Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 6 October 2021 [1]

Case C-666/19 P

Changmao Biochemical Engineering Co. Ltd
v

European Commission

(Appeal – Dumping – Imports of aspartame originating in China – Applicability *ratione temporis* of Regulation (EU) 2016/1036 – Article 2(7)(a) of Regulation (EC) No 1225/2009 – Determination of the normal value on the basis of the price in the European Union for the like product – Article 2(10) of Regulation (EC) No 1225/2009 – Adjustments for the purposes of determining the dumping margin – Adjustments for the purposes of determining the existence of injury)

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[1] Original language: English.

1. By this appeal, Changmao Biochemical Engineering Co. Ltd requests the Court of Justice to set aside the judgment of 28 June 2019, *Changmao Biochemical Engineering* v *Commission* ('the judgment under appeal'),[2] by which the General Court dismissed its action for the annulment of Commission Implementing Regulation (EU) 2016/1247 ('the regulation at issue')[3] imposing an anti-dumping duty of 55.4% on the imports of its aspartame production.

2. This appeal presents the Court with an opportunity to rule on the extent to which the Commission may, in the case of imports from non-market economy countries, determine the normal value not by using the main method laid down in Article 2(7)(a) of Council Regulation

[2] T-741/16, not published, EU:T:2019:454.

[3] Regulation of 28 July 2016 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of aspartame originating in the People's Republic of China (OJ 2016 L 204, p. 92).

(EC) No 1225/2009,[4] that is, on the basis of the price or constructed value in a market economy third country (an 'analogue country'), but by using an alternative method, that is, on the basis of the price actually paid or payable in the European Union for the like product. This case also raises the question of the Commission's power, or duty, to make adjustments for the purposes of determining not only the dumping margin, but also the existence of injury.

I. Legal framework

3. Article 2(7)(a) of Regulation No 1225/2009, which corresponds to Article 2(7)(a) of Regulation (EU) 2016/1036 of the European Parliament and of the Council,[5] states:

'In the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the [EU], or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the [EU] for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

…'

4. Article 2(10) of Regulation No 1225/2009, which corresponds to Article 2(10) of Regulation 2016/1036, provides:

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

5. According to paragraphs 2 and 3 of Article 3 of Regulation No 1225/2009, entitled 'Determination of injury', which correspond to paragraphs 2 and 3 of Article 3 of Regulation 2016/1036:

'2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:

(a) the volume of the dumped imports and the effect of the dumped imports on prices in the [EU] market for like products; and

[4] Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51).

[5] Regulation of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21). Regulation 2016/1036 repealed and replaced Regulation No 1225/2009.

(b) the consequent impact of those imports on the [EU] industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the [EU]. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the [EU] industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.'

II. Background to the proceedings

6. On 30 May 2015, following a complaint lodged on 16 April 2015 by the sole producer of aspartame in the EU, namely Ajinomoto Sweeteners Europe SAS, now Hyet Sweet SAS, the Commission initiated an anti-dumping proceeding concerning imports of aspartame originating in China into the EU.

7. Aspartame is a sweetening ingredient produced in the form of white, odourless crystals of various sizes with a taste similar to sugar but with an increased sweetness potency and considerably smaller caloric value. It is mainly used as a sugar substitute in the soft drink, food and dairy industries. [6]

8. On 25 February 2016, the Commission adopted the provisional regulation.

9. On 28 July 2016, the Commission adopted the regulation at issue, whereby it imposed definitive anti-dumping duties on the imports of aspartame produced by several Chinese companies, including, as mentioned in point 1 above, a duty of 55.4% on the imports of aspartame produced by Changmao Biochemical Engineering.

III. Proceedings before the General Court and judgment under appeal

10. On 21 October 2016, Changmao Biochemical Engineering brought an action for the annulment of the regulation at issue.

11. By the judgment under appeal, the General Court dismissed that action.

12. Given that I have been requested by the Court of Justice to limit myself in this Opinion to examining the second, third and fourth grounds of appeal, which challenge the General Court's assessment of the second and third pleas in law raised before it, I will summarise below the General Court's assessment of those two pleas only.

13. In the first place, the General Court dismissed the second plea in law, alleging that the Commission infringed Article 2(7)(a) of Regulation 2016/1036 in calculating the normal value on the basis of the prices of the sole EU producer for the like product on the Union market, rather than on the basis of the export prices of a producer of the contemplated analogue country, namely

[6] See recitals 19 to 22 of Implementing Regulation (EU) 2016/262 imposing a provisional anti-dumping duty on imports of aspartame originating in the People's Republic of China (OJ 2016 L 50, p. 4) ('the provisional regulation'), and recital 18 of the regulation at issue.

Japan. According to the General Court, it is apparent from the first indent of that provision that, in the case of imports from non-market economy countries, the Commission may choose not to apply the general rule set out in that provision (according to which the normal value must be determined on the basis of the price in an analogue country, or on the basis of the price from that country to other countries), using some 'other reasonable basis', only where it is impossible to apply that general rule. Such is the case where the information available at the time of choosing is not reliable and is likely to lead to an inappropriate and unreasonable choice of analogue country. In the present case, the data provided by the Japanese producer were not reliable, and interested parties had raised concerns as to the choice of Japan as an analogue country. Moreover, given the rarity of aspartame producers in similar countries and the difficulty of finding a producer willing to cooperate, the Commission did not fail to take due care in its search for analogue countries.

14. In the second place, the General Court dismissed the third plea in law, alleging that the Commission infringed Article 2(10), Article 3(2)(a) and (3) and Article 9(4) of Regulation 2016/1036 and the principle of sound administration by refusing to make the adjustments necessary to ensure a fair price comparison. First, according to the General Court, the Commission did not infringe Article 2(10) of that regulation in refusing to make adjustments for the purposes of determining the dumping margin. This was because Changmao Biochemical Engineering failed to show that the alleged differences in the costs of production between the EU producer and itself affected prices and price comparability, thereby warranting adjustments. Moreover, none of the provisions relied upon by Changmao Biochemical Engineering required the Commission to make adjustments for the purposes of determining the injury margin. Secondly, the General Court rejected Changmao Biochemical Engineering's claim that the Commission had imposed an unreasonable burden of proof on it in requiring it to show that the alleged differences in production costs affected prices and price comparability when it did not have access to EU industry data. In the view of the General Court, this was because data relating to the EU producer had been disclosed to Changmao Biochemical Engineering, and the latter bore the burden of proving an impact on prices.

IV. Proceedings before the Court and forms of order sought

15. By this appeal, Changmao Biochemical Engineering requests that the Court of Justice: set aside the judgment under appeal; give final judgment in the matter and annul the regulation at issue in so far as it concerns Changmao Biochemical Engineering; and order the Commission and Hyet Sweet to pay its costs. In the alternative, Changmao Biochemical Engineering requests the Court of Justice to refer the case back to the General Court for it to rule on the second part of the first plea raised at first instance, relating to the second indent of Article 2(7)(c) of Regulation 2016/1036, or, in the further alternative, to rule on any other pleas raised at first instance, and to reserve the costs.

16. The Commission claims that the Court should dismiss the appeal and order Changmao Biochemical Engineering to pay the costs.

V. Analysis

17. Changmao Biochemical Engineering puts forward five grounds of appeal. As mentioned in point 12 above, I have been requested by the Court to limit myself in this Opinion to examining the second, third and fourth grounds of appeal.

18. However, a preliminary question arises as to the applicability *ratione temporis* of Regulation 2016/1036, on which the regulation at issue is based.[7] Indeed, Regulation 2016/1036, which repealed and replaced Regulation No 1225/2009, entered into force on the twentieth day following that of its publication in the *Official Journal of the European Union*, that is, on the twentieth day following 30 June 2016.[8] Therefore, Regulation 2016/1036 entered into force before the adoption of the regulation at issue on 28 July 2016, but *after the facts under investigation*. The question thus arises whether the Commission and the General Court[9] erred in applying Regulation 2016/1036, rather than Regulation No 1225/2009. A question for written response to that effect was addressed to the parties, who replied within the time limit set by the Court. Consequently, I will examine whether Regulation 2016/1036 was applicable *ratione temporis* (Section A) before I analyse the second, third and fourth grounds of appeal (Sections B, C and D).

A. Is Regulation 2016/1036 applicable ratione temporis to the present case?

1. Arguments of the parties

19. Changmao Biochemical Engineering submits that the substantive rules of Regulation No 1225/2009 governed the adoption of the anti-dumping duty in the present case, as that regulation was in force at the date of the underlying facts, of their definitive assessment in the general disclosure document, and of Changmao Biochemical Engineering's comments on that document. Thus, the Commission erred in referring to Regulation 2016/1036 in the regulation at issue.

20. By contrast, the Commission takes the view that Regulation 2016/1036 governed the adoption of the anti-dumping duty in the present case. This follows, in its view, from the early but standing case-law, which makes no distinction between substantive and procedural rules, and from the fact that Regulation 2016/1036 is a mere codification of Regulation No 1225/2009 and of the amendments to that regulation. The Commission also submits that it follows from the judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 28), that the Court cannot examine of its own motion the applicability *ratione temporis* of substantive rules.

2. Assessment

21. At the outset, I should emphasise that the provisions of Regulation 2016/1036 whose infringement is alleged in the present case[10] are identical to the corresponding provisions of Regulation No 1225/2009. Thus, should the Court of Justice find that the Commission and the General Court erred in the determination of the applicable regulation, this would have no impact on the outcome of the case. However, it seems to me that it is important to determine which regulation is applicable to the present case, or the Court's judgment could be based on a regulation that is not applicable *ratione temporis*.

7 See preamble ('having regard to [Regulation 2016/1036] …') and recital 142 of the regulation at issue.

8 Article 25 of Regulation 2016/1036.

9 Paragraph 1 of the judgment under appeal.

10 As listed in footnotes 18 and 19 below.

22. I will examine, first, whether, contrary to what the Commission argues, the Court may examine of its own motion whether Regulation 2016/1036 is applicable *ratione temporis* to the present case, and, secondly, whether or not that regulation is applicable.

23. First, I take the view that the applicability *ratione temporis* of Regulation 2016/1036 may be examined of the Court's own motion.

24. It is true that, according to the case-law of the Court of Justice, while certain pleas may, and indeed must, be raised by the EU Courts of their own motion, a plea going to the substantive legality of the decision at issue can, by contrast, be examined by the EU Courts only if it is raised by the applicant. [11]

25. However, it also follows from the case-law of the Court of Justice that the EU Courts cannot confine themselves to the arguments put forward by the parties in support of their claims, or they might be forced, in some circumstances, to base their decisions on erroneous legal considerations. [12] Thus, the EU Courts have the power and, where appropriate, a duty to raise *certain* pleas of substantive legality of their own motion. The General Court and the Civil Service Tribunal have already held that that applies to a plea in law alleging misapprehension of the scope of the law. [13]

26. Reference should be made, in particular, to the judgment of 16 September 2013, *Wurster* v *EIGE* (F-20/12 and F-43/12, EU:F:2013:129), in which the Civil Service Tribunal examined of its own motion the applicability *ratione temporis* of the general implementing provisions concerning the middle management staff of the European Institute for Gender Equality, [14] which had been adopted after the applicant had signed a temporary staff contract, but before she had completed the probationary period, which those general implementing provisions extended. The Civil Service Tribunal found that the general implementing provisions were not applicable *ratione temporis*. [15]

27. Thus, by analogy, I conclude that the Court may examine of its own motion whether Regulation 2016/1036 is applicable *ratione temporis* to the present case.

28. Secondly, I take the view that Regulation 2016/1036 is not applicable *ratione temporis* to the present case.

[11] Judgment of 25 October 2017, *Commission* v *Italy* (C-467/15 P, EU:C:2017:799, paragraph 15). See also Opinion of Advocate General Mengozzi in *Bensada Benallal* (C-161/15, EU:C:2016:3, points 62 and 63).

[12] Judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39, paragraph 58).

