Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 December 2016 [1]

Joined Cases C-376/15 P and C-377/15 P

Changshu City Standard Parts Factory,
Ningbo Jinding Fastener Co. Ltd
v

Council of the European Union

(Appeal — Dumping — Regulation (EC) No 1225/2009 — Article 2(7)(a), (10) and (11) — Anti-Dumping Agreement — Article 2.4 and 2.4.2 — Implementing Regulation (EU) No 924/2001 — Imports of certain iron or steel fasteners originating in the People's Republic of China — Product concerned — Exclusion of certain export transactions for the purposes of calculating the dumping margin — Fair comparison between the export price and the normal value in the case of imports from a non-market economy country — Refusal to make certain adjustments — Obligation to state reasons)

1. When the institutions of the European Union determine the existence of dumping margins, in particular in a case of imports from a country which does not have a market economy, can they exclude from the comparison between the normal value and the export price some export transactions for certain types of the product concerned? What is the scope of the requirement to make adjustments under the obligation to make a fair comparison between the normal value and the export price, where the normal value was determined on the basis of the analogue country method?

2. These are, in essence, the main issues raised in the present joined cases, which concern two appeals brought jointly by two Chinese companies, namely Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd. By their appeals, both companies ask the Court of Justice to set aside the judgment of the General Court of the European Union of 29 April 2015, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* [2] ('the judgment under appeal'), by which the latter dismissed their action for annulment of Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 [3] ('the regulation at issue').

3. In these cases the Court will be called upon to provide important clarifications as to the scope of the obligations of the European Commission and the Council of the European Union (together, 'the institutions') when they determine the existence of dumping margins, in particular in a case of imports from a country which does not have a market economy.

1 — Original language: French.

2 — T-558/12 and T-559/12, EU:C:2015:237.

3 — Regulation amending Regulation (EC) No 91/2009 (OJ 2012 L 275, p. 1).

I – Legal framework

A – *WTO law*

4. Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT)[4] ('the Anti-Dumping Agreement') is entitled 'Determination of dumping'. Paragraph 4 thereof states:

'2.4. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. … The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. …

2.4.2. Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. ...'

B – *EU law*

5. Article 2 of Regulation (EC) No 1225/2009 ('the basic regulation'),[5] entitled 'Determination of dumping', provides:

'…

C. Comparison

10. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. …

D. The dumping margin

11. Subject to the relevant provisions governing fair comparison, 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 [Union], or by a comparison of individual normal values and individual export prices to the [Union]

4 — 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), the Council approved the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April 1994, as well as the agreements contained in Annexes 1, 2 and 3 of that agreement, which include the Anti-Dumping Agreement.

5 — Council Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, and corrigendum OJ 2010 L 7, p. 22), as amended by Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 344, p. 1).

on a transaction-to-transaction basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the [Union], if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised. ...'

II – The background to the disputes and the regulation at issue

6. The background to the disputes is set out in detail in paragraphs 1 to 16 of the judgment under appeal. For the purposes of these proceedings, it suffices to recall that by Regulation No 91/2009 [6] the Council imposed an antidumping duty on imports of certain iron or steel fasteners originating in China.

7. On 28 July 2011, the Dispute Settlement Body ('DSB') of the WTO adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the dispute 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China'. [7] In those reports, it was found that the European Union had infringed a certain number of provisions of WTO law.

8. In order to determine how Regulation No 91/2009 should be amended to be brought into compliance with the recommendations of the DSB, the Commission initiated a review of the antidumping measures imposed by that regulation. [8]

9. Following that review, conducted on the basis of Regulation (EC) No 1515/2001, [9] on 4 October 2012 the Council adopted the regulation at issue.

10. In the regulation at issue, the Council, first, pointed out that the DSB reports did not affect the findings set out in Regulation No 91/2009 concerning the product concerned and the like product. [10]

11. Next, the Council recalled that, according to Article 2(7)(a) of the basic regulation, normal value for exporting producers, such as the appellants, not granted MET had to be established on the basis of the prices or constructed value in an analogue country. In the present case, India was regarded as a suitable market economy third country. The normal value was thus determined on the basis of prices of the product concerned, sold on the domestic market by an Indian producer cooperating with the investigation. [11]

12. The Council then rejected requests for adjustments, under Article 2(10) of the basic regulation, in particular made by the appellants, in respect of differences relating to production costs, as well as to efficiency and productivity. [12] In that regard, the Council stated that the parties had not produced evidence that the cost differences were reflected in price differences. The Council recalled that, in

6 — Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive antidumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1).

7 — Report of the Appellate Body, AB-2011-2, WT/DS397/AB/R, of 15 July 2011.

8 — Notice of 6 March 2012 regarding the antidumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation on 28 July 2011 in the EC — Fasteners dispute (DS397) (OJ 2012 C 66, p. 29).

9 — Council Regulation (EC) No 1515/2001 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 antidumping and anti-subsidy matters (OJ 2001 L 201, p. 10). That regulation was replaced and repealed by Regulation No 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning antidumping and anti-subsidy matters (OJ 2015 L 83, p. 6).

10 — See recital 6 of the regulation at issue, which refers to recitals 40 to 57 of Regulation No 91/2009.

11 — Recitals 29 and 31 of the regulation at issue and paragraph 41 of the judgment under appeal.

12 — Recitals 41 and 103 of the regulation at issue.

investigations concerning non-market economy countries, such as China, a third country with a market economy is used in order to prevent prices and costs which are not the normal result of market forces from being taken into account. Since none of the Chinese exporting producers received MET in the original investigation, their cost structure could not be considered as reflecting market values that can be used as a basis for adjustments in particular with regard to access to raw materials. Moreover, the Indian producer was competing with many other producers on the Indian domestic market, with the result that its prices were fully reflecting the situation in the domestic market. Accordingly, the Council dismissed the requests for adjustment.

13. In order to determine the dumping margins, as set out in Article 2(11) of the basic regulation, the institutions chose to compare the weighted average normal value with the weighted average prices of export transactions to the EU ('the first symmetrical method'). [13]

14. However, at the comparison stage, it was found that the Indian producer did not produce and did not sell all the product types concerned which were exported by the Chinese exporting producers. [14]

15. In those circumstances, the institutions made a comparison between the export prices and the normal value only in relation to the product types concerned which were exported by the Chinese exporting producers for which a corresponding type was produced and sold by the Indian producer. The export transactions for the product types concerned for which there was no corresponding domestic sale of the Indian producer were excluded from the calculation of the dumping margin. [15] However, the amount of dumping thus determined was then extended to cover all product types concerned. [16]

16. The institutions considered that method to be the most reliable basis for establishing the level of dumping, since 'to attempt to match all other exported types to closely resembling types of the Indian producer would have resulted in inaccurate findings'. [17] They also considered that the export transactions used in calculating the amount of dumping were representative of all the product types concerned which were exported by the Chinese exporting producers. [18]

17. In conclusion, the regulation at issue reduced the antidumping duty, established by Regulation No 91/2009, to 38.3% for Changshu City Standard Parts Factory and maintained the duty imposed on Ningbo Jinding Fastener at 64.3%. [19]

18. On 12 February 2016, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the dispute 'European Communities — Definitive Anti-Dumping Measures on certain Iron or Steel Fasteners from China — Recourse to Article 21.5 of the DSU by China'. [20] In those reports, it was found that, through the regulation at issue, the EU had infringed a certain number of provisions of WTO law. Those reports call into question, in particular, the parts of the regulation at issue relating to the requests for adjustments made by some interested parties, and the exclusion, for the purposes of calculating the dumping margin, of transactions concerning the product types concerned exported by the Chinese exporting producers for which no corresponding type was produced and sold by the Indian producer.

