Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 4 March 2020 [1]

Case C-104/19

Donex Shipping and Forwarding BV
Intervener:
Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Commercial policy – Anti-dumping duties – Validity of Regulation (EC) No 91/2009 – Imports of certain iron or steel fasteners originating in China – Regulation (EC) No 384/96 – Article 2(10) – Articles 6(7), 19 and 20 – Procedural rights – Infringement of the rights of defence – EU importer that did not take part in the anti-dumping proceeding)

1. The present case concerns a request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) relating to the validity of Regulation (EC) No 91/2009 [2] ('the regulation at issue'), by which the Council of the European Union imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

2. The request for a preliminary ruling has arisen in a dispute before the referring court concerning a challenge brought by the company Donex Shipping and Forwarding BV ('Donex') in respect of demands for payment of anti-dumping duties relating to the import by that company of products falling within the scope of the regulation at issue.

3. Donex has put forward various grounds alleging that the regulation at issue before the referring court is invalid. This Opinion will focus on the question as to whether an EU importer, such as Donex, which was not a party to the proceeding resulting in the adoption of a regulation imposing anti-dumping duties, can claim that that regulation is invalid by invoking an alleged failure on the part of the EU institutions to provide the exporting producers cooperating in that proceeding with the information necessary to enable them to submit requests in good time for an adjustment of the normal value used to determine the dumping margin.

[1] Original language: Italian.

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

I. Legal framework

A. International law

4. Annex 1A to the Agreement Establishing the World Trade Organisation (WTO) contains the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [3] ('the Anti-Dumping Agreement').

5. Article 2.4 of the Anti-Dumping Agreement states as follows:

'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 …. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. 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.'

B. European Union law

1. Basic regulation

6. At the time when the regulation at issue was adopted, the provisions governing the adoption of anti-dumping measures by the European Union were laid down in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, [4] as most recently amended by Council Regulation (EC) No 2117/2005 of 21 December 2005 [5] ('the basic regulation').

7. Article 2 of the basic regulation, entitled 'Determination of dumping', provides as follows in paragraph 10, headed 'Comparison':

'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 nearly 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. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade.'

3 OJ 1994 L 336, p. 103.

4 OJ 1996 L 56, p. 1.

5 OJ 2005 L 340, p. 17.

8. Article 6 of the basic regulation, headed 'The investigation', states as follows in paragraph 7:

'The complainants, importers and exporters and their representative associations, users and consumer organisations, which have made themselves known in accordance with Article 5(10), as well as the representatives of the exporting country may, upon written request, inspect all information made available by any party to an investigation, as distinct from internal documents prepared by the authorities [of the European Union] or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 19, and that … is used in the investigation. Such parties may respond to such information and their observations shall be taken into consideration, wherever they are sufficiently substantiated in the response.'

9. Article 19 of the basic regulation, headed 'Confidentiality', provides as follows in paragraphs 1 and 4:

'1. Any information which is by nature confidential, (for example, because its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he has acquired the information) or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the authorities.

…

4. This Article shall not preclude the disclosure of general information by the [European Union] authorities and in particular of the reasons on which decisions taken pursuant to this Regulation are based, or disclosure of the evidence relied on by the [European Union] authorities in so far as is necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interests of the parties concerned that their business secrets should not be divulged.'

10. Article 20 of the basic regulation, headed 'Disclosure', states in paragraphs 2 to 5:

'2. [The complainants, importers and exporters and their representative associations, and representatives of the exporting country] may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

3. Requests for final disclosure, as defined in paragraph 2, shall be addressed to the Commission in writing … Where a provisional duty has not been applied, parties shall be provided with an opportunity to request final disclosure within time limits set by the Commission.

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.'

2. The regulation at issue and the subsequent regulations relating to anti-dumping duties on imports of certain iron or steel fasteners

11. On 9 November 2007, the Commission initiated a proceeding on the existence of dumping in respect of certain iron or steel fasteners originating in the People's Republic of China. [6]

12. The investigation concerned the period between 1 October 2006 and 30 September 2007. This process involved the cooperation of 110 Chinese companies or groups of companies, of which nine were selected as a sample. [7]

13. On completion of the investigation on 26 January 2009, the Council adopted the regulation at issue, which imposed a definitive anti-dumping duty on certain iron or stainless steel fasteners originating in the People's Republic of China.