[13] Judgments of 15 July 1994, *Browet and Others* v *Commission* (T-576/93 to T-582/93, EU:T:1994:93, paragraph 35); of 12 June 2019, *RV* v *Commission* (T-167/17, EU:T:2019:404, paragraphs 60 and 65); of 31 January 2008, *Valero Jordana* v *Commission* (F-104/05, EU:F:2008:13, paragraph 53); of 21 February 2008, *Putterie-De-Beukelaer* v *Commission* (F-31/07, EU:F:2008:23, paragraph 52) (not set aside on that point by the judgment of 8 July 2010, *Commission* v *Putterie-De-Beukelaer* (T-160/08 P, EU:T:2010:294, paragraph 67)); of 23 September 2009, *Neophytou* v *Commission* (F-22/05 RENV, EU:F:2009:120, paragraph 56); of 13 April 2011, *Vakalis* v *Commission* (F-38/10, EU:F:2011:43, paragraphs 28, 38 and 40); and of 16 September 2013, *Wurster* v *EIGE* (F-20/12 and F-43/12, EU:F:2013:129, paragraph 84).

[14] Judgment of 16 September 2013, *Wurster* v *EIGE* (F-20/12 and F-43/12, EU:F:2013:129, paragraph 84).

[15] The reason why those general implementing provisions were found not to be applicable *ratione temporis* was that they stated not that they applied retroactively, but that they applied on the day following that of their adoption. Moreover, the situation of the applicant was definitively established before the general implementing provisions were adopted, given that she already satisfied all the conditions of eligibility for the post when she was recruited, and the probationary period affected only the term of her contract (judgment of 16 September 2013, *Wurster* v *EIGE*, F-20/12 and F-43/12, EU:F:2013:129, paragraphs 93 to 97).

29. According to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. By contrast, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them.[16] In other words, while *procedural* rules are generally held to apply immediately to situations existing before their entry into force, *substantive* rules are generally held not to apply to those situations, unless they provide otherwise.

30. There is no dispute that the provisions of Regulation 2016/1036 whose infringement is alleged in the present case[17] lay down substantive rules.[18] Moreover, no provision of Regulation 2016/1036 states that that regulation applies to situations existing before its entry into force.

31. Therefore, it follows from the case-law cited in point 29 above that the provisions of Regulation 2016/1036 whose infringement is alleged are not applicable to the present case.

32. My conclusion in point 31 above is not called into question by the judgments of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258), of 9 June 2011, *Diputación Foral de Vizcaya* v *Commission* (C-465/09 P to C-470/09 P, not published, EU:C:2011:372), and of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709), on which the Commission relies to argue that no distinction should be drawn between procedural and substantive rules, with the result that any new rules, even substantive ones, should apply immediately to situations existing before their entry into force.

33. It is true that, in the judgment of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraphs 129 to 140), the Court found that Regulation (EU) No 1168/2012 of the European Parliament and of the Council,[19] which extended the three-month time limit for the Commission to make a determination on a claim for market economy treatment, was applicable *ratione temporis* although it entered into force *after* the three-month time limit had expired in that particular case without the Commission making a determination on the Chinese exporting producers' claim.[20] However, the situation in the present case differs from the situation in that judgment. First, unlike Regulation 2016/1036, Regulation No 1168/2012 contains transitional provisions. It expressly states that it applies 'to all pending investigations as from 15 December 2012'[21] – a date at which the investigation was still pending in that case. Secondly, Regulation No 1168/2012, in so far as it extends the three-month time limit mentioned above, may be regarded as a procedural rule. As such, it should, according to the case-law cited in point 29 above, apply immediately to existing situations. Thus, paragraphs 135 and 136 of that judgment, in which the Court states that the Chinese exporting producers' situation was definitively determined only upon the entry into force of the regulation imposing anti-dumping

16 Judgment of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraphs 49 and 50 and the case-law cited).

17 Namely, Article 2(7)(a) and (c), Article 2(10), Article 3(2), (3) and (5), Article 6(8), and Article 9(4) of that regulation.

18 Given that the fourth part of the third ground of appeal is, in my view, inadmissible to the extent that it alleges infringement of Article 20(2) and (4) of the same regulation (see point 127 below).

19 Regulation of 12 December 2012 amending Regulation No 1225/2009 (OJ 2012 L 344, p. 1).

20 Regulation No 1168/2012 nonetheless entered into force before the adoption of the regulation imposing anti-dumping measures in that case.

21 Article 2 of Regulation No 1168/2012.

duties on them, cannot be relied on to argue, as the Commission, in essence, does, that the imposition of anti-dumping duties is governed by whatever rules are in force on the date of their adoption.

34. It is also true that, in the judgment of 9 June 2011, *Diputación Foral de Vizcaya* v *Commission* (C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraphs 121 to 129), the Court found that the Guidelines on national regional aid [22] were applicable *ratione temporis* although they had entered into force *after* the adoption of planned aid. [23] However, those guidelines expressly stated that they applied to unnotified aid implemented before their adoption – which was the case of the aid measures in question. Thus, the situation in the present case differs from the situation in that judgment, given that, unlike the guidelines in question in that judgment, Regulation 2016/1036 does not contain any transitional provisions.

35. Finally, it is true that, in the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraphs 43 to 59), the Court held that Commission Regulation (EC) No 70/2001 [24] was applicable *ratione temporis* although it was adopted *after* the notification of the aid in question. [25] However, I stress that, in order to reach that finding, the Court relied, in paragraphs 52 and 53 of that judgment, on the fact that the notification of planned aid does not give rise to a definitively established situation as it is solely intended to allow the Commission to carry out the preventive control of State aid. Obviously, there is no notification requirement in the field of anti-dumping law. Thus, that judgment cannot be relied on to argue, as the Commission does, that the imposition of anti-dumping duties is governed by the substantive rules in force on the date of their adoption.

36. In any event, I stress that, even if the Court agreed with the Commission that the substantive rules of EU law apply immediately to situations existing before their entry into force, it would not follow that Regulation 2016/1036 is applicable *ratione temporis* to the present case.

37. This is because, in my view, the situation in the present case cannot be regarded as 'existing' on the date on which Regulation 2016/1036 entered into force. Indeed, the period taken into consideration in order to determine whether the conditions for imposing anti-dumping duties were met ran until 31 March 2015. [26] Thus, the facts predate the entry into force of Regulation 2016/1036. Moreover, the determination of those facts was completed before that regulation entered into force, given that the final disclosure of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive measures, the submission of observations concerning that disclosure, and the hearing all predate the entry into force of Regulation 2016/1036. [27] In other words, the facts were definitively established before Regulation 2016/1036 entered into force.

22 OJ 1998 C 74, p. 9.

23 They nonetheless entered into force before the adoption of the decisions in which the Commission found the aid measures in question to be incompatible with the internal market.

24 Regulation of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33).

25 Regulation No 1370/2007 nonetheless entered into force before the adoption of the decision whereby the Commission found the aid to be compatible in part with the internal market.

26 The investigation period and the period considered for the assessment of injury ran until 31 March 2015 (see recital 3 of the regulation at issue).

27 The final disclosure took place on 2 June 2016, observations were submitted on 13 June 2016, and a hearing took place on 5 July 2016 (see paragraphs 7 to 9 of the judgment under appeal).

38. The approach in point 37 above is consistent with the case-law of the Court of Justice according to which compliance with the principles governing the temporal application of the law and with the principles of legal certainty and the protection of legitimate expectations requires the application of the substantive rules in force *at the date of the facts in issue*, even if those rules are no longer in force when an EU institution adopts an act. [28]

39. That approach is also consistent with the case-law of the General Court according to which, where the facts covered by the anti-dumping investigation predate the entry into force of Regulation 2016/1036, but the imposition of anti-dumping measures is subsequent to the entry into force of that regulation, the situation is governed by the procedural rules laid down in Regulation 2016/1036, and by the substantive rules provided for by Regulation No 1225/2009. [29]

40. I conclude that Regulation 2016/1036 is not applicable *ratione temporis* to the present case, and that the General Court erred in referring, in paragraph 1 of the judgment under appeal, to that regulation as the applicable regulation.

41. However, I recall that, as mentioned in point 21 above, given that the provisions of Regulation No 1225/2009 whose infringement is alleged in the present case are identical to those of Regulation 2016/1036, this has no impact on the outcome of the case.

42. Nevertheless, I will refer below in my analysis of the second, third and fourth grounds of appeal not to Regulation 2016/1036, but to Regulation No 1225/2009.

B. The second ground of appeal

1. Arguments of the parties

43. By its second ground of appeal, Changmao Biochemical Engineering submits that the General Court distorted the facts and erred in law in holding that, by failing to request and assess a detailed export transaction listing from the Japanese exporting producer, the Commission did not infringe Article 2(7)(a) and Article 6(8) of Regulation 2016/1036 or the principle of sound administration, nor did it breach its duty of care. The second ground of appeal is divided into three parts.

44. By the first part of the second ground of appeal, Changmao Biochemical Engineering maintains that the General Court erred in finding, in paragraphs 113, 115, 116, 128 and 129 of the judgment under appeal, that the Commission did not infringe Article 2(7)(a) of Regulation 2016/1036 or the principle of sound administration, or breach its duty of care, by determining the normal value on the basis of EU industry data even though it had not requested the Japanese exporting producer to provide transaction-by-transaction data on its export sales. In the view of Changmao Biochemical Engineering, it follows from Article 2(7)(a) of Regulation 2016/1036 that, in the case of imports from non-market economy countries, the normal value may be determined on the basis of EU industry data only if the domestic price in an analogue country and the export price from that country are not reliable. However, in the present case, it cannot be excluded that certain export transactions of the Japanese exporting producer were profitable, and therefore,

[28] Judgment of 14 June 2016, *Commission* v *McBride and Others* (C-361/14 P, EU:C:2016:434, paragraph 40). See also judgments of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187, paragraph 76), and of 19 June 2019, *C & J Clark International* (C-612/16, not published, EU:C:2019:508, paragraph 54).

[29] Judgment of 20 September 2019, *Jinan Meide Casting* v *Commission* (T-650/17, EU:T:2019:644, paragraphs 41 and 42). See also judgment of 19 September 2019, *Zhejiang Jndia Pipeline Industry* v *Commission* (T-228/17, EU:T:2019:619, paragraph 2).

reliable, given that the Commission had at its disposal only aggregated data, not transaction-by-transaction data, concerning that producer's export sales. Thus, the General Court distorted the facts in finding, in paragraph 113 of the judgment under appeal, that *all* export sales of that producer were loss-making. It follows that the Commission could not determine the normal value on the basis of EU industry data.

45. By the second part of the second ground of appeal, Changmao Biochemical Engineering claims that the General Court erred in finding, in paragraphs 125 and 126 of the judgment under appeal, that, by failing to request transaction-by-transaction data from the Japanese exporting producer and to examine that information, it did not fail to comply with its obligation under Article 6(8) of Regulation 2016/1036 to 'examin[e] for accuracy as far as possible' the information supplied by interested parties.

46. By the third part of the second ground of appeal, Changmao Biochemical Engineering submits that the General Court erred in finding, in paragraphs 117 and 118 of the judgment under appeal, that it was for the applicant to adduce evidence that the dumping margin would have been lower than the injury margin had the Japanese exporting producer's export sales been taken into account. Rather, it is for the Commission to consider on its own initiative all the information available.

47. The Commission submits that the second ground of appeal is ineffective in its entirety, as it does not challenge the General Court's finding, in paragraphs 112 and 114 of the judgment under appeal, that the data provided by the Japanese exporting producer were unreliable, and it does not explain why additional data requested from that producer would not have the same shortcomings.

48. In the alternative, the Commission claims that the third part of the second ground of appeal, as summarised in point 46 above, is unfounded and that, consequently, the first and the second parts of that ground, as summarised in points 44 and 45 above, are ineffective.

49. In the further alternative, the Commission maintains that the first and the second parts of the second ground of appeal, as summarised in points 44 and 45 above, are either ineffective (first part, to the extent that it alleges a distortion of the facts in paragraph 113 of the judgment under appeal) or inadmissible (second part), and that, in any event, they are unfounded.

