Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 January 2017*

(Appeal — Dumping — Implementing Regulation (EU) No 501/2013 — Imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka and Tunisia — Extension to such imports of the definitive anti-dumping duty imposed on imports of bicycles originating in China — Regulation (EC) No 1225/2009 — Article 13 — Circumvention — Article 18 — Lack of cooperation — Evidence — Body of consistent evidence)

In Joined Cases C-247/15 P, C-253/15 P and C-259/15 P,

APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 27 May, 29 May and 1 June 2015, respectively,

Maxcom Ltd, established in Plovdiv (Bulgaria), represented by L. Ruessmann, avocat, and J. Beck, Solicitor,

appellant,

the other parties to the proceedings being:

Chin Haur Indonesia PT, established in Tangerang (Indonesia), represented by T. Müller-Ibold, Rechtsanwalt, and F.-C. Laprévote, avocat,

applicant at first instance,

Council of the European Union, represented initially by S. Boelaert, and subsequently by H. Marcos Fraile and B. Driessen, acting as Agents, and by R. Bierwagen and C. Hipp, Rechtsanwälte,

defendant at first instance,

European Commission, represented by J.-F. Brakeland and M. França, acting as Agents,

intervener at first instance (C-247/15 P),

and

European Commission, represented by J.-F. Brakeland and M. França, acting as Agents,

appellant,

the other parties to the proceedings being:

* Language of the case: English.

Chin Haur Indonesia PT, established in Tangerang, represented by T. Müller-Ibold, Rechtsanwalt, and F.-C. Laprévote, avocat,

applicant at first instance,

Council of the European Union, represented initially by S. Boelaert, and subsequently by H. Marcos Fraile and B. Driessen, acting as Agents, and by R. Bierwagen and C. Hipp, Rechtsanwälte,

defendant at first instance,

Maxcom Ltd, established in Plovdiv, represented by L. Ruessmann, avocat, and J. Beck, Solicitor,

intervener at first instance (C-253/15 P),

and

Council of the European Union, represented initially by S. Boelaert, and subsequently by H. Marcos Fraile and B. Driessen, acting as Agents, and by R. Bierwagen and C. Hipp, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Chin Haur Indonesia, PT, established in Tangerang, represented by T. Müller-Ibold, Rechtsanwalt, and F.-C. Laprévote, avocat,

applicant at first instance,

European Commission, represented by J.-F. Brakeland and M. França, acting as Agents,

intervener at first instance,

Maxcom Ltd, established in Plovdiv, represented by L. Ruessmann, avocat, and J. Beck, Solicitor,

intervener at first instance (C-259/15 P),

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 2 June 2016,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2016,

gives the following

Judgment

1 By their appeals, Maxcom Ltd, the Council of the European Union and the European Commission seek to have set aside the judgment of the General Court of the European Union of 19 March 2015, *Chin Haur Indonesia* v *Council* (T-412/13, 'the judgment under appeal', EU:T:2015:163), by which that court annulled Article 1(1) and (3) of Council Implementing Regulation (EU) No 501/2013 of 29 May 2013 extending the definitive anti-dumping duty imposed by Implementing Regulation (EU) No 990/2011 on imports of bicycles originating in the People's Republic of China to imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka and Tunisia, whether declared as originating in Indonesia, Malaysia, Sri Lanka and Tunisia or not (OJ 2013 L 153, p. 1) ('the regulation at issue'), in so far as that regulation concerns Chin Haur Indonesia PT ('Chin Haur').

Legal context

2 At the material time, the provisions governing the adoption of anti-dumping measures by the European Union were to be found in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343 p. 51; 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) ('the basic regulation').

3 Article 13 of the basic regulation, entitled 'Circumvention', was worded as follows:

'1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place. Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) may be extended to imports from companies benefiting from individual duties in the countries subject to measures when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

The practice, process or work referred to in the first subparagraph includes, inter alia, the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics, the consignment of the product subject to measures via third countries, the reorganisation by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the Community through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers, and, in the circumstances indicated in paragraph 2, the assembly of parts by an assembly operation in the Community or a third country.

2. An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:

(a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures, and

(b) the parts constitute 60% or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost, and

(c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

3. Investigations shall be initiated pursuant to this Article on the initiative of the Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which may also instruct the customs authorities to make imports subject to registration in accordance with Article 14(5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities, and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. The extension shall take effect from the date on which registration was imposed pursuant to Article 14(5) or on which guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

4. Imports shall not be subject to registration pursuant to Article 14(5) or measures where they are traded by companies which benefit from exemptions. Requests for exemptions duly supported by evidence shall be submitted within the time limits established in the Commission regulation initiating the investigation. Where the circumventing practice, process or work takes place outside the Community, exemptions may be granted to producers of the product concerned that can show that they are not related to any producer subject to the measures and that are found not to be engaged in circumvention practices as defined in paragraphs 1 and 2 of this Article. Where the circumventing practice, process or work takes place inside the Community, exemptions may be granted to importers that can show that they are not related to producers subject to the measures.

These exemptions shall be granted by decision of the Commission after consultation of the Advisory Committee or decision of the Council imposing measures and shall remain valid for the period and under the conditions set down therein.

…’

4 Article 18 of the basic regulation stated as follows:

‘1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

…

6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.’

Background to the proceedings and the regulation at issue

5 The background to the dispute is set out in paragraphs 1 to 28 of the judgment under appeal. For the purposes of the appeal proceedings, it may be summarised as follows.