14. It is apparent from the regulation at issue that, for Chinese exporting producers not granted market economy treatment (MET), the normal value was established on the basis of information received from a producer in an analogue country, in this case India. [8]

15. With regard specifically to the non-cooperating companies, because of the limited degree of cooperation, the dumping margin was established as an average of the value found from Eurostat data and the highest margins found for product types sold in a representative quantity by the cooperating exporting producer with the highest dumping margin. On that basis, the dumping margin was calculated as 115.4%. [9]

16. However, as the countrywide injury margin was found to be 85%, on the basis of the 'lesser duty rule', in accordance with Article 9(4) of the basic regulation, [10] the rate of the definitive anti-dumping duty for non-cooperating companies was set at 85%.

17. On 28 July 2011, the Dispute Settlement Body of the WTO ('the DSB') adopted the Appellate Body Report of 15 July 2011, [11] and the Panel Report as amended by the Appellate Body Report in the case 'European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (WT/DS397). Those reports stated, in particular, that, in adopting the regulation at issue, the EU had acted inconsistently with certain provisions of the WTO Anti-Dumping Agreement.

6 OJ 2007 C 267, p. 31.

7 Recitals 13 and 16 of the regulation at issue.

8 Recitals 86 to 98 of the regulation at issue.

9 Of the cif Community frontier price, duty unpaid. See recitals 110 and 111 of the regulation at issue.

10 According to the last sentence of that provision: 'The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the [Union] industry.'

11 WT/DS397/AB/R.

18. Following those reports, the Council adopted Implementing Regulation (EU) No 924/2012 of 4 October 2012, amending Regulation (EC) No 91/2009,[12] which maintained the anti-dumping measures imposed by the regulation at issue but reduced future maximum anti-dumping duties from 85% to 74.1%.[13]

II. The facts, main proceedings and questions referred for a preliminary ruling

19. Donex filed a declaration in 2011 for the release into free circulation of iron or steel fasteners. Following an investigation by the European Anti-Fraud Office (OLAF), it was established that those items originated in the People's Republic of China and were therefore subject to anti-dumping duties under the regulation at issue.

20. Consequently, on 4 June 2014, Donex received demands for payment of anti-dumping duties in an amount calculated on the basis of the 85% rate established in the regulation at issue for non-cooperating Chinese exporting producers.

21. Donex challenged those demands for payment before the Rechtbank Noord-Holland (Northern Holland District Court, Netherlands). Following the dismissal of its action, Donex brought an appeal before the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands). In its judgment, that court dismissed the appeal brought by Donex, in particular dismissing the arguments used by the company to contest the validity of the regulation at issue.

22. Donex brought an appeal in cassation against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court in the present case, reiterating its arguments in relation to the invalidity of the regulation at issue.

23. That court has raised questions concerning the validity of that regulation from two angles: first, in relation to the determination of the dumping margin in the regulation at issue, pursuant to Article 2(11) of the basic regulation, and second, in relation to the fair comparison made under Article 2(10) of the basic regulation.

24. With regard to the second aspect, the referring court entertains doubts, in particular, concerning the validity of the regulation at issue in respect of the argument raised by Donex that the EU institutions have infringed Article 2(10) of the basic regulation by failing to provide cooperating Chinese exporting producers in good time with all the data concerning the Indian producer relating to determination of the normal value. The referring court makes express reference in that regard to the Opinion of Advocate General Mengozzi in *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2016:928; 'the Opinion in *Changshu and Ningbo*').

[12] OJ 2012 L 275, p. 1.

[13] Following a second complaint by the People's Republic of China, the WTO Appellate Body submitted a report on 18 January 2016, adopted by the DSB on 12 February 2016, which stated that, by adopting Implementing Regulation No 924/2012, the European Union had also infringed the Anti-Dumping Agreement. In those circumstances, the Commission adopted Implementing Regulation (EU) 2016/278 of 26 February 2016 repealing the definitive anti-dumping 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).

25. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Regulation (EC) No 91/2009 invalid in respect of an EU importer due to the infringement of Article 2(11) of Regulation (EC) No 384/96 in so far as the Council, in determining the dumping margin for the relevant products of non-cooperating Chinese exporting producers, excluded the export transactions of certain types of the product from the comparison referred to in that provision?

