a determination within three months of the initiation of the investigation of the market economy treatment claims submitted by exporting producers in China and Vietnam that were sampled pursuant to Article 17 of the [basic regulation]?

(4) Is [the regulation at issue] invalid in so far as it violates Articles 3, 4(1), 5(4), and 17 of the [basic regulation] given that insufficient Community industry producers cooperated so as to allow the Commission to make a valid injury assessment and, as a result, a valid causation assessment?

(5) Is [the regulation at issue] invalid in so far as it violates Article 3(2) of the [basic regulation] and Article 253 EC given that evidence in the investigation file showed that the Community industry injury was assessed using materially flawed data, and given that the [regulation at issue] does not provide any explanation why this evidence was ignored?

(6) Is [the regulation at issue] invalid in so far as it violates Article 3(7) of the basic anti-dumping regulation given that the effects of other factors known to be causing injury were not properly separated and distinguished from the effects of the allegedly dumped imports?

(7) To what extent may Member State courts rely on the interpretation of [the regulation at issue] made by the Court of Justice in the judgments in *Brosmann Footwear (HK) and Others* v *Council* [C-249/10 P, EU:C:2012:53] and *Zhejiang Aokang Shoes* v *Council* [C-247/10 P, EU:C:2012:710] to consider that duties were not legally owed within the meaning of Article 236 of the Customs Code for companies that, just as the Appellants in the Brosmann and Zhejiang Aokang cases, were not sampled but did submit [MET] and [IT] requests that were not examined?'

B – *Case C-34/14*

33. The Finanzgericht München has referred the following questions to the Court:

'(1) Are [the regulation at issue] and [the extending regulation] valid as a whole in so far as they were not annulled by the judgments in *Brosmann Footwear (HK) and Others* v *Council* [C-249/10 P, EU:C:2012:53] and *Zhejiang Aokang Shoes* v *Council* [C-247/10 P, EU:C:2012:710]?

(2) In the event that the answer to question 1 is in the negative, but the abovementioned regulations are not invalid as a whole:

(a) In relation to which exporters and producers in the People's Republic of China (PRC) and in Vietnam, from which Puma purchased goods in the period from 2006 to 2011, are [the regulation at issue] and [the extending regulation] invalid?

(b) Does a declaration that the abovementioned regulations are invalid in whole or in part constitute unforeseeable circumstances or *force majeure* within the meaning of the second subparagraph of Article 236(2) of the Customs Code?'

IV – **Analysis**

A – *Admissibility of the plea of illegality of the regulation at issue and the extending regulation*

34. The Council and the Commission consider that the applicants in the main proceedings are not justified in raising a plea of illegality against the regulation at issue before the referring courts. First of all, Puma had the opportunity to bring an action for annulment against the regulation before the EU judicature. The Commission refers to the judgment in *TWD Textilwerke Deggendorf*,[14] according to which a litigant may not reasonably call in question before the national courts, by way of an objection, the lawfulness of a decision of the European Union where it could have challenged that decision in a direct action for annulment and it allowed the mandatory time-limit laid down in that regard to expire.[15]

35. Secondly, the Council and the Commission consider that the applicants in the main proceedings also had the opportunity to bring an action on the basis of Article 11(8) of the basic regulation, which provides that an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level below the level of the duty in force. Accordingly, in the view of the two institutions, the applicants in the main proceedings may not circumvent the requirements and time-limits laid down in that provision by raising a plea for a declaration of illegality before a national court. The judgment in *TWD Textilwerke Deggendorf*[16] should therefore be extended to cover this situation.

36. Thirdly, the Council and the Commission consider that importers such as C & J Clark and Puma may not rely on an alleged infringement of the right to have MET or IT claims examined in order to have the regulation at issue and the extending regulation declared invalid. According to the two institutions, that right is a subjective right granted solely to exporting producers which have submitted a claim to that effect.

37. First of all, I would point out that, according to consistent case-law, a litigant's ability to plead, before the court hearing its action, the invalidity of provisions in European Union acts presupposes that it had no right of direct action under Article 263 TFEU by which it could challenge those provisions. However, it follows from that same case-law that the admissibility of such a direct action must be beyond any doubt.[17]

38. As regards more particularly regulations imposing an anti-dumping duty, the Court has held that those regulations, although by their nature and scope of a legislative nature, may be of direct and individual concern to those producers and exporters of the product in question to whom dumping is imputed on the basis of information originating from their business activities. Generally, that is the case with those exporters and producers who are able to establish that they were identified in the measures adopted by the Council and the Commission or were concerned by the preliminary investigations. The same is true of those importers of the product concerned whose resale prices were taken into account for the construction of export prices and who are consequently concerned by the findings relating to the existence of dumping.[18] The Court has also held that importers associated

14 — C-188/92, EU:C:1994:90.

15 — Paragraphs 17 and 18.

16 — C-188/92, EU:C:1994:90.

17 — Judgment in *Valimar* (C-374/12, EU:C:2014:2231, paragraphs 28 and 29 and the case-law cited). See also judgment in *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 18).

18 — Judgment in *Valimar* (C-374/12, EU:C:2014:2231, paragraphs 30 and 31 and the case-law cited).

with exporters in third countries on whose products anti-dumping duties have been imposed may challenge the regulations imposing such duties, particularly where the export price has been calculated on the basis of those importers' resale prices on the Community market and where the anti-dumping duty itself is calculated on the basis of those resale prices.[19]

39. In the main proceedings, the Commission claims that, as Puma is an 'original equipment manufacturer',[20] according to the case-law of the Court, it was not entitled to raise a plea of illegality. At the hearing, the Commission considered that the same was true of C & J Clark.

40. It is true that, in the judgments in *Nashua Corporation and Others* v *Commission and Council*[21] and *Gestetner Holdings* v *Council and Commission*,[22] the Court, without defining the applicants as importers or exporters, took account of the particular features of the business dealings between the latter, regarded as OEMs, and the producers covered by the anti-dumping measures. It thus found that, in the light of those dealings, the OEMs were concerned by the findings relating to the existence of the dumping complained of and that the provisions of the contested regulations regarding the producers' dumping practices were therefore of direct and individual concern to the OEMs,[23] thus entitling them to bring an action for annulment against those regulations.

41. More precisely, the Court noted that, in order to construct the normal value, the profit margin of the exporting producers was revised downwards in view of the particular features of their business dealings with the OEMs, thus resulting in a different dumping margin from those ascertained for sales of the products concerned under the exporter's own brand. All the dumping margins were then taken into account to set the anti-dumping duty. The Court also noted that the traders in question, including the OEMs, were identified by the EU institutions.[24] Consequently, there was no doubt that the OEMs were concerned by the investigation and distinguished from other traders in the regulations at issue.