2. Assessment

50. By its second ground of appeal, Changmao Biochemical Engineering submits that the General Court erred in finding that the Commission did not infringe Article 2(7)(a) of Regulation No 1225/2009 or the principle of sound administration or breach its duty of care in determining the normal value by using data from the EU industry even though it had not requested the Japanese exporting producer to provide transaction-by-transaction data concerning its export sales.

51. As explained in points 44 to 46 above, the second ground of appeal is divided into three parts. The first part, which is directed against paragraphs 113, 115, 116, 128 and 129 of the judgment under appeal, alleges infringement of Article 2(7)(a) of Regulation No 1225/2009 and of the principle of sound administration and breach of the Commission's duty of care. The second part, which is directed against paragraphs 125 and 126 of the judgment under appeal, alleges infringement of Article 6(8) of that regulation. By the third part, which is directed against paragraphs 117 and 118 of the judgment under appeal, Changmao Biochemical Engineering

maintains that the General Court erred in finding that it was for the applicant to adduce evidence that the dumping margin would have been lower than the injury margin had the Japanese exporting producer's export sales been taken into account.

(a) Admissibility

52. The Commission challenges the admissibility of the second part of the second ground of appeal, on the ground that that plea was not raised at first instance.

53. Before the General Court, Changmao Biochemical Engineering submitted that, by determining the normal value on the basis of EU industry data, the Commission infringed Article 2(7)(a) of Regulation No 1225/2009 and breached its duty of care. It did not submit that, in so doing, the Commission infringed Article 6(8) of that regulation. In fact, there is no mention of the latter provision in Changmao Biochemical Engineering's written submissions before the General Court.

54. Moreover, there is no reference to Article 6(8) of Regulation No 1225/2009 in paragraphs 102 to 130 of the judgment under appeal, in which the General Court examines and dismisses the plea summarised in point 53 above. In particular, there is no reference to that provision in paragraphs 125 and 126 of that judgment, against which the second part of the second ground of appeal is directed.

55. Thus, I find that the second part of the second ground of appeal is inadmissible.

(b) Substance

56. I will examine the third part of the second ground of appeal before I assess the first part of that ground.

(1) The third part of the second ground of appeal

57. At the outset, I should mention that, under the 'lesser duty' rule laid down in the last sentence of Article 9(4) of Regulation No 1225/2009, 'the amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the [EU] industry'. Thus, the injury margin is used to determine the rate of the anti-dumping duty where the dumping margin is higher than the injury margin. In the present case, the anti-dumping duty imposed on Changmao Biochemical Engineering was set at the level of the injury margin (55.4%) as it was lower than the dumping margin (124%). [30]

58. In order to dismiss Changmao Biochemical Engineering's argument that the normal value should have been determined by using the export prices of the Japanese exporting producer, rather than EU industry data, the General Court relied, in paragraphs 117 and 118 of the judgment under appeal, on the fact that Changmao Biochemical Engineering had not shown that, had the normal value been calculated as it proposed, the dumping margin would have been lower than the injury margin, and that, therefore, the anti-dumping duty imposed on it would have been fixed on the basis of the dumping margin.

[30] Recital 131 of the regulation at issue.

59. As mentioned in point 51 above, by the third part of its second ground of appeal, Changmao Biochemical Engineering submits that paragraphs 117 and 118 of the judgment under appeal contain an error in law.

60. As the Commission argues, should the Court find no error in law in those paragraphs, the first part of the second ground of appeal would have to be dismissed as being ineffective. Indeed, should the Court find that Changmao Biochemical Engineering was required to show that the dumping margin would have been lower than the injury margin had the normal value been calculated on the basis of the Japanese exporting producer's export prices, which, it is undisputed, Changmao Biochemical Engineering failed to do, it would be irrelevant whether or not the normal value could be calculated in that way without infringing Article 2(7)(a) of Regulation No 1225/2009 and the principle of sound administration and breaching the Commission's duty of care. This is why, as mentioned in point 56 above, I will examine the third part of the second ground of appeal before I assess the first part of that ground.

61. I take the view that the third part of the second ground of appeal is well founded, but that it must nonetheless be dismissed as ineffective.

62. I consider that, in cases where the anti-dumping duty is fixed on the basis of the injury margin, a producer on whom an anti-dumping duty has been imposed may challenge the calculation of the dumping margin even though it has not shown that, had the dumping margin been calculated as it proposes, it would have been lower than the injury margin, and that, therefore, the anti-dumping duty would have been fixed on the basis of the dumping margin. Thus, in my opinion, paragraph 118 of the judgment under appeal contains an error in law, and the third part of the second ground of appeal is well founded for the reasons set out below.

63. First, it is true that, in some cases, the applicant has been required, in order to challenge the calculation of the dumping margin, to show that the dumping margin would have been lower than the injury margin had the former been calculated as it proposed.

64. Reference should be made, in that regard, to the judgment of 5 October 1988, *Brother Industries* v *Council* (250/85, EU:C:1988:464, paragraph 24). In that judgment, the Court dismissed the plea alleging, in essence, an error in the calculation of the dumping margin on the ground that (i) the anti-dumping duty had been set on the basis of the injury margin of 21%, while (ii) the dumping margin amounted to 33.6%, with the result that (iii) the alleged error, which would have led to a 1.5% reduction in the dumping margin, 'would not have any impact on the rate of the anti-dumping duty'.

65. Reference should also be made to the judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62, paragraph 111). In that judgment, the General Court dismissed the plea alleging an error in the calculation of the injury margin (consisting, in essence, in the Commission's failure to take into account the sales of EU producers to related companies) by holding that: (i) the anti-dumping duties imposed on the applicants had been set on the basis of the dumping margin of 25.7%, not on the basis of the injury margin of 57%;[31] (ii) the alleged error in the calculation of the injury margin affected at most 10% of the total sales of the EU industry; with the result that (iii) it would have been necessary for the sales prices charged by the companies related to the EU producers to have been

[31] The situation in the judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62), is thus the reverse of that in the present case (in which the anti-dumping duty was fixed on the basis of the injury margin, not on the basis of the dumping margin).

totally disproportionate in relation to the other sales taken into account in the calculation of the injury margin for the latter to be brought at a level below that of the dumping margin. The Court of Justice found no error of law in that reasoning. Furthermore, it held that, as a consequence, the other pleas challenging the determination of injury had to be declared ineffective. [32]

66. Similarly, in the judgment of 4 March 2010, *Foshan City Nanhai Golden Step Industrial* v *Council* (T-410/06, EU:T:2010:70, paragraphs 94 to 98), the General Court dismissed as ineffective the plea alleging an error in the calculation of the underselling margin of 66% on the ground that, without that error, the underselling margin would have amounted to either 20.5% (according to the Council) or to 17.3% (according to the applicant) and it would thus still have been above the dumping margin of 9.7%, on which basis the anti-dumping duty imposed on the applicant had been set. [33]

67. However, I note that, in the judgments of 5 October 1988, *Brother Industries* v *Council* (250/85, EU:C:1988:464), and of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62) – albeit not in the judgment of 4 March 2010, *Foshan City Nanhai Golden Step Industrial* v *Council* (T-410/06, EU:T:2010:70) – it was clear that, without the alleged error in the calculation of the injury margin, the latter would *not* have fallen below the dumping margin (or that, without the alleged error in the calculation of the dumping margin, the latter would *not* have fallen below the injury margin). Indeed, in those first two judgments, the alleged error was small and/or the gap between the dumping margin and the injury margin was significant.

68. Secondly, it is true that, in the judgment of 14 March 1990, *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115, paragraph 38), on which the General Court relied in paragraph 118 of the judgment under appeal, the Court of Justice dismissed the plea alleging that the Council erred in calculating the anti-dumping duty solely on the basis of the injury caused by the sales made by Japanese producers, without taking into account the injury caused by the sales made by Japanese original equipment manufacturers (OEMs). That plea was dismissed on the ground that the applicant, Japanese manufacturer Ricoh, 'ha[d] failed to demonstrate that [the Council's approach of excluding the sales by OEMs] affected the level of the anti-dumping duty imposed, or to what extent that level would have differed if sales by OEMs had also been taken into account'.

69. However, I note that, in the judgment mentioned in point 68 above, the anti-dumping duty had been fixed on the basis of the injury margin, [34] and the applicant disputed precisely the determination of injury. Thus, what the Court required of the applicant was a demonstration that, without the alleged error, the anti-dumping duty would have been lower, not a demonstration that, without that error, the duty would have been fixed on the basis of the dumping margin, rather than the injury margin.

70. Thirdly, I emphasise that there are numerous examples of situations in which the EU Courts have examined pleas alleging an error in the calculation of the dumping margin even though the applicant had not shown that, without the alleged error, the dumping margin would have been

[32] 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 153 to 158). See also Opinion of Advocate General Mengozzi in Joined Cases *Council* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2011:245, points 254, 277 and 278).

[33] Reference should also be made to the judgment of 21 March 2012, *Fiskeri og Havbruksnæringens Landsforening and Others* v *Council* (T-115/06, not published, EU:T:2012:136, paragraphs 35, 36, and 45 to 47).

[34] See recitals 27, 107 and 114 of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12).

lower than the injury margin. Reference should be made, for instance, to the judgment of 15 September 2016, *PT Musim Mas* v *Council* (T-80/14, not published, EU:T:2016:504). Although the anti-dumping duty imposed on the applicant had been set on the basis of the injury margin,[35] the General Court examined the plea alleging that the Council and the Commission had erred in constructing the normal value on the basis of the production costs of the main raw material as reflected by published international prices, without requiring the applicant to demonstrate that, had the normal value not been calculated in that way, the dumping margin would have been lower than the injury margin.

71. Fourthly, I note that, in the judgment of 2 April 2020, *Hansol Paper* v *Commission* (T-383/17, not published, EU:T:2020:139, paragraphs 162 to 169), the General Court, referring to the judgment of 4 March 2010, *Foshan City Nanhai Golden Step Industrial* v *Council* (T-410/06, EU:T:2010:70, paragraph 94), mentioned in point 66 above, held that a plea challenging the calculation of the injury margin was admissible even though the applicant had not precisely stated the extent to which, without the alleged error, the injury margin would have been lower than the dumping margin. In the General Court's view, by that plea, the applicant more generally called into question the determination of the existence of injury and of a causal link, which were essential conditions for the purposes of imposing an anti-dumping duty, and whose erroneous assessment was thus 'capable of leading to the annulment of the contested implementing regulation, *without … the need to pose the question whether the injury margin was below the dumping margin*'.[36]

72. Fifthly, I emphasise that requiring exporting producers upon whom anti-dumping duties have been imposed to demonstrate that, without the alleged error in the calculation of the dumping margin, the latter would have been lower than the injury margin would, as Changmao Biochemical Engineering argues, amount to imposing on exporting producers a heavy burden of proof which, given the complexity of the calculations involved, they may not be able to discharge. This would hold true even if exporting producers were only required to demonstrate that, without the alleged error, the dumping margin *could* have been lower than the injury margin,[37] given the difficulty of defining under which conditions or in which circumstances that would be the case.

73. I conclude that the General Court erred in holding, in paragraph 118 of the judgment under appeal, that Changmao Biochemical Engineering bore the burden of proving that the dumping margin would have been lower than the injury margin, had the former been calculated as it proposed. Thus, the third part of the second ground of appeal is well founded.

74. However, as mentioned in point 61 above, the third part of the second ground of appeal must nonetheless be dismissed as ineffective. This is because, in order to dismiss the second plea raised before it, the General Court did not rely solely on the fact that Changmao Biochemical Engineering had failed to show that the dumping margin would have been lower than the injury margin, had the normal value been calculated as it proposed. The General Court also relied, in paragraphs 111 to 116 of the judgment under appeal, on the fact that the information available at the time of choosing was not reliable and was likely to lead to an appropriate and unreasonable choice of analogue country.

[35] Recital 215 of Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ 2013 L 315, p. 2).

[36] Judgment of 2 April 2020, *Hansol Paper* v *Commission* (T-383/17, not published, EU:T:2020:139, paragraph 168). Emphasis added.