13 — Recital 105 of the regulation at issue.

14 — See paragraph 42 of the judgment under appeal.

15 — Recitals 82, 102 and 109 of the regulation at issue and paragraphs 43, 44 and 60 of the judgment under appeal.

16 — See paragraph 60 of the judgment under appeal.

17 — Recital 109 of the regulation at issue.

18 — Recital 109 of the regulation at issue.

19 — See Article 1 of the regulation at issue. Those antidumping duties were subsequently maintained by Commission Implementing Regulation (EU) 2015/519 of 26 March 2015 imposing a definitive antidumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009 (OJ 2015 L 82, p. 78).

20 — Report of the Appellate Body, AB-2015-7, WT/DS397/AB/RW, of 18 January 2016.

19. On 26 February 2016, the Commission adopted Implementing Regulation (EU) 2016/278.[21] In that regulation, adopted in accordance with Regulation (EU) No 2015/476,[22] the Commission, following the DSB reports referred to in the previous point, decided to repeal the antidumping duties imposed by Regulation No 91/2009 and modified by the regulation at issue.

III – The procedure before the General Court and the judgment under appeal

20. By applications lodged at the Registry of the General Court on 24 December 2012, the appellants each brought an action for annulment of the regulation at issue. In support of their actions before the General Court, the appellants advanced two pleas in law.

21. The first plea alleged infringement of Article 2(7)(a), (8), (9) and (11) and Article 9(5) of the basic regulation, the principle of non-discrimination and Article 2.4.2 of the Anti-Dumping Agreement. In the context of that plea, the appellants criticised the institutions for having excluded, for the purposes of calculating the dumping margin, the transactions concerning the product types concerned exported by the Chinese exporting producers for which no corresponding type was produced and sold by the Indian producer in question.

22. The second plea alleged infringement of Article 2(10) of the basic regulation and Article 2.4 of the Anti-Dumping Agreement as well as infringement of Article 296 TFEU. It was concerned with the rejection of requests for adjustment which the appellants had submitted.

23. By the judgment under appeal, the General Court rejected the two pleas raised by the appellants and dismissed the actions in their entirety.

IV – The forms of order sought and the procedure before the Court

24. The appellants claim that the Court should:

— set aside the judgment under appeal;

— grant the form of order sought by the appellants in their action before the General Court and annul the regulation at issue, in so far as it relates to them;

— order the Council to bear the costs incurred by them in the proceedings before the General Court and the Court of Justice and order the intervening parties to bear their own costs.

25. The Council contends that the appeals should be dismissed and that the appellants should be ordered to pay the costs of the appeals and the proceedings before the General Court.

26. The Commission asks the Court to dismiss the appeals as inadmissible. In the alternative, it asks the Court to dismiss the appeals as unfounded and order the appellants to pay the costs.

27. By order of the President of the Court of 22 September 2015, Cases C-376/15 P and C-377/15 P were joined for the purposes of the written procedure, the oral procedure and the judgment.

21 — Regulation repealing the definitive antidumping duty imposed on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not (OJ 2016 L 52, p. 24).

22 — See footnote 9 of this Opinion.

V – Analysis

28. In support of their appeals, the appellants put forward two grounds of appeal. Before analysing those grounds of appeal, however, it is necessary to address two issues of a preliminary nature: the possible existence of *lis pendens* and the possibility of relying, in this case, on the Anti-Dumping Agreement and the rulings and recommendations of the DSB.

A – *The plea of lis pendens*

29. The Commission raises a plea of *lis pendens*. It argues that the appeals in the two joined cases at issue are identical. In its view, they are concerned with the same parties, contested acts, judgment under appeal and grounds of appeal and arguments submitted by the parties in their appeals.

30. In that regard, it should be recalled that, according to the case-law, an action brought subsequently to another which is between the same parties, is brought on the basis of the same submissions and seeks the annulment of the same legal measure must be dismissed as inadmissible on the ground of *lis pendens*.[23]

31. In this case, it should be noted that the appeals brought jointly by the two appellants in the two cases in question are between exactly the same parties. Moreover, their purpose is identical, since both appeals ask the Court to set aside the judgment under appeal. Finally, the two appeals are identical and raise exactly the same grounds of appeal. In those circumstances, having been brought subsequently, the appeal relating to Case C-377/15 P must be dismissed as inadmissible on the ground of *lis pendens*.

B – *The possibility of relying on the Anti-Dumping Agreement and the rulings and recommendations of the DSB*

32. The parties rely in their arguments on certain provisions of the Anti-Dumping Agreement and several rulings and recommendations of the DSB. In the judgment under appeal, when assessing the legality of the regulation at issue, the General Court referred, first, to Article 2.4 and 2.4.2 of the Anti-Dumping Agreement and, secondly, for the purpose of excluding its relevance, to a report of the Appellate Body of the WTO.[24] Furthermore, as is apparent from point 18 of this Opinion, in February 2016, after delivery of the judgment under appeal, the DSB adopted two reports whose conclusions relate directly the regulation at issue. Those reports were discussed by the parties at the hearing before the Court.

33. In those circumstances, it is necessary to determine, first of all, whether and to what extent the Anti-Dumping Agreement and the rulings and recommendations of the DSB to which the parties referred at length may be relied upon in the present case.

34. As regards, first, the Anti-Dumping Agreement, it should be recalled that, according to the settled case-law of the Court, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed. Nonetheless, in two situations the Court has accepted, by way of exception, that it is for the EU judicature, if necessary, to review the legality of an EU measure and of the measures adopted for its

23 — Judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraph 58 and case-law cited).

24 — See, respectively, paragraphs 33 to 40 and 86 to 90 of the judgment under appeal.

application in the light of the WTO agreements.[25] The first such situation is where the European Union intended to implement a particular obligation assumed in the context of those agreements (the 'Nakajima' exception[26]) and the second is where the EU measure at issue refers explicitly to specific provisions of those agreements (the 'Fediol' exception[27]).

35. In that regard, the Court has stated that, in order that in a particular case the WTO's antidumping system could constitute an exception to the general principle that the EU Courts 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, 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. To that end, it is necessary to be able to deduce from the specific provision of EU law at issue that it seeks to implement into EU law a particular obligation stemming from the WTO agreements.[28]

36. In this case, the Court has already recognised that by means of Article 2(11) of the basic regulation, the European Union intended to implement the particular obligations laid down by Article 2.4.2 of the Anti-Dumping Code.[29] The General Court therefore rightly considered in paragraph 34 of the judgment under appeal that it was for the General Court to review the legality of the measure in question in the light of that provision.

37. With regard to Article 2(10) of the basic regulation, it is clear from the fact that that provision uses, in its first sentence, exactly the same terms as those used in Article 2.4 of the Anti-Dumping Agreement that, at least as regards the obligation to make a 'fair comparison' between the export price and the normal value provided for in its first sentence, the EU legislature intended, by that provision of the basic regulation, to implement the particular obligations laid down by the Anti-Dumping Agreement.[30] It follows that, under that provision too, when the Court reviews the legality of the EU measures at issue it must give to the concept of 'fair comparison' the meaning that it has in WTO law.[31]

38. As regards, secondly, the rulings and recommendations of the DSB, the Court has held that a trader cannot be permitted to plead before the Courts of the European Union that an EU act is incompatible with a ruling of the DSB. Therefore, according to the Court's case-law, at any rate apart from in situations where, following those rulings and recommendations, the European Union intended to assume a particular obligation, a ruling or recommendation of the DSB finding non-compliance with WTO rules cannot, any more than the substantive rules which comprise the WTO agreements, be relied upon before the Courts of the European Union in order to determine whether an EU provision is incompatible with that recommendation or ruling.[32]

25 — Judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraphs 82 to 87 and case-law cited).