(2) Is Regulation (EC) No 91/2009 invalid in respect of an EU importer due to the infringement of Article 2(10) of Regulation (EC) No 384/96 in so far as, in calculating the magnitude of the dumping margin for the products concerned, the EU institutions refused to take into account, when comparing the normal value of the products of an Indian producer with the export prices of similar Chinese products, adjustments relating to import duties on raw materials and indirect taxes in the analogue country India and differences in production or production costs and/or in so far as the EU institutions, during the investigation, did not provide cooperating Chinese exporting producers (in a timely manner) with all the data relating to the Indian producer with regard to the determination of the normal value?'

III. Analysis

A. Preliminary observations on the request for a preliminary ruling

26. By its request for a preliminary ruling, the referring court is asking the Court to assess the validity of the regulation at issue from three angles: a potential infringement of Article 2(11) of the basic regulation in the determination of the dumping margin (first question); a potential infringement of Article 2(10) of that regulation, in relation to the alleged refusal by the EU institutions to take certain adjustments into consideration (first part of the second question); and a potential infringement of that latter provision in relation to the alleged failure by those institutions to provide cooperating Chinese exporting producers with all the data relating to the Indian producer concerning the determination of the normal value (second part of the second question).

27. In accordance with the Court's request, this Opinion will focus on the second part of the second question referred.

28. However, as a preliminary matter, I consider it appropriate to point out that, according to the Court's case-law, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union 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 relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. [14]

[14] See, most recently, judgment of 19 September 2019, *Trace Sport* (C-251/18, EU:C:2019:766, paragraph 47 and the case-law cited).

29. Second, I would observe that, as the basis for some of its doubts as to the validity of the regulation at issue, the referring court makes reference on a number of occasions to Regulation No 924/2012, adopted following the DSB's decision of 28 July 2011 mentioned in point 17 above. Donex itself refers in its submissions to that regulation to support some of its arguments relating to the invalidity of the regulation at issue. However, it should be borne in mind that Regulation No 924/2012 was enacted after the regulation at issue and was adopted to amend that regulation following a specific investigation, different from the investigation that led to the adoption of the regulation at issue. In my view, it therefore follows that it is not possible to claim that Regulation No 924/2012 is unlawful or that there were flaws in the investigation leading to its adoption as the basis for contesting the validity of the regulation at issue.

B. The second part of the second question referred

1. Preliminary observations

30. In the second part of its second question, the referring court asks the Court whether the regulation at issue is invalid in respect of an EU importer such as Donex on the ground of infringement of Article 2(10) of the basic regulation, in so far as the EU institutions failed, during the investigation that resulted in its adoption, to provide cooperating Chinese exporting producers in a timely manner with all the data relating to the Indian producer used to determine the normal value.

31. This question arises in a context in which, as noted in point 14 above, the EU institutions determined the normal value in the regulation at issue for Chinese exporting producers not granted MET on the basis of the information received from a producer in an analogue country, namely India.

32. The question put by the referring court is based on arguments made by Donex before that court, which are essentially reiterated before the Court of Justice. According to Donex, the alleged fact that the Commission did not, in a timely manner during the investigation, provide cooperating Chinese exporting producers with the necessary information, in particular all the data relating to the Indian producer, prevented those producers from exercising their right to seek adjustments under Article 2(10) of the basic regulation.

33. In addition to contesting the merits of the claim alleging infringement of Article 2(10) of the basic regulation in the present case, the EU institutions have raised a preliminary issue. They maintain that as Donex did not take part in the anti-dumping proceeding in question, it cannot claim infringement of the rights of defence of third parties, namely the cooperating Chinese exporting producers.

34. I therefore consider that it is necessary to examine first the issue raised by the EU institutions, which is a preliminary matter in relation to the analysis of the substance of the question put by the referring court.

2. Whether it is possible for an importer to claim infringement of the procedural rights of third parties in an anti-dumping proceeding in which it was not involved

35. In their observations submitted to the Court, the EU institutions maintain that, as an importer of products subject to anti-dumping duty that did not take part in the proceeding leading to the imposition of that duty, Donex cannot allege infringement of the rights of defence of the cooperating Chinese exporting producers before the referring court. Donex cannot therefore derive any benefit from a potential infringement, in the course of the proceeding that led to the adoption of the regulation at issue, of an alleged obligation on the part of the EU institutions to provide information to the abovementioned exporting producers to enable them to submit requests for adjustments. That conclusion applies a fortiori because the Chinese exporting producers from which Donex has imported products subject to duty did not even cooperate in the investigation.