[37] See, in that regard, paragraph 194 of the judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234) , in which the General Court held that '*it cannot be excluded* that, if the price undercutting had been calculated correctly, the injury margin of the Union industry would have been established at a level below that of the dumping margin' (emphasis added).

(2) The first part of the second ground of appeal

75. By the first part of its second ground of appeal, Changmao Biochemical Engineering submits that the Commission infringed Article 2(7)(a) of Regulation No 1225/2009 and the principle of sound administration and breached its duty of care by determining the normal value on the basis of EU industry data, even though it had not requested the Japanese exporting producer to provide transaction-by-transaction data on its export sales.

76. I take the view that the first part of the second ground of appeal is unfounded.

77. As regards, in the first place, the infringement of Article 2(7)(a) of Regulation No 1225/2009, I note that the first subparagraph of that provision states that, in the case of imports from non-market economy countries, in derogation from the rules set out in Article 2(1) to (6) of the same regulation, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country, that is to say, according to the analogue country method.

78. However, according to case-law, the Commission may choose not to apply the general rule set out in Article 2(7)(a) of Regulation No 1225/2009, for the determination of the normal value of products not originating in non-market economy countries, using some other reasonable basis, only where it is impossible to apply that general rule. [38]

79. In the present case, in the provisional regulation, the normal value was calculated on the basis of the information received from a cooperating producer in a market economy third country, namely Japan ('the Japanese producer'). That producer was Ajinomoto Co., Japan. [39] Indeed, the world production of aspartame was concentrated in a few countries, that is, China, France, Japan and South Korea, and, while the only known producer in South Korea refused to cooperate, the Japanese producer agreed to do so. [40]

80. However, in the regulation at issue, the normal value was calculated on '[an]other reasonable basis', as provided for by the first subparagraph of Article 2(7)(a) of Regulation No 1225/2009. It was based on the prices of the sole EU producer for the like product on the EU market, namely Ajinomoto Sweeteners Europe SAS, now Hyet Sweet, which was a subsidiary of the Japanese producer. [41] The reasons why, in the regulation at issue, the Commission decided not to use the data provided by the Japanese producer were that: (i) that producer was the sole producer active on the Japanese market, competing with imports from China and Korea; and (ii) more importantly, the profit margins of the Japanese producer varied greatly between types and sizes of customers, without the investigation bringing to light any rational reason for the wide difference between profit margins. [42]

81. In paragraphs 105 to 116 of the judgment under appeal, the General Court held that the Commission did not infringe Article 2(7)(a) of Regulation No 1225/2009 in calculating the normal value on the basis of the prices of the sole EU producer on the EU market. In the General Court's view, this was because: (i) the data provided by the Japanese producer were not reliable, due to the great and unjustifiable variations in that producer's profit margins; (ii) as shown by

38 Judgment of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158, paragraph 26).

39 See recitals 17(e), 45 and 46 of the provisional regulation.

40 See recitals 42 to 46 of the provisional regulation. See also recital 29 of the regulation at issue.

41 See recitals 2, 26, 32 and 33 of the regulation at issue.

42 See recital 31 of the regulation at issue.

Table 15 of the Japanese producer's reply to the Commission's questionnaire, while all the domestic sales of that producer were highly profitable, all its export sales were loss-making; and (iii) concerns had been raised by interested parties as to the choice of Japan as an analogue country.

82. Changmao Biochemical Engineering's argument is that the Commission requested the Japanese producer to provide transaction-by-transaction data on its domestic sales, but not on its export sales. Thus, in Changmao Biochemical Engineering's view, it cannot be excluded that some export sales of that producer may be profitable. It follows that the Commission failed to demonstrate that the data provided by the Japanese producer were unreliable, and that it was not possible to use those data for the purposes of calculating the normal value. Changmao Biochemical Engineering concludes that, in calculating the normal value not on the basis of the Japanese producer's export prices, but on the basis of EU industry data, the Commission infringed Article 2(7)(a) of Regulation No 1225/2009, and that paragraphs 113, 115 and 116 of the judgment under appeal contain an error in law.

83. Thus, Changmao Biochemical Engineering does not dispute that, as explained in points 77 and 78 above, the method of determining the normal value on the basis of prices in the EU is an alternative method that may only be used where it is not possible to use the main method. What Changmao Biochemical Engineering disputes is the General Court's finding that, in the present case, it was not possible to use the Japanese producer's data (and that, therefore, the normal value could not be calculated on that basis).

84. The Commission replies that the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009 is ineffective and, in any event, unfounded.

85. In my opinion, the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009 must be dismissed as unfounded, not as ineffective. I will explain below why I disagree with the Commission's position that that plea is ineffective before I set out the reasons why it is unfounded.

86. In the Commission's view, the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009 is ineffective because, first, Changmao Biochemical Engineering does not dispute the General Court's finding that the information provided by the Japanese producer was unreliable, secondly, it challenges only one of three reasons which led the General Court to dismiss the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009, namely, the reason set out in paragraph 113 of the judgment under appeal, not those laid down in paragraphs 112 and 114 of that judgment, and, thirdly, paragraphs 124 to 128 of that judgment suffice to support the General Court's finding of no infringement.

87. However, first, it is true that, as the Commission argues, Changmao Biochemical Engineering does not contend that the data provided by the Japanese producer are incorrect. It does, however, submit that those data are incomplete, in so far as the Japanese producer provided the Commission with aggregated data on its export sales, rather than with transaction-by-transaction data on those sales. It seems to me that, contrary to what the Commission argues, Changmao Biochemical Engineering thereby disputes the reliability of the data provided by the Japanese producer within the meaning of the second subparagraph of Article 2(7)(a) of Regulation No 1225/2009.

88. Secondly, it is true that, as the Commission argues, Changmao Biochemical Engineering challenges only paragraph 113 of the judgment under appeal, not paragraphs 112 and 114 of that judgment. However, paragraphs 112 and 113 do not set out separate reasons why the General Court considered that the Commission did not err in refusing to calculate the normal value on the basis of the data provided by the Japanese producer. Both paragraphs refer to the unexplained variations in the profit margins of the Japanese producer. As for paragraph 114 of the judgment under appeal, it simply reproduces comments made by interested parties during the administrative procedure, without either the Commission or the General Court adopting those comments. Thus, contrary to what the Commission argues, the fact that Changmao Biochemical Engineering challenges paragraph 113 of the judgment under appeal, but not paragraphs 112 and 114 of that judgment, does not mean that the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009 is ineffective.

89. Thirdly, I note that, contrary to what the Commission argues, Changmao Biochemical Engineering challenges paragraph 128 of the judgment under appeal.

90. However, as mentioned in point 85 above, I agree with the Commission that the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009 is unfounded.

91. First, this is because, in my view, it was not necessary for the Commission to obtain transaction-by-transaction data concerning the Japanese producer's export sales in order to consider the data provided by that producer as unreliable and likely to lead to an inappropriate and unreasonable choice of analogue country.

92. According to the second subparagraph of Article 2(7)(a) of Regulation No 1225/2009, an appropriate market economy third country shall be selected 'due account being taken of any reliable information made available at the time of selection'.

93. It is true that, in the judgment of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158, paragraphs 31 and 32), the Court held that the concept of 'reliable information made available' within the meaning of the second subparagraph of Article 2(7)(a) of Regulation No 1225/2009 is not limited to the information provided by the complainant or by the parties concerned, given that the Commission has an obligation to consider on its own initiative all the information available.

94. However, I emphasise that, according to case-law, the Commission enjoys a degree of discretion in determining the availability of information, since the means of investigation stated are optional and are all the more difficult to implement where they relate to information about a third country. Indeed, Article 6(4) of Regulation No 1225/2009 states that investigations may be carried out in third countries provided that, inter alia, 'the firms concerned give their consent'. Moreover, Article 6(8) of that regulation provides that examination of the accuracy of the information is to be made 'as far as possible'. [43]

95. In the present case, although it is common ground that, during the administrative procedure, the Commission neither requested nor received transaction-by-transaction data on the Japanese producer's export sales and on the profit margins achieved on those sales, it nonetheless had at

[43] See, in that regard, judgments of 23 September 2015, *Schroeder* v *Council and Commission* (T-205/14, EU:T:2015:673, paragraph 44); of 23 September 2015, *Hüpeden* v *Council and Commission* (T-206/14, not published, EU:T:2015:672, paragraph 45); and of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278, paragraph 198). (I should note that an appeal is pending against the last judgment).

its disposal aggregated data on that producer's export sales. That the Commission did not find it necessary to request transaction-by-transaction data falls within its discretion, mentioned in point 94 above, to determine the reliability of the information already in its possession.

96. Furthermore, the situation in the present case differs from that in the judgment of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158), in which the Court found that the Council and the Commission had erred in calculating the normal value on the basis of prices in the EU, given that they had failed to take all due care to determine whether the normal value could be calculated on the basis of prices in an analogue country. In that case, the Commission had confined itself to sending a single questionnaire to two Thai companies and it concluded that, because those companies did not reply, it was impossible to determine the normal value on the basis of prices charged in any market economy third country. That is, it failed to examine whether any of three other market economy third countries, whose imports into the EU were markedly more than those from Thailand, could be selected as an analogue country. [44] By contrast, in the present case, it has not been alleged before the Court that the Commission failed to investigate market economy third countries other than Japan. [45]

97. Secondly, and more importantly, Changmao Biochemical Engineering has not established that the Commission's choice of calculating the normal value on the basis of EU industry data lacked any plausibility.

98. Indeed, according to case-law, in the context of a complaint challenging the method of determining normal value, the applicant cannot simply rely on a method of determining normal value alternative to that chosen by the Commission, but must provide sufficient evidence to deprive the assessments on which that choice is based of any plausibility, as the EU Courts cannot substitute their own assessments for those of the Commission. [46]

99. In the present case, in the appeal, Changmao Biochemical Engineering contends simply that 'it may not be excluded' that 'certain' export transactions of the Japanese producer are profitable, and that, therefore, they may be used for the calculation of the normal value. Changmao Biochemical Engineering does not argue, let alone establish, that all export transactions of the Japanese producer, or the majority of those transactions, are profitable, which could call into question the Commission's choice of calculating the normal value not on the basis of the Japanese producer's export prices, but on the basis of EU industry data. Thus, Changmao Biochemical Engineering has not shown the lack of plausibility of the Commission's finding that the data concerning the Japanese producer's export sales were unreliable.

100. I conclude that the first part of the second ground of appeal must be dismissed as unfounded to the extent that it alleges infringement of Article 2(7)(a) of Regulation No 1225/2009.

101. In the second place, as regards the breach of the Commission's duty of care, I note that, according to case-law, under the second subparagraph of Article 2(7)(a) of Regulation No 1225/2009, the Commission must consider the information contained in the file with all the care required for it to be held that the normal value of the product concerned was determined in

[44] Judgment of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158, paragraphs 33 and 34).

[45] I recall that aspartame is produced in few countries, that only one other third country, namely South Korea, could have been selected as an analogue country, and that the only known South Korean producer refused to cooperate (see point 79 above).

[46] Judgment of 20 September 2019, *Jinan Meide Casting* v *Commission* (T-650/17, EU:T:2019:644, paragraph 191). See also, by analogy, judgments of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council* (T-444/11, EU:T:2014:773, paragraph 62), and of 15 October 2020, *Zhejiang Jiuli Hi-Tech Metals* v *Commission* (T-307/18, not published, EU:T:2020:487, paragraphs 241 and 242). (I should note that an appeal is pending against the last judgment).

an appropriate and not unreasonable manner.[47] Thus, it seems to me that the plea alleging breach of the Commission's duty of care must be dismissed as unfounded for the same reasons as the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009.

102. In the third place, as regards the infringement of the principle of sound administration, I note that the Commission is required, under that principle, to examine with all due care and impartiality the evidence provided and to take account of all relevant evidence.[48] Thus, again, the plea alleging infringement of the principle of sound administration must be dismissed as unfounded for the same reasons as the plea alleging infringement of Article 2(7)(a) of Regulation No 1225/2009.