26 — That exception derives its name from the judgment of 7 May 1991, *Nakajima* v *Council* (C-69/89, EU:C:1991:186).

27 — That exception derives its name from the judgment of 22 June 1989, *Fediol* v *Commission* (70/87, EU:C:1989:254).

28 — See, in that regard, judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 44 to 46 and case-law cited).

29 — See judgment of 9 January 2003, *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 56) in relation to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 2331/96 of 2 December 1996 (OJ L 317, p. 1), the wording of which corresponds to the wording of Article 2(11) of the basic regulation.

30 — See also, to that effect, the judgment of the General Court of 8 July 2008 in *Huvis* v *Council* (T-221/05, EU:T:2008:258, paragraph 73).

31 — See, to that effect, as regards Article 1 of the basic regulation, Opinion of Advocate General Wathelet in *Portmeirion Group* (C-232/14, EU:C:2015:583, point 73). See also, in the same case, the judgment of 17 March 2016, *Portmeirion Group* (C-232/14, EU:C:2016:180, paragraph 40 et seq.).

32 — See, to that effect, judgments of 10 November 2011, *X and X BV* (C-319/10 and C-320/10, not published, EU:C:2011:720, paragraph 37 and case-law cited) and 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 96). The Court has held that the recommendation or rulings of the DSB finding a failure to comply with the rules of the WTO cannot in principle, regardless of their legal scope, be fundamentally distinguished from the substantive rules laying down the obligations entered into by a member of the WTO.

39. Nevertheless, the primacy of international agreements concluded by the European Union over provisions of EU secondary legislation requires that the latter be interpreted, in so far as is possible, in accordance with those agreements. Thus, the Court has already referred to the reports of a Panel or of the Appellate Body of the WTO in support of its interpretation of certain provisions of WTO Agreements. [33]

40. In this case, with regard to the reports of 28 July 2011, referred to in point 7 of this Opinion, adopted by the DSB in the dispute 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China', it is apparent from a reading of the regulation at issue that the institutions adopted that regulation [34] 'in order to take into account the conclusions of [those r]eports' in regard to Regulation No 91/2009 and in order 'to correct the aspects of … Regulation [No 91/2009] found to be inconsistent by the DSB in [those r]eports'. [35]

41. In those circumstances, in view of the express references to those reports and the clear intention to take into consideration in the regulation at issue the conclusions contained in those reports, it is necessary to take the view that, in that particular case, in adopting that regulation, the institutions intended to implement, in the EU legal order, the conclusions contained in those reports. It follows that it is for the EU judicature to assess, in so far as it is necessary to do so, the lawfulness of the regulation at issue in the light of those reports.

42. With respect, however, to the reports of the DSB adopted on 12 February 2016 on the basis of Article 21(5) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, referred to in point 18 of this Opinion, it should first be noted that they are subsequent to the adoption of both the regulation at issue and the judgment under appeal. [36] Moreover, as I noted in point 19 of this Opinion, the Commission, on the basis of Regulation 2015/476, adopted Implementing Regulation 2016/278, in which it considered that it was appropriate, following the findings in those reports, to repeal the antidumping measures imposed by the regulation at issue. [37] However, it is clear from Article 2 of Implementing Regulation 2016/278 that the repeal of those measures took effect from the date of its entry into force and cannot serve as a basis for reimbursement of duties collected prior to that date. It follows that, in such circumstances, by excluding reimbursement of duties paid under the regulation at issue, the European Union did not intend to give effect to a specific obligation assumed in the context of the WTO. [38] It follows from the foregoing that, in this case, it is not possible to assess the legality either of the regulation at issue or, still less, of the judgment under appeal in the light of those reports to the DSB.

43. As regards, finally, the other reports of the DSB relied on by the parties, it is clear that the institutions did not intend to assume any particular obligation with regard to the regulation at issue as a result of those reports. In those circumstances, in the light of the case-law referred to in point 39 of this Opinion, those reports may at most constitute elements which the Court can use to interpret the provisions of the Anti-Dumping Agreement in question.

33 — Judgment of 10 November 2011, *X and X BV* (C-319/10 and C-320/10, not published, EU:C:2011:720, paragraphs 44 and 45 and case-law cited). In that regard, see, for example, judgment of 17 March 2016, *Portmeirion Group* (C-232/14, EU:C:2016:180, paragraph 43).

34 — The regulation at issue was adopted on the basis of Regulation No 1515/2001 (see footnote 9 above).

35 — See, in particular, the preamble and recitals 2, 3, 6, 7, 9, 10, 12, 22, 23, 110, 112, 117, 125, 127, 128, 130, 132, 135, 138 of the regulation at issue.

36 — See, in that regard, the judgment of 10 November 2011, *X and X BV* (C-319/10 and C-320/10, not published, EU:C:2011:720, paragraph 40).

37 — See recitals 10 and 13 and Article 1 of Regulation 2016/278.

38 — See judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraph 35).

C – *The first ground of appeal, relating to the exclusion of certain export transactions for the product concerned from the calculation of the dumping margin*

44. The first ground of appeal concerns the reasoning set out in paragraphs 29 to 90 of the judgment under appeal. It alleges infringement of Article 2(10) and (11) of the basic regulation and Article 2.4 and 2.4.2 of the Anti-Dumping Agreement. In that ground of appeal the appellants complain, in essence, that the General Court failed to criticise the institutions for having determined the dumping margins by excluding certain export transactions from the comparison with the normal value, namely those relating to the product types concerned for which the Indian producer had no matching product.

1. The judgment under appeal

45. In the judgment under appeal, the General Court held that Article 2(11) of the basic regulation, read in the light of Article 2.4.2 of the Anti-Dumping Agreement, requires that, when the institutions determine the dumping margins, they compare with the normal value only those transactions which are comparable with it. In accordance with the reference made in those rules to the provisions governing fair comparison, the institutions are required, 'where possible', to make the transactions comparable by making adjustments. Moreover, the provisions at issue do not require the comparison to be 'the most fair', but only require that it be 'fair'.[39]

46. In the present case, according to the General Court, all the product types concerned could be regarded as a 'similar' product and could therefore be regarded as comparable. However, that was not automatically the case for the prices of some of the product types concerned, namely the prices of the products exported by the Chinese exporting producers which were not manufactured by the Indian producer. The absence of the sale prices in India for those product types concerned, despite their similarity, therefore prevented the comparison from being made for those types in order to calculate the dumping margins.[40]

47. The General Court then examined the various methods laid down by the basic regulation which could have allowed the institutions to obtain the normal value for the product types concerned for which the Indian producer had no matching product. According to the General Court, however, even if they were found to be feasible, those methods would not have ensured a fairer comparison than the one made by the institutions.[41] The General Court also dismissed the appellants' arguments concerning the representativeness of the dumping margins calculated in the light of all the exported product types concerned.[42] As a result of that analysis, the General Court concluded that the Council had not committed a manifest error of assessment by excluding from the calculation of the dumping margin the export transactions relating to the product types concerned for which the producer's sale prices in the analogue country were not available.

39 — Paragraphs 37, 40 and 61 of the judgment under appeal.

40 — Paragraph 63 the judgment under appeal.

41 — Paragraphs 67 to 84 of the judgment under appeal.

42 — See, specifically, paragraphs 81 to 83 of the judgment under appeal.