6 On 14 August 2012, the Commission received a request submitted by the European Bicycle Manufacturers Association (EBMA), on behalf of three bicycle manufacturers in the European Union, for it to investigate the possible circumvention, by imports of bicycles from Indonesia, Malaysia, Sri Lanka and Tunisia, of anti-dumping measures imposed by Council Implementing Regulation (EU) No 990/2011 of 3 October 2011 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China, following an expiry review pursuant to Article 11(2) of Regulation No 1225/2009 (OJ 2011 L 261, p. 2).

7 On 25 September 2012, the Commission adopted Regulation (EU) No 875/2012 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Implementing Regulation No 990/2011 by imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka and Tunisia, whether declared as originating in Indonesia, Malaysia, Sri Lanka and Tunisia or not, and making such imports subject to registration (OJ 2012 L 258, p. 21).

8 On 26 September 2012, the Commission informed Chin Haur, a company established in Indonesia which exports bicycles to the European Union, that it had initiated that investigation and forwarded to it an exemption form, pursuant to Article 13(4) of the basic regulation. Chin Haur was asked to reply to that form no later than 2 November 2012. It lodged its response with the Commission on 5 November 2012. Following requests made by the Commission, Chin Haur provided documents relevant to that response on 3 and 4 December 2012.

9 On 6 and 7 December 2012, the Commission made a verification visit at the premises of Chin Haur. On that occasion, the latter gave the Commission a revised response to the exemption form.

10 On 28 January 2013, the Commission informed Chin Haur of its intention to apply Article 18 of the basic regulation. Chin Haur submitted its observations in that regard on 4 February 2013.

11 On 21 March 2013, the Commission sent Chin Haur, and the Indonesian and Chinese authorities, the general disclosure document setting out its conclusions regarding transhipment and assembly operations and stated its intention to propose the extension of the anti-dumping measures on imports of bicycles from China to imports from Indonesia. By that document, the Commission also rejected Chin Haur's request for exemption, in particular because of the unreliability of the data submitted by the latter.

12 On 29 May 2013, the Council adopted the regulation at issue.

13 In recitals 28 to 33 of that regulation, the Council indicated, essentially, as regards the extent of the cooperation provided by the Indonesian companies, that, of the four Indonesian companies which had submitted a request for exemption pursuant to Article 13(4) of the basic regulation, only three were regarded as having cooperated, the conclusions reached concerning the fourth company therefore being based on the facts available, in accordance with Article 18 of the basic regulation.

14 In recital 58 of the regulation at issue, the Council concluded that there had been a change in the pattern of trade between Indonesia and the European Union, within the meaning of Article 13(1) of the basic regulation.

15 In recitals 59 to 67 of the regulation at issue, the Council analysed the nature of the circumvention practices underlying that change in the pattern of trade between that third country and the European Union.

16 As regards transhipment practices, recitals 61, 62 and 64 of the regulation at issue stated as follows:

‘(61) For three out of the four initially cooperating companies, the investigation did not reveal any transhipment practices.

(62) As concerns the fourth company, as stated in recitals 29 to 33 above, application of Article 18 of the basic Regulation was warranted. The investigation revealed that the company did not own sufficient equipment to justify the volumes of exports into the Union in the [reference period] and, in the absence of any other justification, it can be concluded that the company was involved in circumvention practices via transhipment.

…

(64) Therefore, in light of the change of the pattern of trade concluded in recital 58 above between Indonesia and the Union within the meaning of Article 13(1) of the basic Regulation, the findings of one Indonesian company as stated in recital 61 above, and the fact that not all Indonesian producers/exporters came forward and cooperated, the existence of transhipment of Chinese-origin products via Indonesia is confirmed.’

17 In recitals 65 to 67 of the regulation at issue, the Council stated that the existence of assembly operations, within the meaning of Article 13(1) of the basic regulation, had not been established.

18 In recitals 92, 96 and 102 of the regulation at issue, the Council found, first, that there was no due cause or economic justification other than the avoidance of the existing anti-dumping measures, second, that the remedial effects of those measures were being undermined and, third, that, when a comparison was made with the normal value previously established, this indicated the existence of dumping.

19 In those circumstances, the Council concluded, in recital 115 of the regulation at issue, that the anti-dumping duty in question had been circumvented, within the meaning of Article 13(1) of the basic regulation, by transhipment via Indonesia.

20 Article 1(1) of the regulation at issue extended the definitive anti-dumping duty of 48.5% imposed in Article 1(2) of Implementing Regulation No 990/2011 to imports of bicycles consigned from Indonesia, whether or not declared as originating in that country. Article 1(3) of that regulation provided that the extended duty was to be collected on such imports registered in accordance with Regulation No 875/2012.

The procedure before the General Court and the judgment under appeal

21 By application lodged at the Registry of the General Court on 9 August 2013, Chin Haur brought an action for the annulment of Article 1(1) and (3) of the regulation at issue, in so far as those provisions concerned it.

22 By document lodged at the Registry of the General Court on 17 October 2013, the Commission sought leave to intervene in support of the Council. The President of the Seventh Chamber of the General Court granted the Commission’s request to intervene by order of 11 November 2013.

23 By document lodged at the Registry of the General Court on 19 March 2014, Maxcom sought leave to intervene in support of the Council. The Seventh Chamber of the General Court granted that application by order of 16 July 2014.