36. As the basis for their line of argument, the EU institutions refer to the judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573; 'the *Fliesen-Zentrum* judgment').

37. In that judgment, as in the present case, a national court referred a question to the Court relating to the validity of a regulation imposing an anti-dumping duty in a case brought before that court by an importer of products subject to that duty. The national court sought to ascertain, inter alia, whether the EU institutions, by supplying vague information on how exactly the normal value was calculated and therefore making it impossible to submit duly informed observations specifically in relation to an adjustment made under Article 2(10) of the basic regulation, had infringed the rights of defence of the importer in question. [15]

38. In that judgment, after observing that it was common ground that the importer in question did not participate in the dumping investigation procedure that led to the anti-dumping duty being imposed and was not linked to any Chinese producer involved, the Court then ruled that the importer could not itself claim infringement of any rights of defence in a procedure in which it did not participate. [16]

39. Without denying the similarities between the case decided in *Fliesen-Zentrum* and the present case, Donex nevertheless claims that the failure by the EU institutions to provide the cooperating Chinese exporting producers with the information necessary to enable them to submit requests for adjustment of the normal value in a timely manner does not entail an infringement of rights of defence, but constitutes a genuine error in the application of Article 2(10) of the basic regulation. That error, which had an impact on the fair comparison between the normal value and the export price made in the regulation at issue in accordance with that provision, affected the dumping margin established for non-cooperating exporting producers, such as those from which Donex imported the goods in question. [17] Donex bases its argument on the final sentence of Article 2.4 of the Anti-Dumping Agreement, as interpreted by the DSB, [18] and on the Opinion of Advocate General Mengozzi in *Changshu* and *Ningbo*. [19]

[15] See paragraph 71 of the *Fliesen-Zentrum* judgment.

[16] See paragraph 73 of the *Fliesen-Zentrum* judgment.

[17] Indeed, as noted in point 15 above, it is apparent from recitals 110 and 111 of the regulation at issue, for non-cooperating exporting producers, the dumping margin was determined on the basis, inter alia, of the highest margins found for one of the cooperating exporting producers.

[18] In particular in the report of the Appellate Body of 15 July 2011, described in point 17 above. See paragraph 489 of that report.

[19] See, in particular, points 113 to 120 of that Opinion.

40. Against that background, the question therefore arises whether an obligation on the part of the EU institutions may be inferred from Article 2(10) of the basic regulation to provide cooperating exporting producers – or interested parties more generally – with the information necessary to enable them to submit requests for adjustment in good time and, consequently, whether a potential breach of that obligation should be classified as a substantial infringement of Article 2(10) of the basic regulation, or as an infringement of the rights of defence or other procedural rights of those exporting producers.

41. In that regard, it should first be noted that Article 2(10) of the basic regulation, headed 'Comparison', requires that a fair comparison be made between the export price and the normal value with due account taken of 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, must be made for differences in factors that affect prices and price comparability, as indicated in subparagraphs (a) to (k) of that provision.

42. Article 2(10) of the basic regulation therefore contains only substantive provisions concerning the making of a fair comparison between the export price and the normal value. It does not contain any procedural provisions expressly requiring the EU institutions to provide specific information to the interested parties.

43. However, it should also be noted that the text of Article 2(10) of the basic regulation is clearly drawn from Article 2.4 of the Anti-Dumping Agreement.

44. It is clear that, in its first sentence, Article 2(10) of the basic regulation uses essentially the same terms as those used in the first sentence of Article 2.4 of the Anti-Dumping Agreement. It is possible to infer that, at least in terms of the obligation to make a 'fair comparison' between the export price and the normal value, the text of that provision demonstrates the clear intention of the EU legislature to implement in EU law the specific obligation laid down in Article 2.4 of the Anti-Dumping Agreement,[20] within the meaning of the judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494).[21] It therefore follows that the EU court must verify whether EU measures are lawful on the basis of their compliance with that provision of the Anti-Dumping Agreement, giving the notion of 'fair comparison' the meaning attributed to it in the WTO rules.[22]

45. In support of its argument, however, Donex refers not to the first sentence of Article 2.4 of the Anti-Dumping Agreement, but to the final sentence of that article, as interpreted in the rulings and recommendations of the DSB. That final sentence 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.'