103. I conclude that the first part of the second ground of appeal must be dismissed as unfounded, and that, therefore, that ground of appeal must be dismissed in its entirety.

C. The third ground of appeal

1. Arguments of the parties

104. By its third ground of appeal, Changmao Biochemical Engineering submits that, in finding, in paragraphs 141 to 144, 151 to 153, and 155 to 162 of the judgment under appeal, that the Commission did not err in refusing to make the adjustments requested by it for the purposes of calculating the dumping margin, the General Court distorted the facts and infringed the following provisions: Article 2(10) of Regulation 2016/1036; the last sentence of Article 2.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT)[49] ('the Anti-Dumping Agreement'); Article 20(2) and (4) of Regulation 2016/1036 and Article 6.2 of the Anti-Dumping Agreement, in so far as those provisions lay down Changmao Biochemical Engineering's rights of defence; Article 12.2.1 and Article 12.2.2 of the Anti-Dumping Agreement; Article 6.4 of the same agreement; and Article 9(4) of Regulation 2016/1036; and infringed the principle of sound administration and breached the Commission's duty of care.

105. The third ground of appeal is divided, in essence, into four parts.

106. In the first part of its third ground of appeal, Changmao Biochemical Engineering submits that the General Court distorted the facts in finding, in paragraphs 141 to 144 of the judgment under appeal, that Changmao Biochemical Engineering did not provide evidence to substantiate its claim that there were differences in the costs of production between the Union producer and the Chinese producer, and that those differences affected price comparability.

107. In the second part of its third ground of appeal, Changmao Biochemical Engineering submits that the General Court infringed Article 2(10) of Regulation 2016/1036 in finding, in paragraphs 151 to 153 of the judgment under appeal, that requests for adjustments made by Chinese exporting producers that have not been granted market economy status cannot relate to the actual costs in China.

[47] Judgments of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158, paragraph 22); of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraph 51); and of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643, paragraph 31).

[48] Judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 104).

[49] OJ 1994 L 336, p. 103.

108. In the third part of its third ground of appeal, Changmao Biochemical Engineering claims that the General Court erred in holding, in paragraphs 143 and 144 of the judgment under appeal, that Changmao Biochemical Engineering bore the burden of proving that differences in the factors listed in Article 2(10)(a) to (j) of Regulation 2016/1036, such as differences in the costs of production, affected price comparability. In its view, this follows from the wording of Article 2(10). Any other solution would impose an unreasonable burden of proof on non-market economy producers where the normal value is calculated on the basis of EU industry data.

109. In the fourth part of its third ground of appeal, Changmao Biochemical Engineering submits that, in holding, in paragraphs 155 to 160 of the judgment under appeal, that the Commission did not impose an unreasonable burden of proof on it in requiring evidence that the differences in costs of production translated into price differences, the General Court infringed the following provisions: the last sentence of Article 2.4 of the Anti-Dumping Agreement, as interpreted by the decisions of the World Trade Organisation (WTO) Dispute Settlement Body; Article 20(2) and (4) of Regulation 2016/1036 and Article 6.2 of the Anti-Dumping Agreement, in so far as those provisions lay down Changmao Biochemical Engineering's rights of defence; Article 6.4, Article 12.2.1 and Article 12.2.2 of that agreement; and infringed the principle of sound administration and breached the Commission's duty of care. Moreover, the General Court erred in refusing, in paragraph 207 of the judgment under appeal, to order, by way of a measure of organisation of procedure or of a measure of enquiry, the Commission to produce the analysis that led it to find, in recital 70 of the regulation at issue, that there were no differences between the product concerned and the like product that would be systematically reflected in the prices.

110. The Commission contends that the third ground of appeal should be dismissed.

111. In the Commission's view, the first part of the third ground of appeal must be dismissed as, in essence, the appeal neither indicates which facts or evidence the General Court distorted nor shows that the differences in the costs of production translated into price differences.

112. As for the second part of the third ground of appeal, the Commission contends that it is inadmissible as it was not raised before the General Court. In any event, it is ineffective since paragraphs 151 to 153 of the judgment under appeal provide only for alternative reasoning, with the main grounds set out in paragraphs 137 to 150 of that judgment. Finally, it is unfounded, given that, in particular, the origin of the data used to make the adjustment is irrelevant. What matters is that the adjustment does not to render Article 2(7) of Regulation 2016/1036 ineffective.

113. According to the Commission, the third part of the third ground of appeal is unfounded as the wording of the introductory paragraph of Article 2(10) of Regulation 2016/1036, the wording of Article 2(10)(k) of that regulation, and the case-law make it clear that the requirement to demonstrate an impact on prices and price comparability applies to all factors listed under Article 2(10) of the same regulation.

114. The Commission contends that the fourth part of the third ground of appeal is inadmissible to the extent that it alleges an infringement of the following provisions: the last sentence of Article 2.4 of the Anti-Dumping Agreement; Article 20(2) and (4) of Regulation 2016/1036 and Article 6.2 of the Anti-Dumping Agreement, in so far as those provisions lay down Changmao Biochemical Engineering's rights of defence; and Article 6.4, Articles 12.2.1 and Article 12.2.2 of that agreement. This is because the infringement of those provisions was not raised at first instance. In any event, the fourth part of the third ground of appeal is unfounded to the extent that it alleges infringement of those provisions. Finally, as regards the remainder of the fourth

part of the third ground of appeal, that is, Changmao Biochemical Engineering's request for a measure of organisation of procedure or a measure of enquiry, the Commission contends that it is ineffective, and, in any event, unfounded.

2. Assessment

115. By its third ground of appeal, Changmao Biochemical Engineering submits that, in finding that the Commission did not err in refusing to make the adjustments it had requested for the purposes of calculating the dumping margin, the General Court distorted the facts and infringed Article 2(10), Article 9(4) and Article 20(2) and (4) of Regulation No 1225/2009; Article 2.4 and other provisions of the Anti-Dumping Agreement; and the principle of sound administration and breached the Commission's duty of care.

116. As explained in points 105 to 109 above, the third ground of appeal is divided into four parts. The first part, which is directed at paragraphs 141 to 144 of the judgment under appeal, alleges that the General Court distorted the facts in finding that Changmao Biochemical Engineering did not provide evidence that there were differences in the costs of production, which affected price comparability. The second part, which is directed at paragraphs 151 to 153 of that judgment, alleges that the General Court infringed Article 2(10) of Regulation No 1225/2009 in finding that requests for adjustments made by producers in a non-market economy country cannot relate to the actual costs in that country. By the third part, Changmao Biochemical Engineering claims that, in paragraphs 143 and 144 of the judgment under appeal, the General Court infringed Article 2(10) of Regulation No 1225/2009 and imposed an unreasonable burden of proof on non-market economy producers in requiring them to show that differences in the costs of production affected prices and price comparability. The fourth part is directed at paragraphs 155 to 160 of the judgment under appeal and alleges that, in requiring Changmao Biochemical Engineering to show an impact on price comparability even though it had no access to EU industry data, the General Court infringed Articles 2.4, 6.2, 6.4, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement, Article 20(2) and (4) of Regulation No 1225/2009 and the principle of sound administration and breached the Commission's duty of care. The fourth part of the third ground of appeal also challenges the General Court's refusal, in paragraph 207 of the judgment under appeal, to order a measure of organisation of procedure or a measure of enquiry.

(a) Admissibility

117. The Commission raises the inadmissibility of the second part of the third ground of appeal in its entirety and of the fourth part of that ground in part.

118. In the first place, the Commission claims that the second part of the third ground of appeal is inadmissible as it is a new plea in law.

119. In my opinion, that plea of admissibility must be dismissed.

120. First, Changmao Biochemical Engineering did not raise before the Court of Justice any argument it had not put forward before the General Court.

121. Indeed, in the second part of its third ground of appeal, Changmao Biochemical Engineering claims that the Commission infringed Article 2(10) of Regulation No 1225/2009 in refusing to make the adjustments it requested on the ground that a request for adjustment made by a

Chinese exporting producer that does not benefit from market economy treatment cannot relate to the actual costs in China. Changmao Biochemical Engineering points out, in that regard, that it requested the Commission to make an adjustment using not its own production costs, but costs in the EU.

122. Before the General Court, in the context of its third plea in law, alleging that the Commission infringed, inter alia, Article 2(10) of Regulation No 1225/2009 in refusing to make the adjustments it requested, Changmao Biochemical Engineering submitted that the fact that a Chinese exporting producer had not been granted market economy treatment did not preclude that producer from requesting adjustments. In Changmao Biochemical Engineering's view, although those adjustments could not be made using that producer's own costs, they could nonetheless relate to parameters in China other than prices and costs, such as the use of a different production process in that country.

123. Secondly, according to case-law, an appellant is entitled to rely on pleas arising from the judgment under appeal itself which seek to criticise, in law, its merits, whether or not the appellant raised those pleas before the General Court.[50] That is the case here, as the question whether an exporting producer that has not been granted market economy treatment may nonetheless request adjustments, and in relation to which parameters, is addressed in paragraphs 151 to 153 of the judgment under appeal.

124. In the second place, the Commission raises the inadmissibility of the fourth part of the third ground of appeal to the extent that it alleges infringement of the last sentence of Article 2.4 of the Anti-Dumping Agreement, of Articles 6.2, 6.4, 12.2.1 and 12.2.2 of that agreement, and of Article 20(2) and (4) of Regulation No 1225/2009. In the Commission's view, the infringement of none of those provisions was raised before the General Court.

125. In my opinion, that plea of inadmissibility should be upheld. Indeed, the infringement of none of the provisions listed in point 124 above was raised before the General Court in relation to the Commission's refusal to make the adjustments requested by Changmao Biochemical Engineering.

126. However, the fourth part of the third ground of appeal remains admissible to the extent that it alleges infringement of the principle of sound administration and breach of the Commission's duty of care, and to the extent that it challenges the General Court's refusal to order a measure of organisation of procedure or a measure of enquiry.

127. I conclude that the second part of the third ground of appeal is admissible, and that the fourth part of that ground of appeal is inadmissible to the extent that it alleges infringement of the last sentence of Article 2.4 of the Anti-Dumping Agreement, of Articles 6.2, 6.4, 12.2.1 and 12.2.2 of that agreement, and of Article 20(2) and (4) of Regulation No 1225/2009.

(b) Substance

128. I will examine the third part of the third ground of appeal, then the first part of that ground of appeal, the fourth part, and, finally, the second part.

[50] Judgments of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 55), and of 28 February 2018, *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2018:132, paragraph 90).

(1) The third part of the third ground of appeal

129. Pursuant to Article 2(10) of Regulation No 1225/2009, a fair comparison must be made between the export price and the normal value. The introductory paragraph of that provision states that, 'where the normal value and the export price … 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'.

130. According to case-law, if a party requests adjustments under Article 2(10) of Regulation No 1225/2009 in order to make the normal value and the export price comparable for the purposes of determining the dumping margin, it must prove that its claim is justified. The burden of proving that the specific adjustments listed in Article 2(10)(a) to (k) of that regulation must be made lies with those who wish to rely on them. [51]

131. In the present case, recital 48 of the regulation at issue states that Changmao Biochemical Engineering requested the Commission to make adjustments for the purposes of calculating the dumping margin because there were differences in the costs of production between the Chinese producer and the EU producer. According to recital 49 of that regulation, the Commission rejected that request for adjustment on the ground that Changmao Biochemical Engineering had not substantiated its claim, and, in particular, it had not provided evidence that 'the customers consistently pa[id] different prices on the domestic market because of the differences in [the costs of production]'.

132. In paragraphs 143 and 144 of the judgment under appeal, the General Court held that it was for Changmao Biochemical Engineering to demonstrate that the differences in the costs of production translated into differences in prices, which it had failed to do, and that, therefore, the Commission had not infringed Article 2(10) of Regulation No 1225/2009 in rejecting its requests for adjustment.

133. In the third part of its third ground of appeal, Changmao Biochemical Engineering claims that, in so doing, the General Court erred in law.