24 In support of its action for annulment, Chin Haur relied on three pleas in law. The first plea alleged infringement of Article 13(1) and Article 18(1) of the basic regulation. By the first part of that plea, Chin Haur contested the Council's conclusion that there had been a change in the pattern of trade. By the second part of the first plea, Chin Haur took issue with the Council's finding, in particular in recital 62 of the regulation at issue, that it had engaged in transhipment operations. The second plea in law alleged infringement of Article 18 of the basic regulation, the principle of proportionality and the obligation to state reasons and was directed against the Council's conclusions concerning lack of cooperation on the part of Chin Haur. The third plea alleged infringement of Article 13(1) of the basic regulation and of the principle of equal treatment. It was directed against the Council's conclusions as to the existence of dumping.

25 The Council contended that the action for annulment was inadmissible in its entirety.

26 By the judgment under appeal, the General Court dismissed the Council's arguments concerning the admissibility of the action. As to the substance, it rejected the first part of the first plea in law, as well as the second and third pleas relied on by Chin Haur in support of its action, as unfounded.

27 On the other hand, the General Court upheld the second part of the first plea in law. Chin Haur put forward three objections in support of that part. As regards the first objection, alleging that recital 62 of the regulation at issue was vitiated by an error of assessment, the General Court, first, analysed, in paragraphs 81 to 94 of the judgment under appeal, the information provided by Chin Haur in the course of the investigation. It concluded that that information did not prove that it was in fact an Indonesian exporter of bicycles or that it met the criteria laid down in Article 13(2) of the basic regulation.

28 Second, in paragraphs 95 to 103 of the judgment under appeal, the General Court examined the information available to the Council in concluding that there had been transhipment. It found, in paragraphs 95 and 104 of that judgment, that, on the basis of that information, that institution did not have sufficient evidence to justify its conclusion, in recital 62 of the regulation at issue, that Chin Haur did not have sufficient production capacity to justify the volumes exported to the European Union and that it was therefore engaged in transhipment operations. In that regard, the General Court stated, in paragraph 103 of that judgment, that even though Chin Haur had failed to prove that it was an Indonesian exporter or that it met the criteria laid down in Article 13(2) of the basic regulation, it did not follow that it had engaged in transhipment operations.

29 Third, in paragraph 105 of the judgment under appeal, the General Court stated that it could not be ruled out that the practices, processes or work for which there was insufficient due cause or economic justification other than the imposition of the initial anti-dumping duty, within the meaning of the second subparagraph of Article 13(1) of the basic regulation, included the engagement of Chin Haur in transhipment operations. Nonetheless, according to the General Court, the fact that Chin Haur had been unable to prove that it was an Indonesian bicycle producer or that it satisfied the criteria laid down in Article 13(2) of the basic regulation did not entitle the Council to conclude, by default, that it was engaged in transhipment, the power to arrive at such a conclusion being found neither in the basic regulation nor the case-law.

30 The General Court therefore concluded that the second part of the first plea in law had to be upheld, without there being any need to address the other objections raised by Chin Haur.

31 As a consequence, the General Court annulled Article 1(1) and (3) of the regulation at issue, in so far as it concerned Chin Haur.

Forms of order sought and procedure before the Court

32 By its appeal in Case C-247/15 P, Maxcom claims that the Court should:

— set aside the judgment under appeal in so far as concerns the second part of the first plea in law;

— reject in its entirety the first plea raised by Chin Haur before the General Court, and

— order Chin Haur to pay the costs incurred by Maxcom both in the appeal proceedings and in the proceedings before the General Court.

33 By its appeal in Case C-253/15 P, the Commission claims that the Court should:

— set aside the judgment under appeal, dismiss the action at first instance, order Chin Haur to pay the costs, and

— in the alternative, refer the case back to the General Court for reconsideration and reserve the costs of both sets of proceedings.

34 By its appeal in Case C-259/15 P, the Council claims that the Court should:

— set aside the judgment under appeal, dismiss the action at first instance, order Chin Haur to pay the costs incurred by the Council in both sets of proceedings, and

— in the alternative, refer the case back to the General Court for reconsideration and reserve the costs of both sets of proceedings.

35 In its response, lodged in Joined Cases C-247/15 P, C-253/15 P and C-259/15 P, Chin Haur contends that the Court should:

— dismiss the appeals against the judgment under appeal in their entirety;

— in the alternative, annul in part Article 1(1) and (3) of the regulation at issue, in so far as those provisions extend the anti-dumping duty imposed on imports of bicycles from China to Chin Haur and deny Chin Haur's request for exemption;

— order Maxcom, the Council and the Commission to pay the costs incurred by Chin Haur in both sets of proceedings, and

— take any other measures that the Court deems appropriate.

36 By decision of the President of the Court of 4 August 2015, Cases C-247/15 P, C-253/15 P and C-259/15 P were joined for the purposes of the written and oral procedure and the judgment.

The appeals

37 The grounds of appeal relied on by Maxcom, the Council and the Commission in support of their respective appeals all contest the General Court's finding that the Council was not entitled to conclude that Chin Haur had engaged in transhipment, as a result of which that court upheld the action and partially annulled the regulation at issue. Those grounds overlap to a large extent and may essentially be arranged in three groups.

38 First, Maxcom, the Council and the Commission submit, in essence, that the General Court made a number of errors of law in the application of Article 13(1) of the basic regulation. Second, the Council and the Commission claim that the judgment under appeal is vitiated by an inadequate statement of reasons and contradictory reasoning. The Council also maintains that the General Court distorted the facts before it. Third, the Commission argues that the General Court infringed its procedural rights.