42. That does not apply in the cases before us here.

43. In this instance, it is not evident either from the regulation at issue and the extending regulation or from the documents before the Court that the dumping margin was determined on the basis of information and economic data supplied by C & J Clark and Puma. In order to show that the applicants in the main proceedings could have brought an action for annulment against those regulations, the Commission refers to recitals 119 and 120 of the provisional regulation and to recitals 132 to 135 of the regulation at issue.

44. Recitals 119 and 120 of the provisional regulation merely state that some interested parties considered that the analogue State chosen for determining the normal value — namely the Federative Republic of Brazil — was not the most suitable since certain costs, such as those relating to research and development, were not borne by some Chinese and Vietnamese exporting producers but were supported by their customers, whereas those costs were borne by the Brazilian producers. The interested parties challenged the choice of that State because there was, in fact, no OEM, which meant that the production cost structure between the States concerned by the anti-dumping measures

19 — Ibid. (paragraph 32 and the case-law cited).

20 — 'OEM'. An OEM has been defined by the Court as a company supplying under its own brand name products manufactured by other undertakings (see judgment in *Nashua Corporation and Others* v *Commission and Council*, C-133/87 and C-150/87, EU:C:1990:115, paragraph 3).

21 — C-133/87 and C-150/87, EU:C:1990:115.

22 — C-156/87, EU:C:1990:116.

23 — Judgments in *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115, paragraphs 16 to 20) and *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116, paragraphs 19 to 23).

24 — Idem.

and the Federative Republic of Brazil was different. Recital 120 of the provisional regulation then simply states that that difference was not a reason to reject the Federative Republic of Brazil as a suitable analogue State and that adjustments could be made for such costs when establishing normal value.

45. As for recitals 132 to 135 of the regulation at issue, I note that their purpose is to provide grounds for applying an adjustment to the normal value in order to take account of research and development costs, which were different in the States concerned by the anti-dumping measures and in the analogue State.

46. It must therefore be stated that, on reading those recitals, there is no basis for claiming that C & J Clark and Puma provided information and economic data allowing the dumping margin to be calculated and thus enabling them to be distinguished from any other trader.

47. Furthermore, it is important to mention the order in *FESI* v *Council*[25] following an action for annulment brought by the Fédération européenne de l'industrie du sport (FESI) (Federation of the European Sporting Goods Industry), of which Puma is a member, against the extending regulation. FESI considered that it and its members were individually concerned in the light of the judgments in *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115) and *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116). The General Court held, however, that FESI was not individually concerned by dint of the fact that its members provided information and data during the review period,[26] after which the extending regulation was adopted.

48. More precisely, the General Court stated in paragraph 49 of that order that '[i]t is apparent [from that regulation] that the EU institutions assessed a range of complex economic issues in order to predict the consequences of the expiry of the anti-dumping measures. Accordingly, the adjustment of the import price for the calculation of the undercutting margin, made in order to take into account importers' design and research and development costs, is only one element among others making it possible to reach a conclusion as to injury and in no way makes it possible to distinguish the suppliers of that information and data in the same way as the traders in the cases which gave rise [to the judgments in *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115) and *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116)]'.

49. Moreover, the General Court explained, in paragraph 51 of the order in in *FESI* v *Council* (T-134/10, ET:T:2014:143), that '[i]t has not been established that the EU institutions based the calculation of the dumping margin on the information and data supplied by FESI's members. It can be seen from recital 122 of the [extending] regulation and recitals 133 and 135 of the [regulation at issue] that account was taken of the Brazilian producers' design and research and development costs for the purposes of making an adjustment on the basis of the difference between those costs and the research and development costs borne by Vietnamese and Chinese producers. Admittedly, it is apparent from recital 135 of the [regulation at issue] that the adjustment takes account of any differences between sales to OEMs and own brand sales, but that does not mean that the data and information supplied by FESI's members were used to make an adjustment to the normal value, thereby distinguishing them from other traders'.

25 — T-134/10, EU:T:2014:143.

26 — Paragraph 54 of that order.

50. In view of those factors, I consider that, in all likelihood, C & J Clark and Puma are not individually concerned by the regulation at issue and by the extending regulation and that, consequently, they could not have brought an action for annulment under Article 263 TFEU against those regulations. At the very least, it is highly doubtful whether such an action would have been admissible. I would reiterate that a litigant's ability to plead, before the court hearing its action, the invalidity of provisions in European Union acts presupposes that it had, without any doubt, no right of direct action under Article 263 TFEU. [27]

51. In the light of the difficulty in establishing whether C & J Clark and Puma were or were not able to bring an action for annulment against the regulation at issue and the extending regulation, it seems to me that the plea of illegality which they raise before the referring courts against those regulations must be declared admissible if they are to be afforded effective judicial protection.

52. Next, I would reject the argument of the Council and the Commission that, since C & J Clark and Puma had the opportunity to bring an action on the basis of Article 11(8) of the basic regulation, they may not circumvent the requirements and time-limits laid down in that provision by raising a plea for a declaration of illegality before a national court.

53. I would point out that Article 11(8) provides that an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force. Such an action for reimbursement relates to cases where the behaviour of the exporting producers concerned has changed, resulting either in a change in the dumping margin because the normal value has itself been altered (reduced margin), or in the end of dumping (eliminated margin). In those specific cases, importers are not challenging the legality of the anti-dumping duties imposed, but claim that there has been a change in the situation having a direct impact on the dumping margin originally determined.

54. It is therefore clear that the action provided for in Article 11(8) of the basic regulation is different from an action brought before the referring courts during which a plea of illegality raised by the applicants in the main proceedings against the regulation at issue seeks a finding that the anti-dumping duties paid to the competent public authorities were unlawful, thus enabling them to request a refund of those duties under Article 236 of the Customs Code.

55. Finally, I do not share the view of the Council and the Commission that it is impossible for importers such as C & J Clark and Puma to rely on an alleged infringement of the right to have MET or IT claims examined in order to have the regulation at issue and the extending regulation declared invalid.

56. I would point out that the Court has had cause, on a number of occasions, to consider the validity of an anti-dumping regulation in the context of a plea of illegality raised by an importer who has, or has had, to pay anti-dumping duties. In the case which led to the judgment in *Ikea Wholesale*, [28] for example, the Court had the opportunity to consider the validity of an anti-dumping regulation in the light, in particular, of the calculation of the normal 'constructed' value of the product concerned and the 'zeroing' method used in establishing the overall dumping margins. [29] In the case which led to the judgment in *Valimar*, [30] it considered the validity of an anti-dumping regulation in the light of the method for calculating the export price in the context of an expiry review of the anti-dumping

27 — See point 37 of this Opinion.

28 — C-351/04, EU:C:2007:547.