2. A brief summary of the arguments of the parties

48. The appellants argue, in the first place, that the General Court misinterpreted Article 2(11) of the basic regulation and Article 2.4.2 of the Anti-Dumping Agreement. Those two provisions should be interpreted as requiring that all export sales of the product concerned, as defined at the opening of the investigation, must be included in the comparison for the purposes of the calculation of the dumping margin. That margin should cover the product under investigation as a whole. Moreover, status as a non-market economy country does not permit a derogation from the rules concerning determination of the dumping margin.

49. In the second place, the General Court conflated the obligations concerning the calculation of the dumping margin and those concerning the fair comparison. First, when examining whether or not the various solutions for comparing all export transactions were 'fair', the General Court reduced the obligations concerning the calculation of the dumping margin to those concerning the fair comparison. Secondly, the question whether the calculation of the dumping margin complies with Article 2(11) of the basic regulation should be assessed not on the basis of the concept of 'comparable price',[43] but on that of 'comparable transactions'. The appellants also contest the expression 'where possible', which was used by the General Court.[44]

50. In the third place, and in any event, the General Court's analysis is incorrect. According to the appellants, the issue to be determined is not that one approach is fairer than the other, but that the approach used is consistent with Article 2(11) of the basic regulation and Article 2.4.2 of the Anti-Dumping Agreement. It is for the institutions, not the parties concerned, to ensure compliance with those provisions. The concept of 'representativeness' is irrelevant, given that it is referred to neither in the basic regulation nor in the Anti-Dumping Agreement. In any event, the appellants have demonstrated that, in so far as they are concerned, the export transactions used by the EU institutions are unrepresentative.

51. The institutions dispute the appellants' complaints. The Commission submits, first of all, that the first ground of appeal is inadmissible, as the appellants are contesting the assessment of the facts and do not identify any error of law, and also ineffective. Next, according to the Commission, the interpretation of Article 2(11) of the basic regulation and Article 2.4.2 of the Anti-Dumping Agreement proposed by the appellants would be a distortion of the spirit and content of Article 2.4 of the Anti-Dumping Agreement, which is 'impregnated' with the principle of 'fair comparison', the overriding principle. The Council considers that the wording of the basic regulation and the Anti-Dumping Agreement clearly indicates that the fair comparison requirement must prevail over the obligation to calculate the dumping margin on the basis of all the export transactions. According to the institutions, the case-law and the reports of the Appellate Body of the DSB relied on by the appellants are irrelevant because they are concerned with the issue of zeroing, which is very different from the matter at issue in this case. However, the interpretation of Article 2.4.2 of the Anti-Dumping Agreement given by the Appellate Body of the DSB shows that the word 'comparable' is of great importance in ensuring a 'fair comparison'. It also follows from the case-law that the concept of representativeness is relevant.

3. Assessment

52. This ground of appeal concerns the institutions' obligations when determining the existence of dumping margins, as set out in Article 2(11) of the basic regulation.

43 — The appellants refer to paragraph 61 of the judgment under appeal.

44 — Paragraph 40 the judgment under appeal and point 45 of this Opinion.

53. The complaints advanced by appellants are concerned with the interpretation of that provision adopted in the judgment under appeal - recalled in points 45 and 46 of this Opinion - on the basis of which the General Court justified, in this case, the exclusion of certain export transactions for certain types of the product concerned from the calculation of the dumping margins.

54. First of all, it should be noted that, contrary to what the Commission submits, the first ground of appeal is neither inadmissible in its entirety nor ineffective.

55. First, it is, in my view, quite clear from the summary of the appellants' arguments [45] that they complain that the General Court has committed errors of law resulting from an alleged misinterpretation of the provisions of the basic regulation and of the Anti-Dumping Agreement governing the calculation of the dumping margin and the fair comparison. They are questions of law which are admissible in the context of the appeal.

56. Secondly, nor is the ground of appeal ineffective, as the Commission submits. In the event that the Court, in upholding this ground of appeal, were to hold that the General Court's interpretation of the provisions of the basic regulation and of the Anti-Dumping Agreement at issue is incorrect, the judgment under appeal would be vitiated by an error of law which would entail its annulment.

57. As to the substantive analysis of the various complaints put forward by the appellants, it should first of all be observed that, as the General Court correctly pointed out, it is settled case-law that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. [46]

58. More specifically, it is apparent from the case-law that the implementation of Article 2(11) of the basic regulation and, in particular, the choice between the different methods of calculating the dumping margin require an appraisal of complex economic situations. [47]

59. Although the institutions have discretion in the implementation of Article 2(11) of the basic regulation, that discretion must nevertheless be exercised in a manner consistent with the regulatory context established by that regulation. Two particular requirements arising under that regulatory framework seem to me to be relevant in the present context.

60. First, it should be noted that the antidumping regulatory framework relates to the dumping of a product. The very definition of dumping contained in Article 1(2) of the basic regulation refers to the 'dumping of a product'. [48]

61. It is therefore no coincidence that, as part of their antidumping investigations, one of the first steps carried out by the institutions is to define the product concerned by the investigation. That definition is intended to determine the list of products whose importation into the European Union will be subject to the antidumping investigation and, following that, will, if necessary, be subject to the imposition of antidumping duties. [49] It is also on the basis of that definition that the 'like product' within the meaning of Article 1(4) of the basic regulation is then identified.

45 — See points 48 to 50 of this Opinion.

46 — The judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. See, inter alia, judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Council* and *Council* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 34 and case-law cited).

47 — See judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraph 41).

48 — According to that provision, a *product* is to be considered as being dumped if its export price to the European Union is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

49 — See, in that regard, the settled case-law of the General Court referred to in point 46 of the Opinion of Advocate General Wathelet in *Portmeirion Group* (C-232/14, EU:C:2015:583).

62. However, once the institutions have defined the product concerned, they are required to deal with that product in a consistent manner throughout the investigation, in accordance with that definition. [50]

63. It follows, in particular, that, when the institutions determine the existence of dumping margins, they must do so in the light of the *product* concerned, as defined in the context of the investigation and, more specifically, in the light of that product taken as a whole. [51] They cannot, first, define the product concerned by the investigation in one way and, then, calculate the dumping margins in a way which is not fully consistent with that definition.

64. This does not mean that the institutions are prohibited, when they consider it appropriate for the purpose of determining the dumping margins, from subdividing the product concerned into types or models and from making multiple comparisons. However, the requirement for consistent treatment of the product during the investigation means that it is necessary for the results of all those comparisons then to be taken into consideration and for the dumping margins to be established for the entire product taken as a whole. [52]

65. Secondly, it is apparent from the actual wording of Article 2(11) of the basic regulation that the determination of the dumping margins is subject to the requirement that those margins reflect the full degree of dumping being practised. [53]

66. Thus, in the context of the exercise of their discretion in the implementation of Article 2(11) of the basic regulation, it is for the institutions to apply the methods of calculating dumping margins so as to ensure that those margins, as defined, reflect the full degree of dumping being practised. [54]

67. However, an interpretation of Article 2(11) of the basic regulation, such as that advocated by the General Court in the judgment under appeal, which allows the institutions to exclude from the calculation of the dumping margin certain export transactions relating to certain types of the product concerned as defined in the context of the investigation, while nonetheless allowing them to apply the dumping margins thus calculated to all the product types concerned, is liable, in my view, to be contrary to the two requirements referred to in points 62 and 63 and in points 65 and 66 of this Opinion.

68. First, if some product types concerned are not considered in the calculation of the dumping margins, those margin are calculated only in the light of a part of the product concerned and not in the light of that product taken as a whole, as defined in the context of the investigation.