Arguments of the parties

39 The first group of grounds of appeal is directed against paragraphs 95 to 105 of the judgment under appeal. Maxcom, the Council and the Commission maintain, in essence, that those paragraphs are vitiated by errors of law in that the General Court did not correctly apply Article 13(1) of the basic regulation.

40 In the first place, Maxcom and the Commission take issue with the General Court for finding that the Council was not entitled to conclude that Chin Haur had engaged in transhipment on the basis of the finding that the latter was not a genuine Indonesian producer of bicycles and was not involved in assembly operations exceeding the thresholds laid down in Article 13(2) of the basic regulation. First, according to Maxcom, in circumstances such as those of the present case, where Chin Haur imported parts of Chinese origin and exported bicycles to the European Union without proving that it was a producer or that its assembly operations exceeded the thresholds laid down in Article 13(2) of that regulation, it is legitimate to conclude that it was engaged in transhipment. Second, Maxcom maintains that the General Court 'rewarded' Chin Haur for providing incomplete, contradictory and unverifiable information. Third, Maxcom states that the General Court's assessment is not in line with the purpose of the basic regulation or the settled case-law of the Court of Justice to the effect that the EU institutions responsible for conducting anti-dumping investigations and adopting anti-dumping measures ('the EU institutions') have wide discretion in such investigations.

41 In the second place, the Council and the Commission submit that the General Court was incorrect to require the EU institutions to establish the every producer-exporter in the country concerned by the investigation was engaged in transhipment practices and thus reversed the burden of proof. First, Article 13(1) of the basic regulation requires the EU institutions to carry out an analysis at country level, not at the level of the individual exporters, the latter analysis being the responsibility of the producer-exporters. Second, such an interpretation would render Article 13(4) of the basic regulation devoid of purpose. Third, the General Court confused the concept of a 'circumvention practice' with one of its manifestations, namely transhipment. Fourth, the requirement for a finding of individual transhipment disregards the Court's case-law that the EU institutions enjoy broad discretion in establishing circumvention. Fifth, the General Court applied, in its assessment of the various grounds for annulment invoked, clearly contradictory interpretations of the concept of 'circumvention practice'.

42 In the third place, Maxcom, the Council and the Commission maintain that even if the Council's conclusions concerning the existence of transhipment were incorrect, the annulment of the regulation at issue would in any event not be justified. According to Maxcom, it is the Court's established case-law that an error of law may justify the annulment of the measure concerned only if, but for that error, the outcome of the overall assessment would have been different. Moreover, the Council and the Commission observe that the judgment under appeal calls into question recital 62 of that regulation, which relates specifically to Chin Haur. It is apparent from recitals 63 and 64 of the regulation that the finding of transhipment via Indonesia is not based solely on the finding that Chin Haur had engaged in such practices. Accordingly, the Commission submits that even if the Council erred in law in asserting that Chin Haur was involved in transhipment operations, it was entitled to conclude, on the basis of evidence concerning other Indonesian producer-exporters and the change in the pattern of trade, that transhipment was taking place in Indonesia.

43 Chin Haur disputes those arguments.

44 As a preliminary point, Chin Haur submits that, in so far as the arguments put forward by Maxcom, the Council and the Commission call into question the General Court's conclusion that there was not sufficient evidence that Chin Haur was engaged in transhipment operations, those arguments relate to the General Court's assessment of the facts and must therefore be rejected as inadmissible.

45 As its principal argument, Chin Haur claims, in the first place, that Maxcom, the Council and the Commission are mistaken about the full implications of the General Court's conclusions. First, in the judgment under appeal, the General Court simply states that the EU institutions bear the burden of proving the existence of transhipment and observes that, in the present case, those institutions failed to discharge that burden. The Council and the Commission have attempted to circumvent that procedural rule by drawing a distinction between the assessment of circumvention at country level, for which the Council bears the burden of proof, and at exporter level, for which the exporter bears the burden. That approach is irrelevant in this case, as the Council itself merged the two tests in the regulation at issue.

46 Second, Chin Haur contends that, contrary to the arguments put forward by the Council and the Commission, the General Court did not decide that the EU institutions must establish that every individual producer-exporter is engaged in transhipment operations. The General Court merely required that those institutions adduce evidence of what they claim to be the case, namely that bicycles are transhipped via Indonesia because bicycles exported by Chin Haur are transhipped.

47 Third, Chin Haur is of the view that, while the Court held in the judgment in *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154), that, in cases of non-cooperation, the EU institutions are authorised to rely on a body of consistent evidence, in the present case those institutions do not have such a body of evidence showing transhipment.

48 Fourth, Chin Haur submits that the claim that the General Court confused the notion of 'circumvention practice' with one of its manifestations, namely transhipment, does not make sense. If the General Court annulled the regulation at issue on the ground that the EU institutions had failed to establish transhipment, it is because transhipment was the only circumvention practice which, according to those institutions, existed in Indonesia.

49 In the second place, Chin Haur contends that the General Court was entitled to annul the regulation at issue because the Council failed properly to establish any transhipment operations in which Chin Haur had been engaged. Contrary to what is claimed by Maxcom, the Council and the Commission, the Council did not find in the regulation at issue that Indonesian producers other than Chin Haur were engaged in transhipment operations. The only finding in the regulation at issue was that some of those producers, accounting for a small share of the total production of bicycles, had failed to cooperate. Having regard to the Court's case-law, nothing entitles the Council or the Commission to infer that transhipment occurred on the basis of mere failure to cooperate on the part of individual producer-exporters.