29 — Paragraphs 43 to 57.

30 — C-374/12, EU:C:2014:2231.

measures.[31] More recently, in the case which led to the judgment in *TMK Europe*,[32] the Court was led to ascertain whether factors other than those relating to imports could have been so significant as to call into question the existence of a causal link between the harm suffered by Community industry and the dumped imports, thus rendering the anti-dumping regulation in question invalid.[33]

57. In none of those cases did the Court ever call into question the possibility for importers to rely on infringement of their right to have applied to them a particular method for calculating the normal value or the export price for the purpose of establishing anti-dumping duties.

58. Anti-dumping regulations concern importers such as those in the cases cited or such as C & J Clark and Puma not, as we have seen, by virtue of certain attributes peculiar to them or factual circumstances which differentiate them from all other persons, but merely by virtue of their objective status as importers of the products in question, in the same way as any other trader who is, or might in the future be, in the same situation.[34]

59. The effects of the regulation imposing those duties will affect them, as importers of products subject to anti-dumping duties, directly in so far as they will be required to pay the duties, often a considerable sum. The grant of MET to an exporting producer influences the determination of the normal value and, ultimately, the dumping margin and the anti-dumping duties imposed.[35] Similarly, the grant of IT means that exporting producers who fulfil the necessary conditions are subject to an individual duty, distinguishing them from other exporting producers[36] and very often resulting in the application of a lower anti-dumping duty.

60. In the light of all the foregoing considerations, I consider that the plea of illegality raised by C & J Clark against the regulation at issue and the plea raised by Puma against that regulation and the extending regulation are admissible.

B – *The validity of the regulation at issue*

61. It should be observed that the referring court in Case C-34/14 refers to the validity of both the regulation at issue and the extending regulation. It states in that regard that the arguments it puts forward in its request for a preliminary ruling relate only to objections concerning the legality of the regulation at issue, which is the basic act, whereas the extending regulation merely extended the validity of the anti-dumping measures.[37] As we will see, the examination of the questions referred by the court concerning the regulation at issue, and the conclusions I reach, also apply to the extending regulation in so far as it reproduces the methods used to determine the definitive anti-dumping duties.

1. Examination of MET and IT claims

62. The first questions in the present cases require the Court to decide whether the regulation at issue is invalid because of an infringement of Articles 2(7)(b) and (c) and 9(5) of the basic regulation. C & J Clark and Puma consider that those provisions have been infringed in so far as the MET and IT claims submitted by exporting producers not included in the sample, from whom they imported the products concerned, were not examined by the Commission.

31 — Paragraphs 39 to 61.

32 — C-143/14, EU:C:2015:236.

33 — Paragraphs 31 to 45.

34 — Judgment in *Valimar* (C-374/12, EU:C:2014:2231, paragraph 37).

35 — See Article 2(7)(b) and (11) of the basic regulation.

36 — See Article 9(5) of the regulation.

37 — See recital 519 of the extending regulation.

63. In that connection I would point out that the Court held, in the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), that the Commission is under an obligation to adjudicate upon a claim from a trader wishing to claim MET even where that trader is not sampled. [38]

64. The Court stated that 'Article 2(7) of the basic regulation is one of the provisions of that regulation concerned solely with the determination of normal value, whereas Article 17 of that regulation — concerning sampling — is one of the provisions relating to, inter alia, the methods available for determining the dumping margin. Thus, the provisions differ in content and purpose'. [39]

65. The Court added that Article 2(7)(b) of the basic regulation 'lays down the obligation to determine the normal value in accordance with Article 2(1) to (6), if it is shown, on the basis of properly substantiated claims by one or more producers, that market economy conditions prevail for those producers. Such an obligation concerning the recognition of the economic conditions under which each producer operates, in respect of the manufacture and sale of the like product concerned, is not affected by the manner in which the dumping margin is to be calculated'. [40]

66. The Court, having held that the judgments under appeal had to be set aside on those grounds, and having considered that the state of the proceedings permitted final judgment, held that the regulation at issue had to be annulled in so far as it related to the appellants in those two cases. [41]

67. Although the Court did indeed state, in paragraph 32 of the judgment in *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), that 'the General Court was wrong to reject, in paragraph 91 of the judgment under appeal, the appellant's argument that Article 2(7)(b) and (c) of the basic regulation obliged the Commission to examine MET/IT claims from non-sampled traders', and although that judgment was accordingly set aside on that ground, the Court, however, went on to hold only that the Commission was obliged to adjudicate on a claim for MET. It thus did not express a view on whether the Commission was also obliged to examine IT claims.

68. It is therefore now necessary to ascertain whether the Commission is under such an obligation.

69. The Commission submits that it is not required to examine IT claims from exporting producers who are not included in the sample, where it has concluded, in applying Article 17(3) of the basic regulation, that the calculation of individual dumping margins would be unduly burdensome and would prevent it from completing the investigation in good time.

70. I do not agree.

71. I consider that the provisions on IT, just as those on MET, differ in content and purpose from Article 17(3) of the basic regulation.

72. IT may be granted solely to exporting producers in non-market economy States. The application of IT to an exporting producer enables it to obtain an individual anti-dumping duty which will, in most cases, prove to be lower than the single rate imposed on exporting producers in a non-market economy country. In order to be granted such treatment, the producer must supply information to the Commission demonstrating that it operates independently of State interference, in other words

38 — See, respectively, paragraphs 36 to 38 and paragraphs 29 to 32 of those judgments.

39 — See, respectively, paragraph 37 and paragraph 33 of those judgments.

40 — See, respectively, paragraph 38 and paragraph 30of those judgments.

41 — See, respectively, paragraphs 40 to 43 and paragraphs 34 to 37 of those judgments.

that it is free, in law and in fact, to determine its export sales. Thus, it must, in particular, demonstrate that it is free to repatriate capital and profits in the case of wholly or partly foreign owned firms, that export prices and quantities and conditions and terms of sale are freely determined, and that the majority of the shares belong to private persons. [42]

73. Article 9(5) of the basic regulation thus lays down the criteria to be satisfied in order to be granted IT. Where those criteria are satisfied, the grant of IT will serve to establish the method for calculating normal value. [43] It is only after that method has been used to determine normal value and after the export price has been determined on the basis of information supplied by the exporting producers granted IT that the dumping margin will, in turn, be determined. At that stage, those producers may request, under Article 17(3) of the basic regulation, that the dumping margin be calculated individually. The Commission may then grant that request, or, if it considers that the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time, it may reject the request and fix a country-wide dumping margin.

74. It is therefore clear that a claim for IT, just as a claim for MET, is to be distinguished from a request for an individual dumping margin. Consequently, the Commission could not, in my view, extend the application of Article 17(3) of the basic regulation to IT claims, and it was under an obligation to examine such claims.