46. However, it should be noted that, unlike the first sentence of Article 2.4 of the Anti-Dumping Agreement, Article 2(10) of the basic regulation does not specifically reproduce the provision contained in the final sentence of Article 2.4. That provision does not appear to have been specifically transposed in any other article of the basic regulation.

[20] See point 37 of the Opinion of Advocate General Mengozzi in *Changshu and Ningbo*. On this point, see also judgment of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 73).

[21] See, in particular, paragraphs 45 and 46 of that judgment.

[22] See references in footnote 20 above.

47. Moreover, the Court has clarified on several occasions that, although recital 5 of the basic regulation states that the rules of the Anti-Dumping Agreement should be brought into EU legislation 'as far as possible', that expression must be interpreted as meaning that, while the EU legislature certainly intended to take into account the rules of the agreement in question when adopting the basic regulation, it nevertheless did not manifest the intention of transposing all those rules in that regulation. [23]

48. I therefore consider that, on the basis of the criteria laid down in the abovementioned judgment in *Commission* v *Rusal Armenal* judgment, in the context of the basic regulation, it cannot be inferred from Article 2(10), or from any other provision of that regulation, that there was a clear intention on the part of the EU legislature to implement a particular obligation arising from the provision laid down in the final sentence of Article 2.4 of the Anti-Dumping Agreement.

49. It follows that the Court of Justice cannot examine the lawfulness of the regulation at issue on the basis of its compliance with that provision and, therefore, Donex cannot rely on the provision laid down in the last sentence of Article 2.4 of the Anti-Dumping Agreement, as interpreted by the DSB, to contest the validity of that regulation. [24]

50. Furthermore, with regard to the arguments raised by Donex in relation to the invalidity of the regulation at issue based on the DSB ruling of 28 July 2011 mentioned in point 17 above, the Court has previously held that that ruling cannot be relied on as the legal basis for Donex's arguments because it was issued after that regulation. [25]

51. It also follows from the above that, contrary to what has been asserted by Donex, Article 2(10) of the basic regulation, as such, does not lay down any positive obligation for the EU institutions to provide specific information to the interested parties.

52. This does not mean, however, that the basic regulation does not take into consideration the requirement set out in the last sentence of Article 2.4 of the Anti-Dumping Agreement that the parties in question must be advised of the information they must provide to enable a fair comparison to be made.

53. That requirement forms part of the procedural system created by the EU legislature in connection with the anti-dumping proceedings implemented by the institutions on the basis of that regulation.

[23] Judgments of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 52) and of 4 February 2016, *C & J Clark International* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 90). Lastly, see also judgment of 15 November 2018, *Baby Dan* (C-592/17, EU:C:2018:913, paragraph 72).

[24] See, to that effect, judgments of 4 February 2016, *C & J Clark International* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 92) and of 15 November 2018, *Baby Dan* (C-592/17, EU:C:2018:913, paragraph 75). As regards, specifically, the rulings and recommendations of the DSB, the Court has held that a trader cannot 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, in any event 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. On this point, see paragraph 96 of the abovementioned judgment, *C & J Clark International*, and the judgment of 10 November 2011, *X and X BV* (C-319/10 and C-320/10, not published, EU:C:2011:720, paragraph 37 and the case-law cited).

[25] Judgment of 18 October 2018, *Rotho Blaas* (C-207/17, EU:C:2018:840, paragraph 51).

54. Of particular relevance in that regard are the provisions of Article 6(7) and Article 20(2) to (5) of the basic regulation, which make it possible for certain interested parties to receive information concerning the conduct of the investigation and to submit relevant observations.

55. The first provision makes it possible for complainants, importers and exporters and their representative associations, users and consumer organisations, as well as the representatives of the exporting country, to inspect all information made available by the parties to an investigation, as distinct from internal documents prepared by the authorities of the European Union or its Member States, which is relevant to the presentation of their case and not confidential within the meaning of Article 19 of the basic regulation, and that is used in the investigation.[26] Such parties may also respond to that information by submitting observations, which must be taken into consideration by the Commission. However, that possibility is subject to two conditions: first, those parties must make themselves known in the manner indicated in the notice initiating the proceeding[27] and, second, they must submit a written request to inspect the information in question.