Findings of the Court

Admissibility

50 It should be pointed out that it is settled case-law that the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it

is for the General Court alone to assess the value which should be attached to the evidence produced to it. That appraisal does not therefore constitute, save where the clear sense of the evidence has been distorted, a point of law which is subject as such to review by the Court of Justice.

51 However, an alleged failure to have regard to the rules of evidence is a question of law, which is admissible in an appeal (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 44).

52 By the objections raised in support of the present group of grounds of appeal, Maxcom, the Council and the Commission take issue with the General Court essentially for disregarding the rules of evidence and the standard of proof necessary to demonstrate circumvention for the purpose of Article 13(1) of the basic regulation. Accordingly, Chin Haur's argument that the present group of grounds of appeal is inadmissible cannot be accepted.

Substance

– Preliminary observations

53 The objections raised by Maxcom, the Council and the Commission in the first group of grounds of appeal all concern the issue of the burden of proof and the standard of proof required to show circumvention in circumstances in which some of the producer-exporters concerned have not cooperated with the investigation or have not cooperated sufficiently.

54 It should be observed, in that respect, first, that, according to the Court's settled case-law, 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. 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 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, paragraph 63 and the case-law cited).

55 Next, with regard to the burden of proving circumvention, Article 13(1) of the basic regulation provides that circumvention of anti-dumping measures is established when four conditions are met. First, there must be a change in the pattern of trade between a third country and the European Union or between individual companies in the country subject to measures and the European Union. Second, that change must stem from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty. Third, there must be evidence of injury to EU industry or that the remedial effects of the anti-dumping duty are being undermined. Fourth, there must be evidence of dumping.

56 According to Article 13(3) of the basic regulation, it is for the Commission to initiate an investigation on the basis of evidence which *prima facie* suggests circumvention practices. It is the Court's established case-law that that provision establishes the principle that the burden of proof of circumvention falls to the EU institutions (see, to that effect, judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 35).

57 Moreover, it is apparent from the wording and overall scheme of Article 13 of the basic regulation that, in order to establish circumvention, those institutions must carry out an overall assessment of the third country that is the subject of the investigation in relation to the circumvention as a whole. On the other hand, they are not required, for the purpose of proving circumvention, to carry out an

analysis of the situation of every individual producer-exporter, as that analysis is to be conducted by the individual producer-exporters themselves in the context of the requests made pursuant to Article 13(4) of the regulation.

58 Article 13(1) of the basic regulation provides that where circumvention of anti-dumping measures is established, those measures may be extended, inter alia, to imports from third countries of the like product. Moreover, Article 13(4) of the regulation makes it possible for producer-exporters established in such a third country to obtain an exemption if they so request, provided they are not related to a producer-exporter subject to such measures and can demonstrate that they have not engaged in circumvention practices. That provision states that requests for exemption must be duly supported by evidence.

59 Accordingly, as the Council and the Commission have observed, under Article 13(1) of the basic regulation, it is the task of the EU institutions to establish that anti-dumping measures are being circumvented in respect of the third country in question as a whole, whereas it is for each individual producer-exporter to show that its particular situation justifies an exemption pursuant to Article 13(4) of the regulation.

60 Lastly, with regard to the standard of proof required to demonstrate circumvention where there is insufficient or indeed no cooperation on the part of producer-exporters, it should be noted that there is no provision in the basic regulation which confers on the Commission, in an investigation to establish whether there has been circumvention, the power to compel producers or exporters which are the subject of a complaint to participate in the investigation or to provide information. The Commission is therefore reliant on the voluntary cooperation of the interested parties to provide it with the necessary information (judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 32).

61 It is for that reason that the EU legislature provided in Article 18(1) of the basic regulation that, in cases where an interested party refuses access to, or otherwise does not provide, necessary information, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available (judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 33).

62 Furthermore, Article 18(6) of the basic regulation provides that if an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than it would have been if it had cooperated.

63 In circumstances in which no cooperation whatsoever has been forthcoming from the producer-exporters, the Court has held that even though the basic regulation, and particularly Article 13(3) thereof, establishes the principle that the burden of proving circumvention is imposed on the EU institutions, Article 18(1) and (6) of the regulation are clearly intended to lessen that burden by providing that those institutions may base the findings of an investigation to ascertain whether there has been circumvention on the facts available and that the result may be less favourable to the parties which have not cooperated with it than it might have been if they had cooperated (see, to that effect, judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 35).

64 The Court has stated in that regard that it follows from Article 18 of the basic regulation that it was not the intention of the EU legislature to establish a legal presumption whereby it is possible to infer the existence of circumvention directly from the non-cooperation of the parties interested or concerned, thereby exempting the EU institutions from any requirement to adduce proof. However, given that it is possible to make findings, even definitive findings, on the basis of the facts available and to treat a party which does not cooperate or does not cooperate fully less favourably than if it had cooperated, it is equally evident that the EU institutions are authorised to act on the basis of a body of

consistent evidence showing the existence of circumvention for the purposes of Article 13(1) of the basic regulation (judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 36).

65 Any other approach would risk undermining the efficiency of EU trade defence measures each time the EU institutions are faced with non-cooperation in an investigation to establish whether there has been circumvention (judgment of 4 September 2014, *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 37).