50 — See, in that regard, in so far as Article 2.4.2 of the Anti-Dumping Agreement is concerned, paragraph 53 of the report of the WTO Appellate Body of 1 March 2001 entitled 'European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India' (DS141/AB/R).

51 — See, to that effect, the Opinion of Advocate General Léger in *Ikea Wholesale* (C-351/04, EU:C:2006:236, points 159 and 163). This is, moreover, clear from the actual wording of the definition of the dumping margin, which, according to Article 2(12) of the basic regulation, is to be the amount by which the normal value exceeds the export price. The export price is defined in Article 2(8) as the price paid or payable for the *product* when sold for export from the exporting country to the European Union. Moreover, several reports of the WTO Appellate Body refer, when interpreting Article 2.4.2 of the Anti-Dumping Agreement, to the requirement to consider the product concerned as a whole. In that regard, see, for example, paragraphs 51 and 53 of the report of the WTO Appellate Body of 1 March 2001 entitled 'European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India' (DS141/AB/R) and paragraphs 98 and 99 the report of the WTO Appellate Body of 11 August 2004 entitled 'United States — Final Dumping Determination on Softwood Lumber from Canada' (DS264/AB/R).

52 — As regards Article 2.4.2 of the Anti-Dumping Agreement, see paragraphs 80, 98 and 99 of the report of the WTO Appellate Body of 11 August 2004 entitled 'United States — Final Dumping Determination on Softwood Lumber from Canada' (DS264/AB/R). In that regard, it should be noted that, in the judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547) the Court did not call into question the permissibility in EU law of use of the multiple comparison method.

53 — It follows from that provision that the two symmetrical methods laid down therein must make it possible to reflect the full degree of dumping being practised and that it is only if that is not the case (and if the pattern of export prices differs significantly among different purchasers, regions or time periods) that the institutions may use the asymmetrical method. In that regard, see judgment of 9 January 2003, *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 49), and point 73 et seq. of the Opinion of Advocate General Jacobs in *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2002:253).

54 — See, to that effect, Opinion of Advocate General Léger in *Ikea Wholesale* (C-351/04, EU:C:2006:236, point 154).

69. Moreover, by failing to include in the calculation of the dumping margins the export transactions for certain product types concerned, the institutions cannot take into account or measure the impact which those transactions have on the calculation of the overall dumping margins. It follows that, in that way, those margins are not liable to reflect the full degree of dumping being practised.

70. The conclusion that the institutions cannot exclude certain export transactions for the product concerned from the calculation of the dumping margins is also confirmed, first, in the wording of Article 2(11) of the basic regulation, secondly, in the case-law of the Court and, thirdly, in the interpretation within the WTO of Article 2.4.2 of the Anti-Dumping Agreement.

71. First, the wording of Article 2(11) of the basic regulation expressly provides that, in the context of the first symmetrical method, the existence of margins of dumping is to 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 European Union*. Such wording leaves little room for the possibility of excluding export transactions relating to certain types of the product concerned from the calculation of the dumping margin.

72. Secondly, in the judgment in *Ikea Wholesale*,[55] the Court criticised the Council for failing to 'calculate the overall dumping margin by basing its calculation on comparisons which fully reflect *all the comparable export prices*'.[56]

73. Thirdly, the Appellate Body of the DSB, in interpreting Article 2.4.2 of the Anti-Dumping Agreement, has expressly stated that the existence of margins of dumping for the product concerned must be established 'on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions - that is, for *all transactions* involving *all models or types of the product* under investigation.'[57]

74. Those references to the wording of Article 2(11) of the basic regulation, the case-law of the Court and the decisions of the Appellate Body of the DSB, in cases which concern the lawfulness of the practice of 'zeroing',[58] require clarification in two respects.

75. The first clarification concerns the interpretation adopted by the General Court of Article 2(11) of the basic regulation. The General Court has interpreted that provision in the light of Article 2.4.2 of the Anti-Dumping Agreement and having regard to the obligation to carry out a 'fair comparison' provided for by Article 2(10) of the basic regulation and by Article 2.4 of the Anti-Dumping Agreement.

76. According to the General Court, it is apparent, in essence, from all those provisions that the institutions should compare with the normal value not the price of all the export transactions for the product concerned, but only all 'those *transactions* which are *comparable* with it'.[59] In the present case, the export transactions for the product types concerned for which the Indian producer had no matching product and there therefore existed no *comparable* (sales) *price*, were not, according to the General Court, *comparable transactions*. In the absence of a method which would have ensured a fairer comparison than that made by the institutions, it was therefore reasonable to exclude those transactions from the calculation of the dumping margins.

55 — Judgment of 27 September 2007 (C-351/04, EU:C:2007:547).

56 — See judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraph 56). Emphasis added.

57 — See paragraphs 55 and 58 of the report of the WTO Appellate Body of 1 March 2001 entitled 'European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India' (DS141/AB/R), paragraph 55. Emphasis added.

58 — In accordance with the practice of 'zeroing', the institutions, when determining the overall dumping margin, treat as zero the negative dumping margins, that is the margins established in the light of the models of the product concerned for which the export price is higher than the normal value. See, in that regard, judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraphs 53 and 54) and paragraph 88 of the judgment under appeal.

59 — See paragraph 40 of the judgment under appeal. Emphasis added.

77. In that regard, however, it should be noted, first, that, as is apparent from point 73 above, for the purposes of applying Article 2.4.2 of the Anti-Dumping Agreement — in the light of which the General Court interpreted Article 2(11) of the basic regulation –, all transactions relating to each of the product types concerned must be regarded as 'comparable export transactions'.[60] If all the product types concerned, as defined during the investigation, are similar to the like product, then the requirement for consistent treatment of the product concerned (and of the like product), referred to in point 62 of this Opinion, means that all those types are necessarily considered as comparable and that, accordingly, all the transactions involving them are comparable, despite the lack of price data for some of those transactions.

78. In cases where the institutions do not have price data (either in the exporting country or, where appropriate, in an analogue country) with regard to certain product types concerned, they have two choices: either they reduce the scope of the definition of the product concerned, excluding from the investigation the product types for which there is no comparable price;[61] or they construct the normal value for the product types corresponding to those types of the product concerned, so that it is possible to take into consideration also export transactions concerning them for the purposes of determining the dumping margins.

79. Secondly, it is true that, by virtue of the reference to Article 2(10) of the basic regulation contained in Article 2(11) of that regulation,[62] the obligation to make a fair comparison also covers the determination of the existence of dumping margins. However, that in no way means that that requirement may be interpreted as limiting the scope of the definition of the product concerned or the obligation to consider, in the determination of the dumping margins, *all* exports of that product to the European Union.[63] Moreover, nothing in Article 2(10) of the basic regulation permits the inference as to the existence of the concept of 'the most fair comparison' on which the General Court bases a good part of its reasoning.[64]

80. The second clarification concerns the explicit exclusion by the General Court of the relevance in the present case of cases relating to the practice of 'zeroing'.[65]

81. In particular, the General Court dismissed the relevance of *Ikea Wholesale*, in which the institutions had applied such a method, considering that 'the dumping margin was not calculated on the basis of a significant representation of the product types concerned which thus did not reflect all the comparable export prices.'[66] The General Court then held that, unlike cases where zeroing was used - in which, when the comparison for the purpose of determining dumping margins was being made, the entire category of product types concerned for which a negative dumping margin had been found had been disregarded -, in the present case it was not possible to regard the approach of the institutions as having had the effect of inflating the result of the calculation of the dumping margin.[67]

82. I do not believe that, in the present case, it is possible entirely to exclude the relevance of the case-law and the rulings of the DSB concerning the application of zeroing, as the General Court has done. Those cases and the present case have highly similar features inasmuch as they are all concerned with the failure to take into account, for the purposes of determining dumping margins, a

60 — See the citations in footnote 57 of this Opinion.