56. The second group of provisions enables complainants, importers and exporters and their representative associations, as well as the representatives of the exporting country, to request disclosure of the essential facts and considerations forming the basis of the intention to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of definitive measures. However, also in these cases, the possibility of receiving final disclosure and, subsequently, submitting relevant observations is subject to the requirement that a written request be submitted to the Commission.[28]

57. It must therefore be concluded that, in the system governing anti-dumping proceedings, the basic regulation confers procedural guarantees and rights on certain interested parties,[29] but the exercise of those guarantees and rights depends on the active participation by those parties in the proceeding in question, which must take the form, at the very least, of the submission of a written request within a stated deadline.

58. It is in that procedural context that it is necessary to consider the abovementioned requirement, set out in the last sentence of Article 2.4 of the Anti-Dumping Agreement, that the interested parties must be advised of the information to be provided to enable a fair comparison to be made.

59. In my view, it is also in that procedural context that the observations made by Advocate General Mengozzi in his Opinion in *Changshu and Ningbo*, cited by Donex and mentioned by the referring court, must be viewed. According to those observations, on the basis of the principle of sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, it is for the institutions to provide the exporting producers under

[26] With regard to Article 6(7) of the basic regulation, see the judgment of 28 November 2013, *CHEMK and KF* v *Council* (C-13/12 P, not published, EU:C:2013:780, paragraph 32 et seq.).

[27] In accordance with Article 5(10) of the basic regulation.

[28] As regards the scope of Article 20 of the basic regulation, see also the judgment of the General Court of 30 June 2016, *Jinan Meide Casting* v *Council* (T-424/13, EU:T:2016:378, paragraphs 99 to 102).

[29] On the relationship between the recognition of those procedural guarantees and rights as part of an anti-dumping proceeding and the possibility of bringing legal action against a regulation imposing anti-dumping duty, with specific reference to the situation of associations representing the interests of producers concerned by the proceeding in question see judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155, paragraphs 97 and 106 to 108).

investigation with sufficient information to enable them to make a request for adjustment, in particular in an investigation in which the normal value is established on the basis of the prices of a producer in an analogue country. [30]

60. It follows from the system governing anti-dumping proceedings as established by the basic regulation that, as the procedural guarantees and rights provided by that regulation are subject to active participation in the investigation, they apply only to parties that have been actively involved in such a proceeding. Consequently, a possible infringement of those procedural guarantees and rights during the investigation, which typically takes the form of an infringement of the requirements associated with the interested parties' rights of defence, [31] such as the right to be heard, [32] may be invoked only by the party to which that guarantee or right applies. [33]

61. Moreover, it should also be noted that access to information concerning an anti-dumping investigation available to the interested parties under Article 6(7) and Article 20 of the basic regulation is, in any event, expressly restricted by the confidentiality of such information. The principles governing the interested parties' right to information must, therefore, be reconciled with the requirements of confidentiality, in particular the obligation for the EU institutions to respect business secrecy. [34]

62. The basic regulation therefore lays down a certain number of provisions, including, in particular, Article 19, that allow the requirements linked to the rights of the interested parties to properly defend their own interests to be reconciled with those linked to the need to protect confidential information. [35] Furthermore, the need to reconcile these requirements seems particularly relevant in cases where, as in the regulation at issue, the normal value is determined on the basis of the analogue country method. [36]

30 See, in particular, points 116 to 119 of the Opinion of Advocate General Mengozzi in *Changshu and Ningbo*.

31 On this point, see judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 75 to 87), specifically relating to an adjustment made in accordance with Article 2(10) of the basic regulation.

32 See, for example, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234, paragraphs 59 to 77 and the case-law cited).

33 In its case-law, the General Court has previously recognised on a number of occasions the subjective nature of a breach of rights of defence. See, inter alia, judgments of 12 December 2018, *Freistaat Bayern* v *Commission* (T-683/15, EU:T:2018:916, paragraph 44 and the case-law cited) and of 16 March 2016, *Frucona Košice* v *Commission* (T-103/14, EU:T:2016:152, paragraph 81).