75. In the light of all the foregoing considerations, I take the view that the regulation at issue must be held to be invalid in so far as the Commission did not examine MET and IT claims from non-sampled Chinese and Vietnamese exporting producers, contrary to the requirements laid down in Articles 2(7)(b) and 9(5) of the basic regulation. Since the extending regulation prolongs the duration of the anti-dumping duties determined by the regulation at issue, [44] it too must be declared invalid.

2. The consequences to be drawn from failure to observe the three-month time-limit for examining MET and IT claims

76. Questions 2 and 3 in Case C-659/13 and Question 1 in Case C-34/14 require the Court to rule whether the regulation at issue is invalid in so far as the Commission did not make a determination within the time-limit of three months on the MET claims submitted by sampled and non-sampled exporting producers.

77. The applicants in the main proceedings maintain that it is clear from the judgment in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) that the Commission's failure to observe the three-month time-limit laid down in Article 2(7)(c) of the basic regulation for determining whether an exporting producer satisfies the conditions for being granted MET automatically renders the regulation at issue invalid. The Council and the Commission, on the other hand, consider, in particular, that it is clear from the judgment in *Ningbo Yonghong Fasteners* v *Council* (C-601/12 P, EU:C:2014:115) that failure to observe that time-limit may result in the annulment of the regulation at issue only if the applicants in the main proceedings show that, had that time-limit not been exceeded, the Council might have adopted a different regulation more favourable to their interests.

42 — See Article 9(5)(a) to (c) of the basic regulation.

43 — See the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 78), where the General Court rightly arrived at that finding, but without drawing the correct conclusions from it.

44 — See recital 519 and Article 1(3) of the extending regulation.

78. I note that it is apparent from the judgment in *Brosmann Footwear (HK) and Others* v *Council*[45] that, in their third ground of appeal, the appellants submitted that the General Court had erred in law in finding that they could not rely on Article 2(7)(c) of the basic regulation in relation to their own MET claims on the ground that the three-month period 'relate[d] to cases in which the Commission [was] required to examine' the claims for MET and for IT claims.[46] The Court of Justice, when examining that ground of appeal, simply stated that, under that provision, a determination whether the producer meets the criteria referred to in the first subparagraph of Article 2(7)(c) in order to claim MET is to be made within three months of the initiation of the investigation.[47] Moreover, the General Court's judgment in that case was set aside not only on the basis of that ground alone, but also on the basis of the first two grounds of appeal submitted by the appellants.[48]

79. It therefore appears difficult, on a reading of the judgment in *Brosmann Footwear (HK) and Others* v *Council*,[49] to conclude that the Court held that failure to observe the three-month time-limit laid down in Article 2(7)(c) of the basic regulation automatically renders the regulation at issue invalid. Furthermore, in paragraph 35 of its judgment in *Ningbo Yonghong Fasteners* v *Council*,[50] the Court explained that, in the judgment in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53), it gave no indication as to the consequences of failure to observe that time-limit.

80. Regarding the judgment in *Ningbo Yonghong Fasteners* v *Council* (C-601/12 P, EU:C:2014:115), contrary to the submissions of the Council and the Commission, I consider that it has not been clearly established that failure to observe the time-limit can lead to the annulment of the regulation at issue only if the applicants show that, had that time-limit not been exceeded, the Council might have adopted a different regulation more favourable to their interests. In the case which led to that judgment, the Court, on appeal, was required to assess two grounds of appeal relating to the General Court's interpretation of the second subparagraph of Article 2(7)(c) of the basic regulation concerning the time-limit for submitting a claim for MET. The first ground of appeal was declared inadmissible by the Court.[51] As for the second ground of appeal, the Court simply stated that the appellant had made an incorrect reading of the judgment under appeal[52] and that '[i]n those circumstances, [this] ground of appeal clearly lacks any basis in fact and must therefore be declared unfounded, without there being any need to give a ruling as whether the time-limit laid down in [that provision] constitutes a procedural guarantee intended to protect Ningbo Yonghong Fasteners' rights of defence'.[53]

81. Admittedly, in paragraph 42 of that judgment, the Court held that '[i]n any event, the arguments submitted by Ningbo Yonghong Fasteners in connection with that ground of appeal [were] ineffective *ab initio* since that company has not adduced any reasons to show that, if the Commission had complied with the three-month time-limit in question, the MET decision or the regulation at issue might have been more favourable to Ningbo Yonghong Fasteners' interests, and especially since it has not disputed before this Court the findings made in the judgment under appeal concerning the substance of the MET decision'. This added consideration suggests that the Court, in reality, agrees

45 — C-249/10 P, EU:C:2012:53.
46 — Paragraph 25.
47 — Paragraph 39.
48 — Paragraph 40.
49 — C-249/10 P, EU:C:2012:53
50 — C-601/12 P, EU:C:2014:115.
51 — Paragraphs 29 to 33.
52 — Paragraphs 39 and 40.
53 — Point 41.

with the General Court's decisions on the consequences to be drawn from failure to comply with the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation.[54] However, those decisions provide no certainty, in my view, and the present cases give the Court an opportunity to make its position clear.

82. In my opinion the case-law should be confirmed. As the General Court points out, the basic regulation does not contain any indication as regards the consequences of exceeding the three-month period for granting MET, unlike other procedural time-limits laid down in that regulation.[55] Likewise, the preparatory work which led to the insertion of Article 2(7)(c) of the basic regulation sheds no more light, in that it merely states that claims for MET must be examined early enough in the investigation in order to allow the other time-limits to be met.[56]

83. In the judgment in *Foshan Shunde Yongjian Housewares & Hardware* v *Council*,[57] the Court of Justice had to rule whether failure to comply with the 10-day period prescribed in Article 20(5) of the basic regulation must result in annulment of the regulation at issue imposing anti-dumping duties. That provision requires the Commission to allow the companies concerned a minimum period of 10 days to submit their observations on final disclosure of the facts and the considerations on the basis of which it is intended to recommend the imposition of definitive measures. Just as with Article 2(7)(c) of the basic regulation, Article 20(5) does not contain any indication as regards the consequences of failure to comply with that time-limit.

84. The Court of Justice, confirming the General Court's position, held that 'failure to comply with [that time-limit] can result in annulment of the regulation at issue only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus in fact adversely affected the applicant's rights of defence'.[58] In that regard, it pointed out that 'it is clear from the case-law of the Court of Justice that an applicant cannot be required to show that the Commission's decision would have been different in content but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error'.[59]

85. Moreover, in that same judgment, the Court had occasion to consider the consequences of the adoption, by the Commission, of a decision concerning the grant of MET, taken after the three-month period and replacing a preliminary decision. The Court stated that, 'in the light of the principles of legality and sound administration, [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 those substantive criteria to the detriment of the undertaking concerned'.[60] It found that, 'if the Commission realises in

54 — See, by way of example, the judgments in *Shanghai Excell M & E Enterprise and Shanghai Adeptech Precision* v *Council* (T-299/05, EU:T:2009:72); *Since Hardware (Guangzhou)* v *Council* (T-156/11, EU:T:2012:431), and *Gold East Paper and Gold Huasheng Paper* v *Council* (T-443/11, EU:T:2014:774).