66 In the present case, only some of the producer-exporters failed to cooperate. First, there is nothing in the wording of Article 13(1) of the basic regulation to prevent the EU institutions establishing circumvention of anti-dumping measures on the basis of a body of consistent evidence where producer-exporters accounting for a significant part of the imports of the product concerned into the European Union have not cooperated or have failed to cooperate sufficiently with the investigation. Second, the need to guarantee the effectiveness of trade defence measures also justifies, in circumstances such as those of the present case, those institutions being authorised to act on the basis of such a body of consistent evidence showing the existence of circumvention within the meaning of that provision.

67 While the EU institutions are entitled to rely on such a body of evidence, the fact nonetheless remains that, in accordance with Article 13(1) and (3) of the basic regulation, that evidence must show that the four conditions outlined in paragraph 55 above are met. Thus, as regards the second of those conditions, the EU institutions must have acquired evidence which tends to establish that the change in the pattern of trade stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty.

– Errors of law in the application of Article 13(1) of the basic regulation

68 It is in the light of the foregoing considerations that it is necessary to determine whether, as Maxcom, the Council and the Commission claim, the General Court's reasoning is vitiated by errors of law in the application of Article 13(1) of the basic regulation, in so far as it found, in paragraph 105 of the judgment under appeal, that the Council was not entitled to conclude that Chin Haur was engaged in transhipment, and, as a consequence, upheld the action and annulled Article 1(1) and (3) of the regulation at issue in so far as it concerned that company.

69 In essence, Maxcom, the Council and the Commission argue, first, that, contrary to what was stated by the General Court, the Council was fully entitled to conclude from the finding that Chin Haur was not a genuine Indonesian producer of bicycles and was not involved in assembly operations exceeding the thresholds laid down in Article 13(2) of the basic regulation that such transhipment operations were being conducted. Second, they take issue with the General Court for requiring the EU institutions to establish that every producer-exporter in the country concerned by the investigation was engaged in transhipment practices, thus reversing the burden of proof. Third, they maintain that even if the Council's conclusions concerning the existence of transhipment were incorrect, the annulment of the regulation at issue would in any event not be justified.

70 By those arguments, Maxcom, the Council and the Commission call into question the General Court's reasoning in paragraphs 95 to 105 of the judgment under appeal. In those paragraphs, the General Court found that the Council did not have sufficient evidence to claim, in recital 62 of the regulation at issue, that Chin Haur did not have sufficient production capacity to justify the volumes exported to the European Union and that it was therefore engaged in transhipment operations. That conclusion is based on two findings. First, the General Court carried out, in paragraphs 96 to 102 of that judgment, a thorough examination of the evidence available to the Council and found, at the conclusion of that examination, that that evidence did not point to the existence of transhipments. Second, in

paragraph 103 of the judgment, the General Court stated that the Council had also based its reasoning on the fact that Chin Haur failed to provide evidence showing that it was in fact an Indonesian producer or that it met the criteria laid down in Article 13(2) of the basic regulation. According to the General Court, it could not be inferred from that finding that Chin Haur had been engaged in transhipment operations.

71 In the first place, with regard to the argument relating to the need for an individual analysis of the transhipment operations, which it is appropriate to examine first, it is apparent from the preceding paragraph that the General Court's partial annulment of the regulation at issue is based on the finding that recital 62 of that regulation was vitiated by an error relating specifically to the transhipment operations in which Chin Haur was allegedly engaged. Recital 62 forms part of a section of the regulation headed 'Transhipment', which addresses the second of the four conditions set out in paragraph 55 above.

72 In that section, the Council stated, first of all, in recital 61 of the regulation at issue, that for three out of the four initially cooperating companies, the investigation did not reveal any transhipment practices. Next, in recital 62, the Council indicated that, with regard to the fourth company, namely Chin Haur, application of Article 18 of the basic regulation was warranted. It also stated that the investigation had revealed that that company did not own sufficient equipment to justify the volumes of exports into the European Union during the reference period. The Council added that, in the absence of any other justification, it could be concluded that the company was involved in circumvention practices via transhipment. Lastly, in recital 64 of the regulation at issue, the Council concluded that the existence of transhipment of Chinese-origin products via Indonesia was confirmed. It relied, for that purpose, on the conclusion in recital 58 of that regulation that there had been a change in the pattern of trade between Indonesia and the European Union, on the finding in recital 62 concerning Chin Haur and on the fact that not all Indonesian producer-exporters came forward and cooperated.

73 As the Advocate General observed in point 57 of his Opinion, in order to show that the second of the four conditions set out in paragraph 55 above was met, the Council thus relied, inter alia, on elements relating to Chin Haur as an individual producer-exporter to support its conclusion concerning Indonesia as a whole.

74 In those circumstances, the Court finds that, as submitted by Chin Haur, by annulling the regulation at issue in part on account of the irregularity vitiating recital 62 of that regulation, the General Court neither required the EU institutions to establish that every individual producer-exporter was engaged in transhipment operations nor reversed the burden of proof. The General Court simply took account of the fact that the finding that transhipment operations were being engaged in at country level in recital 64 of the regulation was based, inter alia, on the finding concerning Chin Haur in recital 62, suggesting by implication that the unlawfulness vitiating the first of those findings rendered the second finding unlawful.

75 It cannot therefore be concluded that the General Court erred in law in that regard. Accordingly, the present argument must be dismissed as unfounded.

76 In the second place, with regard to the errors of law allegedly vitiating the General Court's conclusion concerning recital 62 of the regulation at issue, it is necessary to ascertain whether the two findings mentioned in paragraph 70 above, on which that court relied in reaching that conclusion, are based on an incorrect application of Article 13(1) of the basic regulation.