61 — See, to that effect, Opinion of Advocate General Léger in *Ikea Wholesale* (C-351/04, EU:C:2006:236, point 168).

62 — Similarly, Article 2.4.2 of the Anti-Dumping Agreement refers to Article 2.4 of the same agreement.

63 — In that regard, it should also be pointed out that the Appellate Body of the DSB has expressly stated that 'a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions … is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2. '. – See report of 1 March 2001 entitled 'European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India' (DS141/AB/R), paragraph 55.

64 — See, in that regard, paragraph 84 of the judgment under appeal.

65 — See paragraphs 85 to 89 of the judgment under appeal.

66 — See paragraph 85 of the judgment under appeal.

67 — See paragraph 88 of the judgment under appeal.

part of the export transactions for the product concerned as defined in the investigation. In the context of the cases concerning the practice of zeroing, they were transactions for which the comparison of their price with the normal value had resulted in a negative margin. In the present case, they are transactions concerning product types for which the institutions did not have sales price data. The difference between the two types of cases lies precisely in the fact that, in the first, the effect of the transactions at issue on the determination of the dumping margins was distorted, whilst, in the present case, the effect of those export transactions on that determination was, because they were excluded, simply ignored.

83. However, I do not see why such a difference should have the result that the principles expressed in those decisions with regard to the determination of dumping margins — and, specifically, the requirement to take into account all exports relating to the product concerned in that determination — must be disregarded and are thus not applicable in the present case.

84. As regards the argument concerning the representativeness of the dumping margins as calculated in terms of all the product types concerned,[68] it should be noted that, even if those margins were representative of the five most sold product types, as the General Court stated in paragraph 81 of the judgment under appeal, this in no way alters the fact that the institutions, by excluding certain export transactions from the calculation of those margins, have neglected to take into consideration the product concerned as a whole and to calculate those margins by taking into account the prices of all export transactions to the European Union of that product as set out in Article 2(11) of the basic regulation.[69]

85. Moreover, it is not disputed that, in the present case, 38% and 43%, respectively, of the two appellants' sales were not taken into account in calculating the dumping margins, with the result that, first, the representativeness of those margins in relation to the appellants may be considered questionable and, secondly, it may be asked whether the requirement, referred to in points 65 and 66 of this Opinion, for the dumping margin to reflect the full degree of dumping being practised was, at least as regards the appellants, fulfilled.[70]

86. As regards, finally, the General Court's observation, in paragraph 89 of the judgment under appeal, that use of the analogue country method may give rise to additional difficulties, I would point out that nothing in Article 2(7)(a) of the basic regulation or in the objectives pursued by that provision[71] justifies its being interpreted as limiting the obligation, set out in Article 2(11) of that regulation, to consider, when determining the dumping margin, all exports to the European Union of the product concerned, as defined during the investigation.

68 — In that regard, see also paragraphs 81 to 84 of the judgment under appeal.

69 — In that regard, contrary to what the Commission claims, I do not believe that it is possible to infer from the Court's use of the expression 'which fully reflect', in paragraph 56 of the judgment of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547), reproduced in point 72 of this Opinion, that the Court intended to endorse an interpretation of Article 2(11) of the basic regulation which, contrary to the wording of the provision itself, would permit the dumping margin to be determined by excluding certain export transactions relating to the product concerned.

70 — In such a context, the General Court cannot remedy the determination of dumping margins in a manner which is not consistent with Article 2(11) of the basic regulation by arguing that the appellants claim that, 'by taking into consideration all the product types, the dumping margin calculated would have been substantially different from the one defined in the contested regulation' (see the end of paragraph 83 of the judgment under appeal). Moreover, given that the data relating to the construction of the normal value remained confidential, providing evidence of that fact would in this case have been practically impossible (see point 118 et seq. of this Opinion). It is on the basis of those considerations that it is necessary also to reject the argument, based on that paragraph of the judgment under appeal, alleging the irrelevance of the first ground of appeal put forward by the Commission at the hearing.

71 — See points 99 and 100 and the case-law cited in footnote 79 of this Opinion.

87. In the light of all the foregoing considerations and for the reasons set out above, I consider that the General Court committed an error of law in concluding that the Council had not committed a manifest error of assessment by excluding from the calculation of the dumping margin export transactions for certain types of the product concerned and that, accordingly, the regulation at issue infringed neither Article 2(11) of the basic regulation nor Article 2.4.2 of the Anti-Dumping Agreement. I therefore propose that the Court uphold the first ground of appeal.

D – *The second ground of appeal, relating to the refusal to make certain adjustments*

88. The second ground of appeal, which is subdivided into four parts, concerns the General Court's reasoning set out in paragraphs 96 to 126 of the judgment under appeal. It alleges infringement of Article 2(10) of the basic regulation, Article 2.4 of the Anti-Dumping Agreement, the principle of sound administration and Article 296 TFEU.

1. The first and second parts of the second ground of appeal, alleging infringement of Article 2(10) of the basic regulation and Article 2.4 of the Anti-Dumping Agreement in the light of the rejection of the requests for adjustment

89. The appellants claim that the General Court erred in not finding that the institutions infringed Article 2(10) of the basic regulation and Article 2.4 of the Anti-Dumping Agreement in that the institutions rejected the appellants' requests for adjustments on the basis of, first, the differences between their production costs and those of the Indian producer[72] and, secondly, the differences of consumption efficiency and productivity.[73]

(a) The judgment under appeal

90. As regards, first, the request for adjustments on the basis of the alleged differences between production costs, the appellants, before the General Court, claimed to have demonstrated, through an analysis of data concerning the Indian producer, that the latter had systematically set its prices in a way which ensured that it fully recovered its costs and that, consequently, all the cost differences were reflected by the price differences. In the judgment under appeal, the General Court rejected that argument, noting that India was considered a market economy country - a choice which was not contested by the appellants - and that the institutions could legitimately consider that, since it was competing with many other producers in the domestic market in India, that Indian producer could not freely set its prices but was bound to maintain them at the level of Indian market prices.[74] The General Court also considered that, in this case, the appellants had not demonstrated that the alleged differences affected the price comparability.[75]

91. As regards, secondly, the rejection of the requests for adjustment on the basis of differences relating to consumption efficiency and productivity, the General Court considered that the appellants had not demonstrated how those differences affected the comparability between the normal value and the export price. Moreover, according to the General Court, first, where the institutions use the analogue country method, all data concerning that country, and not only the prices and costs, should be taken into account, and, secondly, Article 2(10) of the basic regulation cannot be used in order to

72 — The appellants referred specifically to costs of access to raw materials and costs relating to the use of additional production processes (self-generation of energy) by the Indian producer.

73 — The appellants referred to the differences between themselves and the Indian producer in consumption (in quantity and not by value) of raw materials, in consumption (in quantity and not by value) of electricity and in productivity per worker.

74 — Paragraphs 103 to 108 of the judgment under appeal.

75 — Paragraph 116 of the judgment under appeal.

render Article 2(7)(a) of that regulation ineffective.[76] The General Court also held that the appellants had failed to prove that the Council had been incorrect to conclude that, in general, the production processes in China had been found to be comparable to those of the Indian producers, and that the alleged differences had been very minor. In addition, according to the General Court, since the appellants did not qualify for market economy status, the data relating to them could not be considered for the purposes of determining the normal value.[77]

(b) A brief summary of the arguments of the parties

92. In the context of the first part of their second ground of appeal, the appellants argue that it is not clear how, given the evidence which they had provided, the institutions could legitimately assume that the Indian producer could not reflect the higher costs resulting from the fact that it imported raw materials and that it was engaged in an additional production process merely because it was in competition with numerous other producers. Furthermore, they provided the General Court with declarations confirming the direct impact of costs on prices in the European Union too, which is also characterised by the existence of competition.