55 — Judgment in *Shanghai Excell M & E Enterprise and Shanghai Adeptech Precision* v *Council* (T-299/05, EU:T:2009:72, paragraphs 116, 118 and 119).

56 — See Communication from the Commission to the Council and the European Parliament on the treatment of former non-market economies in anti-dumping procedures and a proposal for a Council Regulation amending Council Regulation (EC) No 384/96 [COM(97) 677 final]. Similarly, the preparatory work which led to the adoption of Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012 amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community (OJ 2012 L 344, p. 1) does not provide any further information on the purpose of such a time-limit, which was extended to eight months.

57 — C-141/08 P, EU:C:2009:598.

58 — Paragraphs 81 and 107 and the case-law cited.

59 — Paragraph 94.

60 — Paragraph 111.

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'. [61]

86. The General Court, rightly in my opinion, concluded that it must be held 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, be taken within three months of the initiation of the investigation and that determination should remain in force throughout the investigation, the fact nevertheless remains that, under EU law as it currently stands and according to the EU judicature's interpretation of that provision […], first, the adoption of a decision outside that period does not, by virtue of that fact alone, lead to the annulment of the regulation imposing anti-dumping duty and, second, such a decision may be amended in the course of the proceeding if it proves to be incorrect'. [62]

87. In the light of those factors, I take the view that the Court should confirm the General Court's case-law according to which there is no ground for holding that any failure to comply with the three-month time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation must automatically entail the annulment of the Council's regulation imposing definitive anti-dumping duties. Failure to comply with that time-limit can entail such annulment only if the applicant shows that, in the absence of such failure, the Council might have adopted a different regulation more favourable to its interests than the regulation at issue. [63]

88. It must be held that the applicants in the main proceedings have not provided any information capable of showing that the Commission's compliance with the time-limit would have resulted in the adoption of a regulation more favourable to their interests than the regulation at issue.

89. I therefore consider that the failure to comply with the time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation has not revealed the existence of factors capable of affecting its validity.

3. Determination of the dumping margin

90. In Question 1 in Case C-34/14, the referring court also asks whether the regulation at issue is invalid because of an infringement of Article 9(6) of the basic regulation, in so far as the margin of Golden Step — the only company granted MET — was not taken into account in the calculation of the weighted average dumping margin for the sample and thus had no influence on the weighted average dumping margin applied to Chinese exporting producers not included in that sample.

91. I understand that, according to the referring court, the Commission was required to calculate individual dumping margins in respect of the sampled exporting producers and then to calculate the weighted average dumping margin including Golden Step's individual margin.

92. In that regard, I think that the referring court has misinterpreted the provisions of the basic regulation. Under Article 2(11) of that regulation, 'the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a

61 — Paragraph 112.

62 — Judgment in *Since Hardware (Guangzhou)* v *Council* (T-156/11, EU:T:2012:431, paragraph 167).

63 — Ibid. (paragraph 160 and the case-law cited).

transaction-to-transaction basis'. This paragraph does not preclude the use of sampling. In the light of that provision, the Commission was perfectly entitled to calculate a weighted average dumping margin for the sampled exporting producers, since, at the time when the provisional regulation was adopted, none of those exporting producers had obtained MET or IT. [64]

93. Next, concerning the method used to set the dumping margin for exporting producers who had cooperated in the investigation but were not included in the sample, it should be noted that the Commission applied Article 9(6) of the basic regulation. Accordingly, it follows from recital 135 of the provisional regulation that the dumping margin for those exporting producers, who were not examined individually, was determined by establishing the weighted average of the dumping margins of the companies in the samples. One dumping margin having been established for the sampled exporting producers in China and one for the sampled exporting producers in Vietnam, those same margins were attributed to all other exporting producers in those two countries. [65]

94. Between the adoption of the provisional regulation and the regulation at issue, the Commission granted MET to Golden Step, which was part of the sample, judging, in the light of the information provided by that company, that the original decision should be reviewed and it should be awarded MET. [66] An individual dumping margin was therefore calculated for the company. [67] However, the method used remained the same, that is, the Commission applied Article 9(6) of the basic regulation, [68] and there is no indication in that regulation that Golden Step's dumping margin was not taken into account in that calculation method. In that connection, it is clear from its judgment in *Zhejiang Aokang Shoes* v *Council* [69] that the General Court found that Golden Step's dumping margin was taken into account in calculating the weighted average margin of dumping for the sample. [70] Admittedly, that judgment was set aside by the Court of Justice on the ground that the General Court had infringed Article 2(7) of the basic regulation. [71] However, the finding that Golden Step's dumping margin was taken into account for calculating the weighted average dumping margin was not challenged by the appellant.

95. Consequently, in the light of all the foregoing considerations, I take the view that the dumping margins for exports of footwear with uppers of leather from China and Vietnam were correctly established in the regulation at issue. Furthermore, that finding is also true of the extending regulation, since it is clear from the latter that the same method of calculation was used. [72]

4. Determination of injury and a causal link

96. In Questions 4 to 6 in Case C-659/13, the referring court requests the Court of Justice to rule whether the regulation at issue must be declared invalid in so far as it breaches Articles 3 to 5 and 17 of the basic regulation on the grounds that insufficient Community industry producers cooperated, evidence in the investigation file showed that the Community industry injury was assessed using materially flawed data, and the effects of other factors known to be causing injury were not properly separated and distinguished from the effects of the allegedly dumped imports.

64 — See recital 134 of the provisional regulation.
65 — See recital 143 of the provisional regulation.
66 — See recitals 70 to 72 of the regulation at issue.
67 — See recital 146 of the regulation at issue.
68 — Ibid.
69 — T-407/06 and T-408/06, EU:T:2010:68.
70 — Paragraph 103.
71 — Judgment in *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710, paragraph 34).
72 — See recitals 126, 127 and 130 of that regulation.

97. First of all, in connection with Question 4, C & J Clark maintains that the EU institutions did not assess the injury to Community industry correctly since only 10 Community producers were included in the sample and therefore supported the complaint, accounting for only 4.2% of Community production, nowhere near the 25% required by Article 5(4) of the basic regulation.