77 First, it is true, as the General Court observed in paragraph 103 of the judgment under appeal, that it does not follow from the simple fact that Chin Haur failed to provide evidence that it was in fact an Indonesian bicycle producer or that it met the criteria laid down in Article 13(2) of the basic regulation that that company was engaged in transhipment operations.

78 As is apparent from paragraphs 64 and 67 above, first, there is no lawful presumption on the basis of which it may be directly inferred from a failure to cooperate on the part of an interested party that anti-dumping measures are being circumvented, and, second, the EU institutions must have in their possession evidence to show that the change in the pattern of trade stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty.

79 Therefore, it cannot be concluded that the General Court's finding in paragraph 103 of the judgment under appeal is vitiated by an error of law.

80 Second, with regard to the General Court's finding concerning the evidence available to the Council, it follows from paragraph 66 above that that institution was, in the present case, entitled to rely on a body of consistent evidence in reaching its conclusion that there was circumvention, within the meaning of Article 13(1) of the basic regulation, at Indonesian level.

81 Similarly, for the same reasons as those set out in paragraphs 63 to 66 above, the EU institutions are entitled, as the Advocate General observed in point 78 of his Opinion, to rely on a body of consistent evidence in reaching the conclusion that an individual producer-exporter which has failed to cooperate or not cooperated sufficiently in the circumvention investigation has engaged in circumvention.

82 In the present case, given that, as is apparent from paragraph 86 of the judgment under appeal, it is common ground that Chin Haur did not cooperate sufficiently in the investigation, the Council was entitled to rely on a body of consistent evidence in concluding that that company had circumvented anti-dumping measures.

83 It is clear from paragraphs 96 to 102 of the judgment under appeal that, in support of the finding in recital 62 of the regulation at issue, the Council relied on a certain amount of factual evidence gathered by the Commission's agents in the course of the verification visit at Chin Haur's premises. In particular, in paragraph 97 of that judgment, the General Court mentioned the following evidence: Chin Haur did not have the machinery to produce the parts in the volumes that it was claiming to produce; certain machines were new or had not been used recently; Chin Haur had no cutting or welding machines; it had not been possible during that visit to see the raw material for the alloy rims or the raw frames; Chin Haur's premises contained boxes of complete bicycles, bearing the sign 'made in Indonesia', with no mention of Chin Haur's Chinese supplier, and other boxes filled with frames bearing no origin; the frames seen at Chin Haur's premises were delivered by suppliers and already painted; Chin Haur's employees were unable to explain the production process.

84 The General Court nevertheless took the view that that evidence was not such as to prove that Chin Haur was engaged in transhipment operations, although it acknowledged, in paragraph 100 of the judgment under appeal, that some of the evidence, such as the fact that Chin Haur's Chinese supplier was not mentioned anywhere or that certain boxes were filled with frames bearing no origin, contributed to uncertainty as to that company's actual activities, which was also compounded by the fact the latter failed to justify the figures provided in the exemption forms.

85 As the Advocate General observed in point 81 of his Opinion, although it used the term 'evidence', the General Court thus denied the Council the possibility of basing its conclusion on a body of consistent evidence and required that institution to furnish direct evidence that Chin Haur was in fact engaged in transhipment operations, at odds with the standard of proof required to show circumvention where cooperation is not forthcoming from producer-exporters.

86 It follows that the General Court erred in law in finding, in paragraphs 104 and 105 of the judgment under appeal, that the Council was not entitled to conclude that Chin Haur was engaged in transhipment, and in therefore upholding the action and annulling Article 1(1) and (3) of the regulation at issue, in so far as it concerned that company.

87 The first group of grounds of appeal must therefore be upheld.

88 In the light of the foregoing considerations, the judgment under appeal must be set aside, without there being any need to consider either the other arguments and objections put forward in the present group of grounds of appeal or the other groups of grounds.

The action before the General Court

89 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is so in the present case.

90 Given that, as is apparent from, inter alia, paragraph 86 above, the General Court's analysis of the second part of the first plea in law at first instance is vitiated by an error of law, it is necessary to analyse the three objections put forward by Chin Haur in that part.

91 Those objections must be examined in the light of the case-law cited in paragraph 54 above, to the effect that judicial review should be confined to ascertaining whether the procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers.

92 The first objection raised by Chin Haur before the General Court was that on the basis of which that court upheld, erroneously, the second part of the first plea in law. By that objection, Chin Haur claimed that the Council made an error of assessment in concluding, in recital 62 of the regulation at issue, that it did not have sufficient production capacity to justify the volumes exported to the European Union.

93 It should be recalled in that regard that, as is apparent from the considerations set out in paragraphs 55 to 66, 81 and 82 above, in the present case the burden of proof on the EU institutions is lessened and those institutions were therefore entitled to rely on a body of consistent evidence to show that Chin Haur was engaged in circumvention operations, in particular transhipment.

94 First, it is apparent from the matters of fact referred to by the General Court, in particular in paragraphs 97 and 100 of the judgment under appeal, that the Council's doubts as to the true nature of Chin Haur's activities were justified by a number of items of evidence. That evidence was described in paragraphs 83 and 84 above. Second, as is clear from paragraph 118 of the judgment under appeal, it is common ground that Chin Haur exported bicycles in significant numbers to the European Union, without being able to prove their origin.

95 Accordingly, it must be found that the Council had a body of consistent evidence entitling it to conclude, without making a manifest error of assessment, that Chin Haur was engaged in transhipment operations.