34 See, in this regard, judgment of 20 March 1985, *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraph 24). On this point, see also judgment of the General Court of 30 June 2016, *Jinan Meide Casting* v *Council* (T-424/13, EU:T:2016:378, paragraph 94). The Court has also held that the obligation of EU institutions to respect the principle of confidential treatment of information concerning undertakings, and particularly undertakings in non-member countries that have expressed their readiness to cooperate with the investigation, may not be interpreted in such a way that the rights conferred on the parties concerned by the basic regulation are deprived of their substance. On this point, see paragraph 29 of the abovementioned judgment in *Timex* v *Council and Commission*.

35 In particular, Article 6(7), Article 19(2) to (4), and Article 20(4) of the basic regulation. See, in greater detail, judgment of the General Court of 30 June 2016, *Jinan Meide Casting* v *Council* (T-424/13, EU:T:2016:378, paragraph 105).

36 As noted by Advocate General Mengozzi in point 113 of his Opinion in *Changshu and Ningbo*, 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 request conflicts with the requirement to maintain the confidentiality of the data of undertakings in the analogue country that agree to cooperate with the institutions in anti-dumping investigations. In cases in which the analogue country method is applied, those undertakings generally constitute the essential source of the information on which the institutions rely. A failure to take into consideration that requirement could seriously jeopardise the possibility of carrying out such investigations.

3. The grounds alleging that the regulation at issue is invalid, raised in the second part of the second question

63. In its second question, the referring court questions the validity of the regulation at issue vis-à-vis Donex on the basis of an alleged failure by the EU institutions to provide the cooperating Chinese exporting producers with the information necessary to enable them to submit requests for adjustment of the normal value in good time, in particular all the data of the Indian producer used to determine that value.

64. However, the analysis undertaken in the previous points of this Opinion shows that, even if it were established that there had in fact been such a failure, that could potentially constitute an infringement of the rights of defence of the Chinese exporting producers that exercised their procedural rights in the anti-dumping proceeding leading to the adoption of the regulation at issue.

65. Given that those rights apply only to the parties that took part in the anti-dumping proceeding, and it being accepted that Donex did not take part in that proceeding, it must be concluded that Donex cannot in any event claim a potential infringement of this kind to contest the validity of the regulation at issue.

66. Furthermore, given that, as observed before the Court by the EU institutions and not contested by Donex, if not all, at least the majority of the data relating to the Indian producer used to determine the normal value was confidential, the institutions would not in any event have been able to provide 'all' the data of that producer, as indicated by the referring court in its question.

67. As a secondary consideration, I would also point out that it is clear from case-law the existence of an irregularity relating to rights of defence can result in annulment of the regulation concerned only where there is a possibility that, due to that irregularity, the administrative procedure could have resulted in a different outcome and thus actually undermined the rights of defence of the party alleging such infringement. [37]

68. On that point, even if, *quod non*, it were maintained that an importer could be subrogated to the position of the exporting producer from which it acquired the goods subject to duty and could thus claim a potential infringement of that party's rights of defence, it is clear that the Chinese exporting producers from which Donex acquired the products in question did not take part in the investigation leading to the adoption of the regulation at issue either.

69. In the light of the above considerations, I take the view that the answer to the second part of the second question – in line with the decision reached by the Court in the abovementioned *Fliesen-Zentrum* judgment, and without there being any need to determine in fact whether, by failing to provide cooperating exporting producers with sufficient information to enable them to submit requests for adjustment, the EU institutions potentially infringed their rights of defence – is that Donex cannot contest the validity of the regulation at issue before the referring court by claiming infringement of the rights of defence of third parties, namely the Chinese exporting producers, in the course of a proceeding in which it did not take part. The second part of the second question is therefore inadmissible.

[37] However, that party cannot be required to prove that the decision would have been different in content, but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error. See judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 78 and 79).

IV. Conclusion

70. In the light of all of the considerations set out above, I propose that the Court answer the second part of the second question referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

An EU importer of products subject to anti-dumping duty under a regulation such as Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, which did not take part in the proceeding leading to the adoption of that regulation, cannot subsequently contest the validity of the regulation before a national court by claiming infringement of rights of defence of parties that did take part in that proceeding. The second part of the second question referred is, therefore, inadmissible.