134. I take the view that the third part of the third ground of appeal is unfounded.

135. First, this follows from the wording of Article 2(10) of Regulation No 1225/2009. I do not subscribe to Changmao Biochemical Engineering's argument that the party claiming an adjustment must demonstrate an impact on prices and price comparability only where the adjustment is sought under subparagraph (k) of that provision for 'other factors not provided for under subparagraphs (a) to (j)', but not where the adjustment is sought for differences in the factors listed in subparagraphs (a) to (j). It is true that subparagraph (k) expressly states that it must be 'demonstrated that [the differences in factors] affect price comparability', whereas subparagraphs (a) to (j) do not expressly state as such. [52] However, I note that the introductory paragraph of Article 2(10) of Regulation No 1225/2009, cited in point 129 above, provides that

[51] Judgments of 7 May 1987, *Nachi Fujikoshi* v *Council* (255/84, EU:C:1987:203, paragraph 33); of 10 March 1992, *Canon* v *Council* (C-171/87, EU:C:1992:106, paragraph 32); 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, paragraph 58); of 26 October 2016, *PT Musim Mas* v *Council* (C-468/15 P, EU:C:2016:803, paragraph 83); and of 9 July 2020, *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:539, paragraph 60).

[52] With the exception, however, of Article 2(10)(d)(i) of Regulation No 1225/2009, which states that an adjustment may be made for differences in levels of trade where '*it is shown that* the export price … is at a different level of trade from the normal value and *the difference has affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country*' (emphasis added).

the differences in 'factors' must be 'demonstrated to affect prices and price comparability'. The introductory paragraph covers all factors listed under subparagraphs (a) to (k). I also note that subparagraph (k) requires the demonstration that the differences in other factors 'affect price comparability as required under [that] *paragraph*'.[53] Thus, subparagraph (k) itself indicates that that demonstration is required in all cases where an adjustment is requested under *paragraph* 10, irrespective of the factor at stake.

136. Secondly, this is consistent with the case-law of the General Court, according to which it is apparent from both the wording and the scheme of Article 2(10) of Regulation No 1225/2009 that an adjustment to the export price or the normal value may be made only in order to take account of differences in factors *which affect the prices and therefore their comparability*. For instance, in the judgment of 29 April 2015, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (T-558/12 and T-559/12, not published, EU:T:2015:237, paragraph 114), the General Court held that the Council and the Commission must refuse an adjustment for differences in factors which have not been shown to affect prices, and therefore their comparability.[54] Similarly, in the judgment of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraph 138), the General Court found that the onus was on the exporting producers requesting an adjustment for the amount corresponding to the 14% import duty charged by the authorities of the analogue country to adduce evidence showing that that import duty had an effect on the price levels that constituted normal value and on the possibility of comparing those prices to export prices.

137. Thirdly, I do not subscribe to Changmao Biochemical Engineering's argument that, in requiring it to show an impact on prices and price comparability, the General Court imposed an unreasonable burden of proof on it because the normal value was calculated using data provided by the EU producer, to which, as a Chinese exporting producer, Changmao Biochemical Engineering had no access.

138. I note that that argument was addressed, and dismissed, by the General Court in paragraphs 155 to 159 of the judgment under appeal, which Changmao Biochemical Engineering challenges in the fourth part of its third ground of appeal. I will, however, address it here, or the analysis of the third part of the third ground of appeal would be incomplete.

139. It is true that, according to case-law, a person seeking an adjustment under Article 2(10) of Regulation No 1225/2009 and who is required to establish that the adjustment requested is necessary must not have to bear an unreasonable burden of proof.[55] However, that is not the case here for the following reasons.

140. I emphasise that there is no reservation to the requirement, under the introductory paragraph of Article 2(10) of Regulation No 1225/2009, that the differences in factors listed under subparagraphs (a) to (k) of that provision must be demonstrated to affect prices and price comparability. This means that that proof must be provided irrespective of the method used to

[53] Emphasis added.

[54] I should note that, although that judgment was set aside by the Court of Justice in the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269), that annulment was based, in essence, on the infringement of Article 2(11) of Regulation No 1225/2009, without the Court of Justice examining the second ground of appeal, alleging infringement of Article 2(10) of that regulation.

[55] Judgment of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278, paragraph 580). See also judgments of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraphs 77 and 78); and of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraph 137).

calculate the normal value, and, thus, even where it is calculated using EU industry data. Should this not be the case, the Commission could, upon request, be required to make an adjustment which does *not* affect prices and price comparability, and which, therefore, leads to the creation of an asymmetry between the normal value and the export price.

141. Moreover, contrary to what Changmao Biochemical Engineering argues, it cannot be considered that Chinese exporting producers have no access to the data used to calculate the normal value and the export price where those data were submitted to the Commission by an analogue country producer or, as is the case here, by an EU producer.

142. I should note that, under Article 6(7) of Regulation No 1225/2009, exporters may inspect all information made available by any party to the investigation, and, under Article 20(2) of the same regulation, they 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. It is true that the inspection of information and the final disclosure apply only to information which is not confidential within the meaning of Article 19 of that regulation.[56] However, in the present case, it is apparent from recital 40 of the regulation at issue that the Commission disclosed to Changmao Biochemical Engineering data relating to the EU producer.

143. I also note that, as the Commission argues, Changmao Biochemical Engineering does not contend, in support of its argument that the General Court imposed an unreasonable burden of proof on it, that the Commission failed to disclose to it the data necessary to request an adjustment (apart from a general and unsubstantiated statement in its appeal that 'non market economy producers do not have the analogue producer's price data'). Rather, in support of that argument, Changmao Biochemical Engineering contends, in particular, that the EU producer failed to produce all the information necessary to allow for a fair comparison to be made between the normal value and the export price.

144. Admittedly, Changmao Biochemical Engineering also challenges the General Court's refusal to order, by way of a measure of organisation of procedure or of a measure of enquiry, the Commission to produce the analysis that led it to find, in recital 70 of the regulation at issue, that there were no differences between the product concerned and the like product that would be systematically reflected in the prices. Nevertheless, I note that Changmao Biochemical Engineering alleges, in that regard, not only that the Commission (in its own words) 'concealed' information necessary to make adjustments, but, foremost, that the Commission may simply have failed to collect that information, in particular the invoices and contracts of the EU industry. Thus, it seems to me that, by challenging the General Court's refusal to order the production of the analysis above mentioned, Changmao Biochemical Engineering essentially seeks to determine whether the Commission collected sufficient information, rather than show that the Commission did not disclose sufficient information to it.

145. I conclude that the third part of the third ground of appeal is unfounded.

[56] According to Article 6(7) and Article 20(4) of Regulation No 1225/2009.

(2) The first part of the third ground of appeal

146. In paragraphs 141 to 144 of the judgment under appeal, the General Court found that, in refusing to make the adjustments requested by Changmao Biochemical Engineering, the Commission did not infringe Article 2(10) of Regulation No 1225/2009, given that the latter had not provided any evidence in support of its request and it had failed to demonstrate that the alleged differences in the costs of production translated into price differences.

147. In the first part of its third ground of appeal, Changmao Biochemical Engineering submits that, in so doing, the General Court distorted the facts.

148. I consider that the first part of the third ground of appeal must be dismissed.

149. According to case-law, it is for the appellant to indicate precisely the evidence which has been distorted and show the errors of appraisal which have allegedly been made. [57]

150. In the present case, although Changmao Biochemical Engineering lists, in its appeal, the evidence relied upon in the context of the administrative procedure, it does not explain precisely how the alleged differences in each of the relevant factors affected prices and price comparability, and how, therefore, the General Court distorted the facts in holding, in paragraph 143 of that judgment, that it had not demonstrated that the differences in the costs of production translated into price differences.

151. I should also note that, contrary to what Changmao Biochemical Engineering argues, there is no contradiction between recital 49 of the regulation at issue, which states that Changmao Biochemical Engineering has not shown an impact on prices and price comparability, and recital 76 of that regulation, according to which the Chinese dumped imports undercut EU prices by 21.1%. Indeed, the Commission's finding of undercutting means that the EU industry suffered injury, without there being any indication that that undercutting was caused by the differences in the costs of production, thereby warranting an adjustment.

152. Thus, the first part of the third ground of appeal must be dismissed.

(3) The fourth part of the third ground of appeal

153. In paragraphs 155 to 160 of the judgment under appeal, the General Court held that the Commission did not impose on Changmao Biochemical Engineering an unreasonable burden of proof in requiring it to demonstrate that the alleged differences in costs of production translated into price differences when it did not have access to EU industry data.

154. In the fourth part of its third ground of appeal, Changmao Biochemical Engineering submits that, in so doing, the General Court infringed the last sentence of Article 2.4 of the Anti-Dumping Agreement, Articles 6.2, 6.4, 12.2.1 and 12.2.2 of that agreement, Article 20(2) and (4) of Regulation No 1225/2009 and the principle of sound administration and breached the Commission's duty of care. Moreover, Changmao Biochemical Engineering claims that the

[57] Judgments of 27 April 2017, *FSL and Others* v *Commission* (C-469/15 P, EU:C:2017:308, paragraph 48); of 26 September 2018, *Philips and Philips France* v *Commission* (C-98/17 P, not published, EU:C:2018:774, paragraph 70); and of 10 July 2019, *Caviro Distillerie and Others* v *Commission* (C-345/18 P, not published, EU:C:2019:589, paragraph 56).

General Court erred in refusing, in paragraph 207 of the judgment under appeal, to order, by way of a measure of organisation of procedure or of a measure of enquiry, the Commission to produce the analysis which led it to dismiss its requests for adjustment.

155. As explained in points 124 to 127 above, the fourth part of the third ground of appeal is inadmissible in part. However, for the sake of completeness, I will explain below why, should the Court consider that the fourth part of the third ground of appeal is admissible in its entirety, it would nonetheless have to dismiss it as unfounded.

156. First, the fourth part of the third ground of appeal is unfounded in so far as it alleges infringement of the last sentence of Article 2.4 of the Anti-Dumping Agreement and of Articles 6.2, 6.4, 12.2.1 and 12.2.2 of that agreement.

157. According to settled case-law, given their nature and structure, WTO agreements are not, in principle, among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed. It is only in two exceptional situations, which are the result of the EU legislature's own intention to limit its discretion in the application of the WTO rules, that the Court has accepted that it is for the EU Courts, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements. The first such situation is where the European Union intends to implement a particular obligation assumed in the context of those WTO agreements and the second is where the EU act at issue refers explicitly to specific provisions of those agreements. [58]

158. No article of Regulation No 1225/2009 refers to any specific provision of the WTO agreements. However, according to case-law, Article 2(10) of Regulation No 1225/2009 implements Article 2.4 of the Anti-Dumping Agreement, the provisions of which it essentially reiterates. [59]

159. Nevertheless, Article 2(10) of Regulation No 1225/2009 does not expressly restate the requirement, under the last sentence of Article 2.4 of the Anti-Dumping Agreement, 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'. [60] Thus, it seems to me there was no clear intention on the part of EU legislature to implement the particular obligation laid down in the last sentence of Article 2.4 of the Anti-Dumping Agreement. It follows that the legality of the regulation at issue cannot be reviewed in the light of the last sentence of Article 2.4 of the Anti-Dumping Agreement. [61]

160. Furthermore, without it being necessary to examine whether specific provisions of Regulation No 1225/2009 implement Articles 6.2, 6.4, 12.2.1 or 12.2.2 of the Anti-Dumping Agreement, and whether, consequently, the legality of the regulation at issue may be reviewed in the light of those provisions, I find that the plea alleging infringement of Articles 6.2, 6.4, 12.2.1

[58] Judgments of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraphs 29 and 30); of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 38 to 41); of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraphs 85 to 87); and of 9 July 2020, *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:539, paragraph 46).

[59] Judgments of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 73), and of 20 September 2019, *Jinan Meide Casting* v *Commission* (T-650/17, EU:T:2019:644, paragraph 250). See also Opinion of Advocate General Mengozzi in Joined Cases *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2016:928, point 37).

[60] Judgments of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 77), and of 6 September 2013, *Godrej Industries and VVF* v *Council* (T-6/12, EU:T:2013:408, paragraph 51).