93. In the context of the second part of the second ground of appeal, the appellants argue that it is not apparent from Article 2(7)(a) of the basic regulation that the requirement of fair comparison or the determination of the dumping margin should be based on all the data relating to the analogue country. There is no derogation from the provisions of Article 2(10) of the basic regulation for those countries not having a market economy. It would be wrong to say that the analogue country method would be rendered redundant if it were possible to make adjustments. Taking into account adjustments relating to differences in efficiency and productivity would not be contrary to the objective of the analogue country method, because the lower consumption of raw materials and electricity and the efficiency of the labour force have no connection either with the prices and costs of those elements or with market forces.

94. The institutions dispute the appellants' arguments

(c) Assessment

95. Both these parts raise the question of the relationship between, on the one hand, Article 2(7)(a) of the basic regulation, which is concerned with the determination of normal value in the case of imports from non-market economy countries and, on the other hand, Article 2(10) of that regulation, which, in the context of the obligation to make a fair comparison between the normal value and the export price, lays down the requirement, where that is necessary, to make adjustments.

96. In that regard, it is necessary, first, to recall that, under Article 2(10) of the basic regulation, where the normal value and the export price as established are not on a comparable basis due allowance, in the form of adjustments, is to be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability.

76 — Paragraph 110 of the judgment under appeal.

77 — Paragraph 111 of the judgment under appeal and recital 103 of the regulation at issue.

97. In accordance with the case-law of the Court, if a party claims adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin, that party must prove that its claim is justified. Thus, where a producer claims that an adjustment of the normal value, in principle downward, applies, it is for that operator to indicate and to establish that the conditions for granting such an adjustment are satisfied. [78]

98. Secondly, it should also be recalled that, Article 2(7)(a) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in Article 2(1) to (6), normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country.

99. The Court has stated that the aim of that provision is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces. [79]

100. As regards the relationship between those two provisions, it should be noted that nothing in the basic regulation states that Article 2(7)(a) of the basic regulation lays down a general derogation from the requirement to make adjustments under Article 2(10) of that regulation. However, in the event that requests for adjustments to normal value are presented under that provision in an investigation in which the normal value is determined in accordance with the rules on imports from non-market economy countries, it is, in my opinion, necessary that Article 2(10) of the basic regulation be interpreted in the light and in the context of Article 2(7)(a) of that regulation.

101. Thus, in a case in which, as in this case, the institutions determine normal value in accordance with the analogue country method, under Article 2(10) of the basic regulation, they must, *in general*, take into account, in the form of adjustments, differences between factors which are claimed and demonstrated to affect prices and, accordingly, their comparability.

102. However, the requirement to interpret Article 2(10) of the basic regulation in the light of Article 2(7)(a) of that regulation implies that, in such a case, in order not to render that provision redundant, the institutions cannot be required to make adjustments on the basis of factors which are not directly or indirectly the normal result of market forces.

103. It follows from those considerations that an operator who has not qualified for market economy status cannot, in my view, rely on differences relating to factors linked to its cost structure or to its production activity to request adjustments of the normal value. [80] It is almost certain that both the cost structure and the productive activity of an undertaking operating in non-market economy conditions are, more or less directly, influenced by parameters which are not the normal result of market forces.

104. In the present case, as regards, first, the requests for adjustments on the basis of the alleged differences in production costs, it should immediately be noted that the arguments put forward by the appellants seek, in essence, to call into question the conclusions which the General Court reached in relation to the various elements provided by the appellants in the course of the administrative procedure, namely the analysis of data concerning the Indian producer and the various statements

78 — Judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 58 and 61 and case-law cited).

79 — Judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraph 48 and case-law cited).

80 — The General Court, in essence, applied that principle at the end of paragraph 111 of the judgment under appeal.

concerning the EU market. This is, in essence, tantamount to calling into question the assessment of the evidence made by the General Court, which does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject as such to review by the Court of Justice. [81]

105. Furthermore, in referring to the evidence adduced before the General Court, the appellants have not really challenged the fundamental reason for the rejection of their complaint by the General Court, namely that, since the Indian producer was operating in a competitive market, its freedom to set the prices of its products was limited by competition [82] and that, accordingly, it was not confirmed whether that producer could have automatically passed on any higher production costs in its prices.

106. In any event, in the light of the considerations set out in points 102 and 103 of this Opinion, in a case such as this, requests for adjustments, submitted by undertakings such as the appellants, relating to alleged differences between their production costs and those of the producer in the analogue country, cannot be accepted. In that regard, I note that the appellants have not disputed the conclusion in recital 103 of the regulation at issue, according to which, in so far as they have not qualified for market economy status 'their cost structure [could] not be considered as reflecting market values that can be used as a basis for adjustments'.

107. As regards, secondly, requests for adjustment on the basis of differences relating to consumption efficiency and productivity, I consider that, even though productivity and consumption efficiency are not costs in the strict sense, they are a function of several factors involved in the productive activity which can reasonably be presumed to be influenced, at least indirectly, by parameters which are not the normal result of market forces.

108. It follows that, in a situation in which the normal value is determined on the basis of the analogue country method, an undertaking which has not qualified for market economy status cannot rely on differences regarding productivity and efficiency to request adjustments of the normal value.

109. It follows that the General Court did not commit an error when it rejected the appellants' complaint concerning the institutions' refusal to take into account, in the present case, the adjustments at issue and that, accordingly, the first and second parts of the second ground of appeal must be dismissed.

2. The third part of the second ground of appeal concerning the information necessary for requesting adjustments and the unreasonable burden of proof

110. In the third part of the second ground of appeal, the appellants complain that the General Court infringed Article 2(10) of the basic regulation, Article 2.4 of the Anti-Dumping Agreement and the principle of sound administration.

111. They refer to paragraph 112 of the judgment under appeal, in which the General Court rejected their complaint that the institutions infringed their obligation to indicate what information was necessary in order to request adjustments and not to impose on them an unreasonable burden of proof.

81 — See, inter alia, judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 64 and 65 and case-law cited).

82 — As regards taking into consideration the effect of competition on the determination of prices in the context of an antidumping analysis, with respect to an analysis based on the analogue country method, see judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraphs 57 to 59).

112. The appellants argue that the fact, emphasised by the General Court, that they were able to understand the grounds for rejecting their requests for adjustment has no bearing on whether an unreasonable burden of proof was imposed on them. Moreover, first, the institutions regarded all the information relating to the data of the analogue country producer as confidential; secondly, they required the appellants to demonstrate that the Indian producer had taken into account alleged differences in its prices. However, without access to the Indian producer's data, such a burden of proof would be impossible to discharge.

113. The present part raises the problem of reconciling two requirements which, in certain circumstances, may appear to be opposed. On the one hand, there is the requirement to maintain the confidentiality of the data of undertakings which agree to cooperate with the institutions in antidumping investigations. Such a requirement is particularly important in cases in which the analogue country method is applied, in which the institutions rely, generally, on data provided by undertakings in the analogue country cooperating with the investigation. A failure to take into consideration that requirement could seriously jeopardise the possibility of carrying out such investigations. On the other hand, however, such a requirement conflicts with the requirement to make available to the parties submitting requests for adjustments, under Article 2(10) of the basic regulation, any information necessary to enable them to justify the basis for their requests. [83]

114. In that regard, it should first be pointed out that Article 2.4 of the Anti-Dumping Agreement states that the 'authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties'.