98. I do not agree with C & J Clark here.

99. I would point out that Article 5(1) and (4) of the basic regulation provide that an investigation to determine the existence, degree and effect of any alleged dumping is to be initiated upon a complaint by or on behalf of the Community industry. That is the case if the complaint is supported by Community producers accounting, as regards the like product, for more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation is to be initiated when Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry.

100. Because the number of Community producers was high, the Commission first decided to gather information on those producers by means of a questionnaire on their *locus standi*. Inter alia, the questionnaire asked Community producers to state their views on the possible initiation of an anti-dumping investigation, whether they supported the complaint, were against it or were neutral.[73] As the General Court noted in its judgment in *Brosmann Footwear (HK) and Others* v *Council*,[74] that information was being requested on the basis of Article 5(4) of the basic regulation. Moreover, Articles 4 and 5 of that regulation were attached as an annex to that questionnaire. Like the General Court, I think that that shows that Community producers were therefore aware that the aim of the questionnaire is to determine, in particular, whether or not they supported the complaint, and that they had to supply, for that purpose, a series of items of evidence of dumping, injury and a causal link between the two,[75] the components of a complaint under Article 5(2) of the basic regulation.

101. The conclusion that we can draw is simple. The response to the questionnaire on *locus standi* was sufficient to show that 814 Community producers, accounting for over 40% of Community production, supported the complaint, in accordance with Article 5(4) of the basic regulation.[76] It was only subsequently, in the light of the information supplied by those producers, that the Commission selected those who could best represent the Community industry to form a sample, in accordance with Article 17 of the basic regulation.[77]

102. Next, it is clear from Question 5 in Case C-659/13 that the referring court also has doubts as to the validity of the regulation at issue on the basis of an infringement of Article 3(2) of the basic regulation and of Article 296 TFEU, given that evidence in the investigation file showed that the Community industry injury was assessed using materially flawed data.

103. C & J Clark explains, in that connection, that the Commission received information notes calling into question the information supplied by some Community producers in the anti-dumping investigation. Yet the EU institutions did not review their injury findings on the basis of those notes, and the regulation at issue does not mention why. It states that they thus infringed Article 3(2) of the basic regulation, according to which a determination of injury must be based on positive evidence and must involve an objective examination.

73 — See paragraph 43 and Annex 2 of C & J Clark's observations. See also the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraphs 109 and 110). I would point out that the Court of Justice set that judgment aside on the ground that the Commission had failed to examine the applicants' MET claim. The General Court's findings on these points were therefore not called into question.

74 — T-401/06, EU:T:2010:67.

75 — Paragraph 111.

76 — See recitals 155 and 158 of the regulation at issue.

77 — See recital 65 of the provisional regulation and recital 57 of the regulation at issue, See also paragraph 44 of C & J Clark's observations.

104. It should be mentioned that Article 3(5) of the basic regulation states that the examination of the impact of the dumped imports on the Community industry concerned must include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. I find that the notes referred to by C & J Clark and submitted in an annex to its observations are actually nothing more than claims which appeared in the press about fraud and misconduct allegedly committed by Community footwear producers.[78] Consequently, the EU institutions were fully entitled, in the anti-dumping investigation, to disregard those notes as irrelevant and unreliable and to focus on the many other relevant and complex items of evidence provided by the traders concerned.

105. Lastly, in Question 6, the referring court in Case C-659/13 asks whether the regulation at issue is invalid in so far as it violates Article 3(7) of the basic regulation given that the effects of other factors known to be causing injury were not properly separated and distinguished from the effects of the allegedly dumped imports, so that the causal link between those imports and the injury suffered by the Community industry was not properly established.

106. In particular, according to C & J Clark, the EU institutions did not adequately examine the Community industry's lack of competitiveness, the impact of imports from third countries or the impact of the lifting of quotas on imports from China.

107. I would point out that it is settled case-law that the determination of the existence of harm caused to the Community industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts relied on have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. That is particularly the case as regards the determination of the factors injuring the Community industry in an anti-dumping investigation.[79]

108. In determining injury, the institutions of the European Union are under an obligation to consider whether the injury on which they intend to base their conclusions does in fact derive from the dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves.[80]

109. In this regard, it is for the EU institutions to ascertain whether the effects of those other factors were not such as to break the causal link between, on the one hand, the imports in question and, on the other, the injury suffered by the Community industry. It is for them also to 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. However, if the EU institutions find that, despite such factors, the injury caused by the dumped imports is material under Article 3(1) of the basic regulation, the causal link between those imports and the injury suffered by the Community industry can consequently be established.[81]

78 — See also the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 167).

79 — Judgment in *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 34).

80 — Ibid. (paragraph 35).

81 — Ibid. (paragraphs 36 and 37).

110. The examination of the relevance of other factors to be taken into account for determining injury forms part of a complex economic assessment in which, I would reiterate, the EU institutions have a wide discretion. In the present case, it is clear from the regulation at issue that the EU institutions did consider whether the injury suffered by Community producers derived from factors other than the imports which were the subject of anti-dumping measures, in particular the Community industry's lack of competitiveness, the impact of imports from third countries and the lifting of quotas on imports from China. [82]

111. In the light of all the foregoing considerations, therefore, I consider that the EU institutions did not err in determining the injury suffered by the Community industry and the causal link between that injury and the imports concerned by the anti-dumping measures.

5. The effects of the reports by the DSB Panel and the WTO rules on the legality of the regulation at issue

112. In Question 1 in Case C-34/14, the referring court expresses doubts about the validity of the regulation at issue given that it is based on Article 9(5) of the basic regulation. The referring court considers that that provision is incompatible with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. Furthermore, the regulation at issue is, it suggests, also invalid given that Golden Step's dumping margin was not calculated in accordance with Article 2.2.2(iii) of the Anti-Dumping Agreement, according to the report of the panel of the WTO Dispute Settlement Body ('DSB') to which the 'EU-Footwear' dispute was referred. [83]

113. It should be noted that it is the settled case-law of the Court that, given their nature and purpose, the Agreement establishing the WTO as well as the agreements contained in Annexes 1 to 3 to that Agreement (together 'the WTO agreements') are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions. [84] It is only where the European Union intends to implement a particular obligation assumed in the context of those WTO agreements or where the EU act at issue refers explicitly to specific provisions of those agreements that it is for the EU judicature, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements. [85]

114. According to the referring court, it is clear from recital 3 et seq. of the basic regulation that the provisions of the basic regulation were amended in the light of the multilateral trade negotiations concluded in 1994 and the new Agreements on the implementation of Article VI of GATT of which the Anti-dumping Agreement forms part. Consequently, 'the language of the new agreements should be brought into [EU] legislation *as far as possible*'. [86] The EU legislature thus adopted the basic regulation in order to satisfy its international obligations, and the Court of Justice should therefore review the legality of the regulation at issue in the light of those obligations.