96 It follows that the first objection in the second part of the first plea in law must be rejected as unfounded.

97 With regard to the second objection, Chin Haur contends that the Council erred in law in inferring solely from the change in the pattern of trade that it had engaged in transhipment operations. Moreover, it is alleged that the Council failed to establish a causal link between those operations and the alleged change in the pattern of trade.

98 In that regard, first, it should be noted that it is apparent from recital 64 of the regulation at issue that the Council did not infer solely from the change in the pattern of trade between Indonesia and the European Union that Chin Haur had engaged in transhipment operations. Accordingly, in that recital, after establishing that there had been such a change, the Council indicated that it was relying, in concluding that the existence of transhipment practices at Indonesian level was established, first, on findings in respect of Chin Haur and, second, on the fact that some Indonesian producer-exporters had not cooperated. The Council thus drew the appropriate conclusions from the findings set out in recitals 62 and 63 of that regulation, as evidenced by the use of the term 'therefore', which introduces recital 64.

99 As is apparent from paragraph 95 above, the findings concerning Chin Haur are not vitiated by any manifest error of assessment.

100 In those circumstances, the Court finds that the Council had sufficient consistent evidence, in accordance with the considerations set out in paragraphs 55 to 66, 81 and 82 above, to conclude that circumvention practices were being engaged in at Indonesian level and did not make any manifest error of assessment in that regard.

101 Second, with regard to the argument concerning the alleged error made by the Council in failing to establish a causal link between the transhipment operations and the change in the pattern of trade, it is sufficient to note that the Council established, in recitals 58, 64 and 92 of the regulation at issue, that the pattern of trade between Indonesia and the European Union had changed, that circumvention practices had been engaged in at Indonesian level and that there was no economic justification other than the imposition of the anti-dumping duty.

102 It must be noted that, in establishing that there is no economic justification, the Council checks, in principle, whether there is a plausible alternative explanation for the change in the pattern of trade and the circumvention practices, which, in practice, entails ascertaining whether there are any factors which might preclude the establishment of a causal link between that change and the circumvention practices.

103 The General Court did not err in law in rejecting, in paragraphs 53 to 70 of the judgment under appeal, in connection with the first part of the first plea in law, Chin Haur's objections concerning, first, the Council's finding that there had been a change in the pattern of trade and, second, the claim that the Council had failed to take account of alternative explanations for the circumvention. Moreover, it was held in paragraph 100 above that the finding as to the existence of circumvention practices was not vitiated by any manifest error of assessment. Accordingly, it must be concluded that the Council established a causal link between the transhipment operations and the change in the pattern of trade between Indonesia and the European Union.

104 In any event, as the Advocate General observed in point 122 of his Opinion, there is no evidence to substantiate Chin Haur's claims that the change in the pattern of trade might have resulted from an increase in production capacities in Indonesia, from Chinese exports being diverted to other Asian countries or the fact that producers in other Asian countries, such as Indonesia, took advantage of the decrease in Chinese exports to the European Union in order to increase their market share.

105 Accordingly, the second objection in the second part of the first plea in law at first instance must be rejected as unfounded.

106 With regard to the third objection in the second part of the plea in question, Chin Haur contends that, for want of any other evidence, the information provided should have constituted the facts available, within the meaning of Article 18(1) of the basic regulation.

107 It should be noted in that connection that, as observed by the General Court, in particular in paragraphs 86 and 142 of the judgment under appeal, the information provided by Chin Haur was incomplete, contradictory and unverifiable. Moreover, it is apparent from paragraphs 95 and 100 above that the Council had in its possession sufficient evidence to conclude that Chin Haur had engaged in transhipment operations.

108 It follows that the third objection in the second part of the first plea in law at first instance and the action in its entirety must be dismissed as unfounded.

Costs

109 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Pursuant to Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

110 Since Maxcom, the Council and the Commission have applied for costs against Chin Haur and the latter has been unsuccessful, it must be ordered to pay the costs relating to both the proceedings at first instance in Case T-412/13 and to the appeal.

111 Pursuant to Article 140(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

112 As a consequence, the Commission is to bear its own costs relating to the appeal proceedings in Cases C-247/15 P and C-259/15 P and the proceedings at first instance in Case T-412/13. On the other hand, in the light of the provisions set out in paragraph 109 above, as the Commission has applied for costs against Chin Haur in Case C-253/15 P and the latter has been unsuccessful, it must be ordered to pay the costs relating to the appeal in Case C-253/15 P.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 19 March 2015,** *Chin Haur Indonesia* **v** *Council***, (T-412/13, EU:T:2015:163);**

2. **Dismisses the action for annulment brought by Chin Haur Indonesia PT before the General Court of the European Union in Case T-412/13;**

3. **Orders Chin Haur Indonesia PT to bear its own costs and to pay the costs incurred by Maxcom Ltd and the Council of the European Union in both the proceedings at first instance in Case T-412/13 and the appeal proceedings;**

4. **Orders Chin Haur Indonesia PT to pay the costs incurred by the European Commission in relation to the appeal in Case C-253/15 P;**

5. **Orders the European Commission to bear its own costs in relation to the appeal proceedings in Cases C-247/15 P and C-259/15 P and the proceedings at first instance in Case T-412/13.**

von Danwitz Juhász Vajda

Jürimäe Lycourgos

Delivered in open court in Luxembourg on 26 January 2017.

A. Calot Escobar
Registrar

T. von Danwitz
President of the Fourth Chamber