115. In its report of 28 July 2011, mentioned in points 7 and 40 and 41 of this Opinion, concerning the dispute 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China', the Appellate Body of the DSB stated that that provision requires that the authorities responsible for the investigation indicate to the parties the information which requests for adjustments should contain, so that the interested parties are in a position to submit such requests. [84]

116. In that regard, the fact remains that the above requirements clearly provided for in Article 2.4 of the Anti-Dumping Agreement are not expressly reproduced in the wording of Article 2(10) of the basic regulation. However, I consider that they follow from an interpretation of that provision given in the light of Article 2.4 of the Anti-Dumping Agreement and that, in any event, they are linked to the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. [85]

117. Unlike the situation in an ordinary antidumping investigation, in an investigation in which the normal value is established on the basis of the prices of a producer in an analogue country, the data concerning that value are obtained from a third-party source and relate to a country different from the country of the exporting producers under investigation. To the extent that they do not have access to the data, those exporting producers would have difficulty in obtaining the information necessary to determine what adjustments are likely to be requested of the institutions in order to take account of any differences affecting price comparability between exported products and products sold on the domestic market by the producer in the analogue country.

118. In such a case, it is thus for the institutions to provide the exporting producers under investigation with sufficient information to allow them to be able to make requests for adjustments.

83 — See points 96 and 97 of this Opinion and the case-law cited in footnote 78 of this Opinion.

84 — Paragraph 489 of the Report of the Appellate Body *EC — Fasteners (China)*.

85 — See, to that effect, judgment of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 77).

119. In that regard, it should be pointed out, first, that the assessment of the question of what specific data should, in practice, be shared with those exporting producers will depend on an analysis to be carried out on a case-by-case basis, taking into account the specific circumstances of each investigation. Secondly, it will be for the institutions to provide such data in a way which takes account of the requirement to maintain the confidentiality of the data of the undertakings which agreed to cooperate in the investigation in question, including, where appropriate, the producers in the analogue country.

120. However, in this case, it appears that *all* the information concerning the determination of normal value on the basis of data relating to the Indian producer were kept confidential from the exporting producers under investigation.[86] In such a situation, as the appellants submit, 'demonstrat[ing] that the alleged differences affected the price comparability'[87] would, in fact, seem to be an arduous, if not impossible, task.

121. In those circumstances, I consider that the third part of the second ground of appeal should be upheld.

122. However, I would note at this point that, even if the Court, on the basis of the foregoing considerations, were to hold that, in the present case, by not finding that the institutions had infringed their obligation to indicate what information was necessary and not to impose on the exporting producers under investigation an unreasonable burden of proof, the General Court infringed Article 2(10) of the basic regulation, this cannot have any effect on the rejection in the regulation at issue of the requests for adjustment made by the appellants. As is apparent from the considerations which I have set out in the context of the analysis of the first and second parts of this ground of appeal, in any event, the adjustments requested, because of their connection with cost structure and productive activity, could not be demanded by undertakings such as the appellants, which have not qualified for market economy status.[88]

3. The fourth part of the second ground of appeal, alleging infringement of Article 296 TFEU

123. In the fourth part of the second ground of appeal, the appellants argue that, in paragraphs 120 to 124 of the judgment under appeal, the General Court erred in concluding that, in the regulation at issue, the institutions complied with their obligation to state reasons. In its assessment of the level of detail required in the statement of reasons, the General Court failed to take account of the context in which the regulation at issue arose, namely use of the analogue country method and the absence of access to data concerning the Indian producer. Similarly, the General Court did not sufficiently take into account the exchanges between the appellants and the institutions in the course of the administrative procedure, exchanges during which the appellants asked the institutions to provide more detailed explanations. In that context, the institutions were required to specify in sufficient detail the reasons why the arguments and evidence submitted by the appellants did not discharge the burden of proof which was imposed on them.

124. In that regard, the Court has already held that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its power of review. That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure, the nature of the reasons

86 — See paragraph 112 of the judgment under appeal. That fact was not contested by the institutions.

87 — See paragraph 116 of the judgment under appeal.

88 — In that regard, it should also be noted that the appellants have not argued that, because they have not had access to information concerning the determination of normal value on the basis of the Indian producer's data, they were prevented from making requests for other types of adjustments.

given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [89]

125. In the present case, to the extent that the appellants complain that the General Court did not sufficiently take into account exchanges in the course of the administrative procedure, that argument seeks to call into question the General Court's assessment of the evidence, which, as I pointed out in point 105 of this Opinion, is not admissible in appeal proceedings. [90]

126. As regards the argument based on the failure to take into consideration the use of the analogue country method, it should be noted that the analysis in recitals 41 and 103 of the regulation at issue, reproduced in paragraph 99 of the judgment, shows unequivocally that the Council did take that circumstance into account in the statement of the reasons why it considered that it must reject the requests for adjustments submitted by the appellants. In those circumstances, it is not possible to complain that the General Court failed to criticise the statement of reasons in the regulation at issue on that ground. As regards the argument based on the absence of access to data concerning the Indian producer, that element has no effect on the institutions' obligation to state reasons and, in any event, any more detailed statement of reasons cannot compensate for the lack of access to the information necessary for requesting the adjustments.

127. It follows that, in my opinion, the fourth part of the second ground of appeal must be also rejected.

128. In conclusion, it is apparent from points 87 and 121 of this Opinion that, in my view, it is necessary to uphold the appeal brought by the appellants in Case C-376/15 P and to set aside the judgment under appeal.

VI – The action before the General Court

129. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the Court may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits. I consider that this is so in the present case.

130. It is clear from the considerations set out in points 52 to 87 of this Opinion that, by excluding, in the regulation at issue, from the calculation of the dumping margin the product types manufactured and exported by the appellants for which the sales prices of the producer in the analogue country were not available, the Council infringed Article 2(11) of the basic regulation and Article 2.4.2 of the Anti-Dumping Agreement.

131. In those circumstances, I consider that it is necessary to annul the regulation at issue in so far as it concerns the appellants.

89 — See judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraphs 75 and 76 and case-law cited).

90 — See the case-law cited in footnote 81 of this Opinion.

VII – Costs

132. If the Court adopts my assessment, the Council will be the unsuccessful party in Case C-376/15 P. In those circumstances, since the appellants have claimed that it should be ordered to pay the costs, pursuant to Articles 138(1) and 184(1), (2) and (4) of the Rules of Procedure, I propose that the Court order the Council to pay the costs incurred by the appellants both at first instance and in the appeal proceedings in Case C-376/15 P and order the Commission to bear its own costs in this case.

133. However, since the appeal in Case C-377/15 P must be dismissed as inadmissible, it is necessary to order the appellants to pay the costs in that case.

VIII – Conclusion

134. In the light of the foregoing considerations, I propose that the Court:

(1) dismiss as inadmissible the appeal in Case C-377/15 P;

(2) set aside the judgment of the General Court of 29 April 2015, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd* v *Council* (T-558/12 and T-559/12, EU:T:2015:237);

(3) annul Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation EC No 91/2009 imposing a definitive antidumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, in so far as it relates to Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd.;

(4) order the Council of the European Union to pay the costs incurred by Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd. in Case C-376/15 P and before the General Court;

(5) order the Commission of the European Union to bear its own costs in Case C-376/15 P;

(6) order Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd. to pay the costs relating to Case C-377/15 P.