82 — See recitals 222 to 238 of that regulation and 210 to 231 of the provisional regulation. In this connection, the General Court, in the case which led to the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67), had occasion to examine those points in detail and rejected a plea alleging that the causal link between the dumped imports and the injury to the Community industry was not adequately established (paragraphs 190 to 200). I would point out that, although that judgment was set aside by the Court of Justice, the findings of the General Court were not called into question by the Court of Justice in the appeal.

83 — See the report by the Panel entitled 'European Union — Anti-dumping measures on certain footwear from China' (WTO document WT/DS405/R).

84 — Judgment in *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 38 and the case-law cited).

85 — Ibid. (paragraphs 40 and 41 and the case-law cited).

86 — See recital 5 of the basic regulation. Emphasis added.

115. The Court of Justice recently had occasion to adopt a position on this point. In its judgment in *Commission* v *Rusal Armenal*,[87] it stated that it 'has in certain cases acknowledged that the WTO's anti-dumping system could constitute an exception to the general principle that the EU judicature cannot review the legality of the acts of the EU institutions in light of whether they are consistent with the rules of the WTO agreements'.[88] However, 'in order for such an exception to be allowed in a specific case, it must also be established, to the requisite legal standard, that the legislature has shown the intention to implement in EU law a particular obligation assumed in the context of the WTO agreements'.[89] 'To that end, it is not sufficient … for the preamble to an EU act to support a general inference that the legal act in question was to be adopted with due regard for international obligations entered into by the European Union. It is, on the other hand, necessary to be able to deduce from the contested specific provision of EU law that it seeks to implement into EU law a particular obligation stemming from the WTO agreements'.[90]

116. Article 9(5) of the basic regulation introduced special rules for imports from non-market economy countries, that is, IT for the exporting producers concerned. The grant of such treatment entails the application of a special method for calculating normal value.

117. The Court's finding concerning Article 2(7) of the basic regulation[91] also applies for Article 9(5) of that regulation. It is clear from the Commission communication referred to earlier[92] that the purpose of IT, like MET, is to take account of the emergence, in non-market economy WTO member countries, of firms operating independently of State interference and free, in law and in fact, to determine their export sales. Article 9(5) of the basic regulation is therefore also an expression of the EU legislature's intention to adopt an approach in this field that is specific to the EU legal system.

118. That finding is not 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.[93]

119. As regards the impact of the report by the DSB Panel on the validity of the regulation at issue, it should be pointed out that under Article 1(1) of Regulation (EC) No 1515/2001,[94] the Council may, in response to a report adopted by the DSB, repeal or amend the disputed measure or adopt any other special measures which are deemed to be appropriate in the circumstances. Clearly, no special measures were adopted to repeal or amend the dumping margin imposed on Golden Step. Since the EU did not intend to give effect to a specific obligation assumed in the context of the Anti-Dumping Agreement and, as we have seen, the basic regulation does not expressly refer to specific provisions of that Agreement, the legality of the regulation at issue cannot be reviewed in the light of the Agreement, as subsequently interpreted by the DSB's recommendations.[95]

120. Consequently, the Court cannot assess the validity of the regulation at issue in the light of the Anti-Dumping Agreement and cannot be bound by the report of the DSBPanel.

87 — C-21/14 P, EU:C:2015:494.

88 — Paragraph 44 and the case-law cited.

89 — Paragraph 45.

90 — Paragraph 46.

91 — Paragraphs 48 to 50.

92 — See footnote 56.

93 — See the judgment in *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 52).

94 — Council Regulation of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ 2001 L 201, p. 10).

95 — See, to that effect, the judgment in *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraphs 29 to 35).

C – Consequences to be drawn from the judgments in Brosmann Footwear (HK) and Others v Council and Zhejiang Aokang Shoes v Council and from the invalidity of the regulation at issue

121. Question 7 in Case C-659/13 and Question 2(a) in Case C-34/14 require the Court to rule, first, on the effects of the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710) in respect of other exporting producers and importers, and, secondly, on the effects of the invalidity of the regulation at issue.

1. Effects of the judgments in *Brosmann Footwear (HK) and Others* v *Council* and *Zhejiang Aokang Shoes* v *Council*

122. In Question 7 the First-tier Tribunal (Tax Chamber) essentially asks the Court whether the annulment of the regulation at issue in the cases which led to the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710) means that the anti-dumping duties paid pursuant to that regulation were not legally owed within the meaning of the first subparagraph of Article 236(1) of the Customs Code.

123. In this question, the referring court is actually asking whether that annulment has an effect erga omnes.

124. I would point out that, in those judgments, the Court annulled the regulation at issue 'in so far as it relates to [the appellants]' in those cases.

125. Furthermore, it is apparent from the case-law of the Court that since it would be ultra vires for the EU judicature to rule ultra petita, the scope of the annulment which it pronounces may not go further than that sought by the applicant.[96] The Court has made clear in this regard that, if an addressee of a decision decides to bring an action for annulment, the matter to be considered by the EU judicature relates only to those aspects of the decision which concern that addressee, whereas unchallenged aspects concerning other addressees do not form part of the matter to be tried by the EU judicature.[97]

126. The Court has also ruled that, although the authority erga omnes of an annulling judgment of a Court of the European Union attaches to both the operative part and the ratio decidendi of the judgment, it cannot entail annulment of an act not challenged before the EU judicature but alleged to be vitiated by the same illegality.[98]

127. Consequently, the Court's annulment of the regulation at issue in the cases which led to the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), in so far as it imposed anti-dumping duties on the applicants in the main proceedings in those cases, does not affect the validity of the other aspects of that regulation, in particular the anti-dumping duty applicable to imports of certain footwear with uppers of leather manufactured by other exporting producers, particularly those supplying C & J Clark and Puma, since those aspects did not form part of the subject of the disputes on which the EU judicature was called to rule.[99]

96 — See the judgment in *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 24 and the case-law cited).

97 — Ibid. (paragraph 25 and the case-law cited).

98 — Ibid. (paragraph 26 and the case-law cited).

99 — See, to that effect, the judgment in *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 27).

128. Accordingly, the annulment of the regulation at issue by those judgments did not have the effect that the anti-dumping duties paid pursuant to that regulation were not legally owed within the meaning of the first subparagraph of Article 236(1) of the Customs Code for importers obtaining supplies from exporting producers other than those concerned by the judgments.

2. Consequences to be drawn from the invalidity of the regulation at issue

129. In Question 2(a) in Case C-34/14, the Finanzgericht München asks what the consequences would be if the Court were to declare the regulation at issue invalid.