[61] Opinion of Advocate General Pitruzzella in *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:159, points 46 to 49).

or 12.2.2 of the Anti-Dumping Agreement cannot succeed. Indeed, I fail to see the pertinence of Articles 12.2.1 and 12.2.2, which relate to public notices of the imposition of anti-dumping measures, or of Article 6.2, which concerns meetings with adverse parties. As for Article 6.4, which states that the authorities shall allow interested parties to see all relevant information that is not confidential, I note that, as explained in point 143 above and in point 161 below, Changmao Biochemical Engineering does not contend that the Commission failed to disclose to it the information necessary to request adjustments.

161. Secondly, in my view, the fourth part of the third ground of appeal is unfounded in so far as it alleges infringement of Article 20(2) and (4) of Regulation No 1225/2009. As mentioned in point 142 above, under Article 20(2) and (4) of Regulation No 1225/2009, exporters may request final disclosure of the essential facts and considerations, 'due regard being had to the protection of confidential information'. However, I explained in point 143 above that, in the present case, Changmao Biochemical Engineering does not contend, in support of its plea alleging infringement of Article 20(2) and (4) of Regulation No 1225/2009, that the Commission failed to disclose to it the information necessary to request adjustments. Rather, in support of that plea, it claims that the Commission failed, in particular, to collect all the information necessary to determine whether or not to grant such requests. That failure, should it be established, cannot constitute an infringement of Article 20(2) and (4) of Regulation No 1225/2009.

162. Thirdly, the fourth part of the third ground of appeal is unfounded in so far as it alleges breach of the Commission's duty of care. According to the case-law cited in point 102 above, the Commission was required to examine with all due care and impartiality the evidence submitted by Changmao Biochemical Engineering in support of its requests for adjustment. However, as I have shown in points 148 to 152 above, the General Court did not distort the facts in finding, in paragraphs 141 to 144 of the judgment under appeal, that Changmao Biochemical Engineering had not demonstrated that the alleged differences in the costs of production affected prices and price comparability.

163. Fourthly, I consider that the fourth part of the third ground of appeal is unfounded in so far as it alleges infringement of the principle of sound administration. According to case-law, it follows from the principle of sound administration that the burden of proof which the Commission imposes on exporting producers requiring an adjustment under Article 2(10) of Regulation No 1225/2009 may not be unreasonable.[62] However, I have set out in points 139 to 144 above the reasons why, in requiring Changmao Biochemical Engineering to show that the alleged differences in the costs of production affected prices and price comparability, the Commission did not impose on it an unreasonable burden of proof.

164. Fifthly, the fourth part of the third ground of appeal is unfounded in so far as it alleges that the General Court erred in refusing, in paragraph 207 of the judgment under appeal, to order, by way of a measure of organisation of procedure or of a measure of enquiry, the Commission to produce the analysis that led it to find, in recital 70 of the regulation at issue, that there were no differences between the product concerned and the like product that would be systematically reflected in the prices. According to case-law, as regards the assessment by the General Court of applications made by a party for measures of organisation of the procedure or for measures of

[62] See case-law cited in footnote 56 above.

enquiry, it must be pointed out that the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it.[63] Moreover, as shown in points 148 to 152 above, no distortion of facts has been established in the present case.

165. I conclude that the fourth part of the third ground of appeal must be dismissed in its entirety.

(4) The second part of the third ground of appeal

166. In paragraphs 151 to 153 of the judgment under appeal, the General Court held that Chinese exporting producers that do not benefit from market economy treatment may make requests for adjustment, but that those requests cannot 'relate to the actual costs in China', or Article 2(7)(a) of Regulation No 1225/2009 would be rendered ineffective.

167. In the second part of its third ground of appeal, Changmao Biochemical Engineering submits that, in so doing, the General Court infringed Article 2(10) of Regulation No 1225/2009.

168. I take the view that, although the second part of the third ground of appeal is well founded, it must nonetheless be dismissed as ineffective. I will set out below the reasons why I consider that it is well founded, before I explain why it is ineffective.

169. According to case-law, the aim of Article 2(7)(a) of Regulation No 1225/2009 is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces.[64]

170. The Commission's argument is that, were an adjustment to be made on account of differences in the costs of production between China and the EU, this would render Article 2(7)(a) of Regulation No 1225/2009 ineffective, because the costs of production in China are linked to China's non-market economy status and they are distorted.

171. In my view, that argument cannot succeed.

172. It is true that, in the judgment of 29 April 2015, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (T-558/12 and T-559/12, not published, EU:T:2015:237), the General Court considered that no adjustments could be made for differences in efficiency and productivity between the Chinese exporting producers on which anti-dumping duties had been imposed and the analogue country producer, because the former had not qualified for market economy treatment and the data relating to them could thus not be considered for the purposes of determining the normal value.[65] Before the Court of Justice, the Chinese exporting producers argued that making adjustments for differences in efficiency and productivity would not render the use of the analogue country method ineffective, because their lower consumption of raw materials and electricity and their higher productivity per employee (as compared with those of the analogue country producer) had nothing to do with the prices and costs or the market forces

[63] Judgments of 30 September 2003, *Freistaat Sachsen and Others* v *Commission* (C-57/00 P and C-61/00 P, EU:C:2003:510, paragraph 47); of 14 September 2016, *Ori Martin and SLM* v *Commission* (C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraph 108); of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission* (C-702/19 P, EU:C:2020:857, paragraph 28); and of 4 March 2021, *Liaño Reig* v *SRB* (C-947/19 P, EU:C:2021:172, paragraph 98).

[64] Judgments of 22 October 1991, *Nölle* (C-16/90, EU:C:1991:402, paragraph 10); of 29 May 1997, *Rotexchemie* (C-26/96, EU:C:1997:261, paragraph 9); of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraph 48); and of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74, paragraph 106).

[65] Judgment of 29 April 2015, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (T-558/12 and T-559/12, not published, EU:T:2015:237, paragraph 111). See also paragraphs 115 and 116 of that judgment.

in China.[66] Advocate General Mengozzi proposed to reject that argument, on the ground that 'an undertaking which has not qualified for market economy status cannot rely on differences regarding productivity and efficiency to request adjustments of the normal value', since productivity and efficiency 'are a function of several factors … which can reasonably be presumed to be influenced, at least indirectly, by parameters which are not the normal result of market forces'.[67] The Court, however, did not adjudicate on the Council and the Commission's refusal to make the requested adjustments.[68]

173. It is also true that, in the judgment of 23 April 2018, *Shanxi Taigang Stainless Steel* v *Commission* (T-675/15, not published, EU:T:2018:209), the General Court held that no adjustments could be made on account of differences in the production process and access to raw materials between China and the analogue country, given that, first, China was not, at the material time, considered a market economy, and, secondly, the applicant, a Chinese exporting producer, had not submitted a claim for market economy treatment. Thus, in the General Court's view, there was nothing to indicate that the sourcing of nickel or the production process of an undertaking operating in non-market economy conditions were not influenced by parameters which were not the result of market forces.[69] Before the Court of Justice, the Chinese exporting producers argued that the General Court should have examined whether the adjustments requested would have had the effect of reintroducing into the normal value costs influenced by parameters which did not result from market forces, which the General Court had not done.[70] The Court of Justice dismissed that argument as ineffective, on the ground that the Chinese exporting producers had not expressly challenged the General Court's finding of fact according to which it did not appear that the adjustments related to factors that were the result of market forces.[71]

174. However, I note that neither in the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269), nor in the judgment of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643), did the Court of Justice examine *on the merits* the question whether Chinese exporting producers that have not been granted market economy treatment can request adjustments for differences in the production process and in the consumption of, and access to, raw materials between China and the analogue country.

175. I also note that Changmao Biochemical Engineering submits, without being contradicted by the Commission, that the situation in the present case differs from that in the judgment of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643), because, in the present case, the adjustments would be made not by reference to the Chinese exporting producer's own production costs or to the costs of production in China, but by reference to the costs of production in the EU. Changmao Biochemical Engineering's argument is, in essence, that the determination of the normal value in accordance with Article 2(7)(a) of Regulation

66 Opinion of Advocate General Mengozzi in Joined Cases *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2016:928, point 93).

67 Opinion of Advocate General Mengozzi in Joined Cases *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2016:928, points 107 and 108).

68 Judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269, paragraph 73).

69 Judgment of 23 April 2018, *Shanxi Taigang Stainless Steel* v *Commission* (T-675/15, not published, EU:T:2018:209, paragraphs 63 and 64).

70 Judgment of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643, paragraph 49).

71 Judgment of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643, paragraphs 51 and 52).

No 1225/2009 does not preclude the Commission from granting requests for adjustment *where the Commission does not use data from the Chinese market in determining the amount of the adjustments*.

176. Changmao Biochemical Engineering explains that, in the present case, it did not request the Commission to make adjustments by reference to its own production costs. First, it requested the Commission, where the EU industry and itself used different raw materials and resources, to either reduce the normal value or increase its export price by an amount equal to the difference between (i) the cost of the raw material or resource used by the EU industry and (ii) the cost *in the EU* of the corresponding raw material or resource used by itself.[72] Secondly, Changmao Biochemical Engineering requested the Commission, where costs were incurred only by the EU industry, not by itself, to make adjustments in amounts equal to those costs. Changmao Biochemical Engineering stresses that, in both cases, the Commission would not have taken into account its own production costs or the actual costs in China in making the requested adjustments. Thus, in Changmao Biochemical Engineering's view, Article 2(7) of Regulation No 1225/2009 did not preclude the Commission from making those adjustments.

177. In my opinion, it is only where the Chinese exporting producers' own production costs or the costs of production in China are used *to determine the amount of the adjustment* and where those costs are thus introduced into the calculation of the normal value, that Article 2(7) of Regulation No 1225/2009 precludes the Commission from granting requests for adjustments made by Chinese exporting producers that have not been granted market economy treatment. By contrast, where the costs of production in China are used only *to establish that there are differences in factors listed under Article 2(10)(a) to (k) of that regulation*, Article 2(7) thereof does not preclude the Commission from granting requests for adjustments made by those exporting producers.

178. This is because, if Chinese exporting producers were precluded from requesting adjustments where the normal value is determined in accordance with Article 2(7)(a) of Regulation No 1225/2009, *even where no data from the Chinese market are used to calculate the amount of the adjustments*, those exporting producers would effectively be precluded from requesting adjustments where the normal value is determined in accordance with that provision. However, it does not follow from the case-law cited in point 169 above, according to which the aim of Article 2(7)(a) of Regulation No 1225/2009 is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces, that the normal value cannot be adjusted at all where it is established in accordance with that provision. Quite the contrary, there is nothing in that regulation to indicate that Article 2(7)(a) of that regulation lays down a general derogation from the requirement to make adjustments on the basis of Article 2(10) of the same regulation, for comparability purposes.[73]

179. Moreover, the solution proposed at point 177 above is consistent with the General Court's finding, in paragraphs 607 and 608 of the judgment of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278), that Article 2(10) of Regulation No 1225/2009 must be interpreted in the light and in the context of Article 2(7)(a) of that regulation, with the result that the

[72] Assume, for instance, that the EU industry uses raw material A, whereas Changmao Biochemical Engineering uses raw material B, thus incurring lower costs of production. According to Changmao Biochemical Engineering, the Commission should have either reduced the normal value or increased its export price by an amount equal to the difference between (i) the cost of raw material A in the EU, and (ii) the cost of raw material B not in China, but *in the EU*.

[73] Judgment of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278, paragraph 605).

adjustments made must not introduce or reintroduce an element of distortion of the Chinese system into the calculation of the normal value determined on the basis of the analogue country method.

180. In the judgment mentioned in point 179 above, the General Court found that an adjustment could be made to the normal value by applying the 12% VAT rate provided for, under Chinese law, for export of the product concerned from China, on the ground, in essence, that that element was not distorted.[74] Admittedly, the situation in that judgment differs from that in the present case since, in that judgment, the adjustment had not been requested by the Chinese exporting producers.[75] However, the fact remains that, according to that judgment, an adjustment may be made using an element of the Chinese system – provided, however, that that element does not create distortions, but is the result of market forces.