130. In that regard, I would point out that the Court has consistently held that 'it is for the national authorities to give due effect, in their legal system, to a declaration of invalidity, the consequence of which would be that anti-dumping duties paid under the regulation concerned would not be legally owed within the meaning of Article 236(1) of the [Customs Code] and should, in principle, be repaid by the customs authorities in accordance with that provision, provided that the conditions to which such repayment is subject, including the condition set out in Article 236(2), are satisfied'. [100]

131. Consequently, in the case of Puma more particularly, it should be noted that after an anti-dumping regulation has been declared invalid by the Court, an economic operator will, in principle, not be able to claim repayment of the anti-dumping duties it has paid under that regulation for which the three-year time-limit provided for in Article 236(2) of the Customs Code has expired. Under that provision repayment of customs duties not legally owed is restricted to a three-year period.

132. Consequently, the answer to Question 2(a) in Case C-34/14 is that Puma, which has brought an action before a national court against the decisions by which the collection of anti-dumping duties is claimed from it under the regulation at issue, declared invalid by the Court of Justice, is, in principle, entitled to rely on that invalidity before the national court in order to obtain repayment of those duties in accordance with Article 236(1) of the Customs Code. It will be for the national court to determine whether the conditions to which such repayment is subject, including the condition set out in Article 236(2), are satisfied.

D – *The concept of unforeseeable circumstances or force majeure under Article 236 of the Customs Code*

133. In Question 2(b) in Case C-34/14, the referring court essentially requests the Court to rule whether the second subparagraph of Article 236(2) of the Customs Code is to be interpreted as meaning that a declaration that the regulation at issue is invalid constitutes 'unforeseeable circumstances' which prevented the company concerned from submitting its application within the three-year time-limit, thus enabling it to extend that time-limit.

134. In that regard, it should be recalled that the Court held, in its judgment in *CIVAD*, [101] that 'the unlawfulness of a regulation is not a case of *force majeure* within the meaning of that provision which would allow an extension of the three-year time-limit during which an importer can request the repayment of import duties paid pursuant to that regulation'. [102]

100 — See judgment in *Trubowest Handel and Makarov* v *Council and Commission* (C-419/08 P, EU:C:2010:147, paragraph 25 and the case-law cited). See also judgment in *CIVAD* (C-533/10, EU:C:2012:347, paragraph 20).

101 — C-533/10, EU:C:2012:347.

102 — Paragraph 35.

135. In my opinion, that judgment is applicable to the situation at issue in Case C-34/14. It must be recalled that 'the concept of unforeseeable circumstances contains an objective element relating to abnormal circumstances unconnected with the trader in question and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices'.[103] In reality, the concepts of unforeseeable circumstances and force majeure are the same.[104]

136. Consequently, the reasoning developed by the Court in its judgment in *CIVAD*[105] must be applied in the present cases. Thus, since the repayment of import or export duties paid is an exception to the normal import and export procedure, the provisions which provide for it are to be interpreted strictly and the concept of 'unforeseeable circumstances' within the meaning of the second subparagraph of Article 236(2) of the Customs Code must be interpreted strictly.[106]

137. Moreover, the Court ruled that the unlawfulness of an anti-dumping regulation, which is the objective element, cannot be regarded as an abnormal circumstance.[107] As regards the subjective element, Puma could have submitted an application for repayment from the first payment of anti-dumping duties under the regulation at issue, with a view in particular to challenging the validity of that regulation by pleading its illegality before the national court, which may, and possibly must, then refer a question to the Court of Justice for a preliminary ruling.[108]

138. Consequently, I take the view that, since Puma had the opportunity to challenge the validity of the regulation within the three-year time-limit laid down by the first subparagraph of Article 236(2) of the Customs Code, by submitting an application for repayment of the duties paid under the regulation at issue, the invalidity of that regulation, were it actually to be declared by the Court, would not constitute unforeseeable circumstances which prevented it from submitting an application within the time-limit.[109]

139. In the light of the foregoing, I consider that the second subparagraph of Article 236(2) of the Customs Code must be interpreted as meaning that the invalidation of a regulation imposing anti-dumping duties does not constitute unforeseeable circumstances within the meaning of that provision, allowing an extension of the three-year time-limit during which an importer can request the repayment of import duties paid pursuant to that regulation.

V – **Conclusion**

140. In the light of the foregoing, I propose that the Court give the following answers to the First-tier Tribunal (Tax Chamber):

(1) Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam and Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear

103 — See the judgment in *Bell & Ross* v *OHIM* (C-426/10 P, EU:C:2011:612, paragraph 48).

104 — See the order in *Faktor B. i W. Gęsina* v *Commission* (C-138/14 P, EU:C:2014:2256, paragraph 20). In its case-law, the Court of Justice has never made any real distinction between these two concepts, even refusing to consider whether any such difference actually exists (see the judgment in *Bayer* v *Commission*, C-195/91 P, EU:C:1994:412, paragraph 33).

105 — C-533/10, EU:C:2012:347

106 — Paragraphs 24 and 25.

107 — Paragraph 30.

108 — Paragraphs 31 to 33.

109 — Paragraph 34.

with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96 are invalid in so far as the European Commission did not examine the market economy treatment and individual treatment claims submitted by exporting producers in China and Vietnam that were not sampled, contrary to the requirements laid down in Articles 2(7)(b) and 9(5) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

(2) The Court of Justice's annulment of Regulation No 1472/2006 in the cases which led to the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), in so far as it imposed anti-dumping duties on the appellants in those cases, does not affect the validity of the other aspects of that regulation, in particular the anti-dumping duty applicable to imports of certain footwear with uppers of leather manufactured by other exporting producers, since those aspects did not form part of the subject of the disputes on which the EU judicature was called to rule.

141. I propose that the Court give the following answers to the Finanzgericht München:

(1) Council Regulation (EC) No 1472/2006 and Implementing Regulation (EU) No 1294/2009 are invalid in so far as the European Commission did not examine the market economy treatment and individual treatment claims submitted by exporting producers in China and Vietnam that were not sampled, contrary to the requirements laid down in Articles 2(7)(b) and 9(5) of Council Regulation (EC) No 384/96.

(2) An importer such as Puma SE which has brought an action before a national court against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 1472/2006, declared invalid by the Court of Justice, is, in principle, entitled to rely on that invalidity before the national court in order to obtain repayment of those duties in accordance with Article 236(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. It will be for the national court to determine whether the conditions to which such repayment is subject, including the condition set out in Article 236(2), are satisfied.

(3) The second subparagraph of Article 236(2) of Regulation No 2913/92 must be interpreted as meaning that the unlawfulness of a regulation imposing anti-dumping duties does not constitute unforeseeable circumstances within the meaning of that provision, allowing an extension of the three-year time-limit during which an importer can request the repayment of import duties paid pursuant to that regulation.