181. It follows that the General Court erred in finding, in paragraph 153 of the judgment under appeal, that the requests for adjustment made by Chinese exporting producers that do not benefit from market economy treatment cannot relate to the actual costs in China. In my opinion, those exporting producers' requests may only be refused where data relating the actual costs in China are used to determine the amount of an adjustment, not where those data are relied upon to establish that differences in costs between China and the analogue country exist.

182. Thus, the second part of the third ground of appeal is well founded.

183. However, as mentioned in point 168 above, it must nonetheless be dismissed as ineffective for the following two reasons.

184. First, it seems to me that, for the Commission to grant requests for adjustment that relate to the actual costs in China, the Chinese exporting producers making those requests must show that the specific costs in issue are the normal result of market forces, even where the data relating to those costs are used only to establish the existence of differences in factors listed under Article 2(10)(a) to (k) of Regulation No 1225/2009. This follows from the case-law cited in point 130 above, according to which the burden of proving that specific adjustments must be made lies with those who wish to rely on them.

185. However, in the present case, Changmao Biochemical Engineering has not, in my opinion, shown that the use of different raw materials and resources, or the costs incurred only by the EU industry,[76] are the normal result of market forces. It has simply described the differences in the raw materials and resources used and in the refinement process between China and the EU, without explaining why those elements are not affected by China's non-market economy status.

[74] Judgment of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278, paragraphs 602 to 610). I should explain that, in that case, the normal value was calculated on the basis of prices in an analogue country, namely India, while the export price used was the actual export price charged by the sampled Chinese exporting producers, and that an adjustment was made for the difference in VAT between export sales from China to the EU (where a 17% tax was charged on export and 5% of it was then refunded) and VAT on domestic sales in India (where taxes had been excluded from the domestic price). The General Court held that, although adjustments could not reincorporate factors linked to the parameters which, in China, were not the normal result of market forces, that was not the case there. Indeed, according to the General Court, the reason why the Chinese VAT system created distortions was only the manner in which China applied export VAT, providing for a refund for certain products and not for others. (Again, I note that an appeal is pending against that judgment).

[75] Recital 79 of Commission Implementing Regulation (EU) 2018/140 of 29 January 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cast iron articles originating in the People's Republic of China and terminating the investigation on imports of certain cast iron articles originating in India (OJ 2018 L 25, p. 6).

[76] See point 176 above.

186. Secondly, the grounds set out in paragraphs 151 to 153 of the judgment under appeal are alternative grounds, given that, in paragraph 144 of that judgment, the General Court already found that, in refusing to make the adjustments requested by Changmao Biochemical Engineering, the Commission did not infringe Article 2(10) of Regulation No 1225/2009, on the ground that that undertaking failed to demonstrate that the alleged differences in the costs of production translated into differences in prices. This is evidenced by the use of the phrase 'in any event' in paragraph 151 of the judgment under appeal.

187. Thus, although it is well founded, the second part of the third ground of appeal must be dismissed as ineffective.

188. For the sake of completeness, I should note that it follows that the plea alleging infringement of Article 9(4) of Regulation No 1225/2009 must also be dismissed. Changmao Biochemical Engineering's argument in support of that plea is that, had the Commission made the requested adjustments, the dumping margin would have fallen below the injury margin, on which basis the anti-dumping duty was set. However, given that, in my view, the Commission did not err in refusing to make those adjustments, there is no infringement of Article 9(4) of Regulation No 1225/2009.

189. I conclude that the third ground of appeal must be dismissed in its entirety.

D. The fourth ground of appeal

1. Arguments of the parties

190. By its fourth ground of appeal, Changmao Biochemical Engineering submits that, in finding, in paragraphs 148 and 150 of the judgment under appeal, that the Commission did not err in refusing to make the adjustments requested for the purposes of determining the existence of injury, the General Court infringed Article 3(2) and (3) of Regulation 2016/1036, as amended, Article 9(4) of that regulation and the principle of sound administration and breached the Commission's duty of care. According to Changmao Biochemical Engineering, the differences in the costs of production between the EU producer and the Chinese exporting producers warranted not only adjustments for the purpose of determining the dumping margin, but also, under Article 2(10) and/or Article 3(2) of the same regulation, adjustments for the purpose of determining the injury margin.

191. The Commission claims that the fourth ground of appeal must be dismissed, as (in particular) Article 2(10), Article 3(2) and (3) of Regulation 2016/103 make no reference to adjustments.

2. Assessment

192. In the regulation at issue, the Commission rejected Changmao Biochemical Engineering's request that adjustments be made for the purpose of determining not the dumping margin, *but the injury margin*, on account of differences in the costs of production between the Union producer and the Chinese exporting producers. The Commission's reason for rejecting those requests was, in essence, that those differences did not necessarily translate into differences in

prices, or that they did not necessarily affect price comparability. [77]

193. In paragraphs 148 and 150 of the judgment under appeal, the General Court held, in essence, that, in refusing to make the adjustments requested for the purposes of determining the existence of injury, the Commission did not infringe Article 2(10) of Regulation No 1225/2009, Article 3(2)(a) and (3) of that regulation, or Article 9(4) thereof.

194. By its fourth ground of appeal, Changmao Biochemical Engineering submits that, in so doing, the General Court infringed those provisions, breached the Commission's duty of care and infringed the principle of sound administration.

195. I take the view that that ground of appeal must be dismissed. Although it is, in my opinion, well founded in so far as it alleges infringement of Article 3(2)(a) and (3) of Regulation No 1225/2009, it is nonetheless ineffective in its entirety. I will set out below the reasons why it is well founded in part before I explain why it is ineffective.

196. Under Article 1(1) of Regulation No 1225/2009, for anti-dumping duties to be imposed, the dumped imports must cause injury to the EU industry. According to Article 3(2)(a) of that regulation, the determination of injury shall involve an objective examination of 'the volume of the dumped imports and the effect of the dumped imports on prices in the [Union] market for like products'. Article 3(3) of the same regulation states that 'with regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the [EU] industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase, which would otherwise have occurred, to a significant degree'.

197. It is true that Article 3(2)(a) and (3), or any other provision of Regulation No 1225/2009, does not state that the Commission must make adjustments for the purpose of determining the injury margin. There is no equivalent, in that context, to Article 2(10) of that regulation, which states that adjustments must be made for the purpose of determining the dumping margin.

198. However, according to case-law, the obligation to carry out an objective examination of the impact of the dumped imports, as set out in Article 3(2) of Regulation No 1225/2009, requires a fair comparison to be made between the price of the product concerned and the price of the like product of the EU industry when sold in the territory of the EU. Such a fair comparison is a prerequisite of the lawfulness of the calculation of the injury to that industry. [78]

199. It seems to me that, where adjustments are necessary in order to guarantee the fairness of the comparison between the price of the product concerned and the price of the like product of the EU industry in the EU, the Commission must be considered to be under an obligation to make those adjustments. Thus, the symmetry between the price of the product concerned and the price of the like product would be re-established, just as, according to case-law, an adjustment to the normal value made in accordance with Article 2(10) of Regulation No 1225/2009 re-establishes the symmetry between the normal value and the export price of a product, thereby ensuring the comparability of prices. [79]

[77] Recitals 64 to 74 of the regulation at issue.

[78] Judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234, paragraph 176).

[79] Judgment of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (T-254/18, EU:T:2021:278, paragraph 593).

200. Although no provision of Regulation No 1225/2009 expressly states that the Commission must make adjustments in order to ensure a fair comparison between the price of the product concerned and the price of the like product of the EU industry in the EU, that obligation may, in my view, be based on Article 3(2)(a) and (3) of that regulation, in so far as that provision requires a fair comparison.

201. It is true that, as the Commission argues, the General Court committed no error in finding, in paragraph 149 of the judgment under appeal, that the judgment of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods* v *Council* (T-122/09, not published, EU:T:2011:46), concerned a breach of the applicants' rights of defence and a failure to state reasons for the contested regulation. Indeed, in that judgment, the General Court did not examine the merits of the claim that the adjustment to the export price, made in the context of the calculation of price undercutting, was inappropriate. [80]

202. However, reference should be made to the judgment of 5 October 1988, *Canon and Others* v *Council* (277/85 and 300/85, EU:C:1988:467, paragraphs 65 and 66), in which the Court held that the Commission had not erred in making, in the context of the injury assessment, an adjustment for differences between the imported models of the product concerned (electronic typewriters) and the most similar Union models. [81]

203. Similarly, in the judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234, paragraphs 172 to 189), the General Court found that the calculation of the undercutting by the Commission was contrary to Article 3(2) of Regulation No 1225/2009, because the Commission had compared the EU industry's prices of sales to the first independent buyers for the like product with the Chinese exporting producer's CIF (cost, insurance and freight) prices. According to the General Court, the obligation to compare prices at the same level of trade required the Commission to use not the Chinese exporting producer's CIF prices, but that exporting producer's prices of sales to the first independent buyers. Thus, the Commission should have made the corresponding adjustments, which it had failed to do. [82]

204. Therefore, the General Court erred in holding, in paragraph 148 of the judgment under appeal, that none of the provisions of Regulation No 1225/2009 cited by Changmao Biochemical Engineering – that is, Article 2(10), Article 3(2) and (3) and Article 9(4) of that regulation – required the Commission to make adjustments for the purpose of determining the existence of injury. In my opinion, Article 3(2)(a) and (3) of Regulation No 1225/2009 requires the Commission to do so. Thus, the fourth ground of appeal is well founded in so far as it alleges infringement of Article 3(2)(a) and (3) of that regulation.

205. Nevertheless, as mentioned in point 195 above, the fourth ground of appeal must, in my view, be dismissed as ineffective.

206. Indeed, it seems to me that, if the Commission is considered to be required to make the necessary adjustments in the context of the assessment of injury, the principles that govern the requests for adjustment made in the context of the determination of dumping should apply. Thus, by analogy with the case-law cited in point 130 above, the party requesting an adjustment

[80] Judgment of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods* v *Council* (T-122/09, not published, EU:T:2011:46, paragraph 93).

[81] See also judgment of 5 October 1988, *Brother Industries* v *Council* (250/85, EU:C:1988:464, paragraph 36).

[82] See also judgment of 30 November 2011, *Transnational Company "Kazchrome" and ENRC Marketing* v *Council and Commission* (T-107/08, EU:T:2011:704, paragraphs 50 to 71).

for the purpose of determining the existence of injury must prove that its claim is justified. It must, in particular, prove that the differences in (for instance) the costs of production translate into differences in prices.

207. However, in paragraph 160 of the judgment under appeal, the General Court held, in essence, that Changmao Biochemical Engineering had failed to show that the differences in the costs of production between China and the EU translated into price differences. I emphasise that paragraph 160 of the judgment under appeal relates specifically to Changmao Biochemical Engineering's request that adjustments be made *for the purpose of determining the undercutting margin*. Indeed, the wording of that paragraph reproduces that of recital 70 of the regulation at issue, in which the Commission states the reason why it rejects Changmao Biochemical Engineering's requests for adjustment for the purpose of determining the undercutting margin.

208. Changmao Biochemical Engineering has not challenged paragraph 160 of the judgment under appeal in the context of its fourth ground of appeal, which concerns the lawfulness of adjustments made for the purpose of determining the undercutting margin. It has challenged that paragraph only in the context of its third ground of appeal, which pertains to adjustments made for the purpose of determining the dumping margin.

209. Thus, although it is well founded, the fourth ground of appeal must be dismissed as ineffective.

210. I conclude that the appeal must be dismissed in its entirety.

VI. Costs

211. According to Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court shall make a decision at to the costs.

212. Under Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, Changmao Biochemical Engineering has been unsuccessful, and the Commission has applied for costs. Thus, Changmao Biochemical Engineering should be ordered to bear its own costs and to pay those incurred by the Commission.

VII. Conclusion

213. I therefore propose that the Court should:

– dismiss the appeal; and

– order Changmao Biochemical Engineering Co. Ltd to bear its own costs and to pay the costs incurred by the European Commission.