Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 March 2019*

(Appeal — Dumping — Imports of crystalline silicon photovoltaic modules and key components (cells) originating in or consigned from China — Definitive anti-dumping duty — Regulation (EC) No 1225/2009 — Article 3(7) — Article 9(4) — Temporal scope of Regulation (EU) No 1168/2012)

In Case C-236/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 May 2017,

Canadian Solar Emea GmbH, established in Munich (Germany),

Canadian Solar Manufacturing (Changshu) Inc., established in Changshu (China),

Canadian Solar Manufacturing (Luoyang) Inc., established in Luoyang (China),

Csi Cells Co. Ltd, established in Suzhou (China),

Csi Solar Power Group Co. Ltd, formerly Csi Solar Power (China) Inc., established in Suzhou,

represented by J. Bourgeois and A. Willems, avocats, and by S. De Knop, M. Meulenbelt and B. Natens, advocaten,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by H. Marcos Fraile, acting as Agent, and by N. Tuominen, avocată,

defendant at first instance,

European Commission, represented by N. Kuplewatzky, J.-F. Brakeland and T. Maxian Rusche, acting as Agents,

intervener at first instance,

THE COURT (Fourth Chamber),

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

* Language of the case: English.

Advocate General: E. Tanchev,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 June 2018,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2018,

gives the following

Judgment

1 By their appeal Canadian Solar Emea GmbH, Canadian Solar Manufacturing (Changshu) Inc., Canadian Solar Manufacturing (Luoyang) Inc., Csi Cells Co. Ltd and Csi Solar Power Group Co. Ltd, formerly Csi Solar Power (China) Inc. ('Csi Solar Power'), request the Court to set aside the judgment of the General Court of the European Union of 28 February 2017, *Canadian Solar Emea and Others* v *Council* (T-162/14, not published, 'the judgment under appeal', EU:T:2017:124), to the extent that the General Court, by that judgment, dismissed their action for the annulment of Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 1, 'the regulation at issue'), in so far as it applies to the appellants.

2 By its cross-appeal, the European Commission requests the Court to set aside the judgment under appeal in so far as the General Court, first, rejected the plea of inadmissibility raised by the Commission and, secondly, erred in law in the interpretation of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51; 'the basic regulation').

Legal context

The basic regulation

3 Article 1(2) and (3) of the basic regulation provides:

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

3. The exporting country shall normally be the country of origin. However, it may be an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country.'

4 Article 2(7)(a) of that regulation provides:

'In the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community 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.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.'

5 Pursuant to Article 2(7)(c) of that regulation, 'a claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions' and, in that respect, fulfils specific listed criteria. That provision adds:

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

6 Under the heading 'Determination of injury', Article 3(6) and (7) of that regulation reads as follows:

'6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

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

7 Article 9(4) of the basic regulation, concerning the imposition of definitive duties, provides:

'Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council [of the European Union], acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. ... The 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 Community industry.'

8 Article 17 of the basic regulation provides:

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

...'

9 On 12 December 2012, Regulation (EU) No 1168/2012 of the European Parliament and of the Council amending Regulation No 1225/2009 (OJ 2012 L 344, p. 1) was adopted. In accordance with Article 1 of Regulation No 1168/2012:

'[The basic regulation] is hereby amended as follows:

(1) Article 2(7) is amended as follows:
   (a) in the penultimate sentence of subparagraph (c) the words "shall be made within three months of the initiation of the investigation" are replaced by the words "shall normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation";
   (b) the following subparagraph is added:
   "(d) When the Commission has limited its examination in accordance with Article 17, a determination pursuant to subparagraphs (b) and (c) of this paragraph shall be limited to the parties included in the examination and any producer that receives individual treatment pursuant to Article 17(3)."

(2) in Article 9(6), the first sentence is replaced by the following:

"When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established with respect to the parties in the sample, irrespective of whether the normal value for such parties is determined on the basis of Article 2(1) to (6) or subparagraph (a) of Article 2(7)."'

10 Under Articles 2 and 3 of Regulation No 1168/2012, that regulation applies to all new and to all pending investigations as from 15 December 2012 and it enters into force on the day following that of its publication in the *Official Journal of the European Union*. That publication took place on 14 December 2012.

The regulation at issue

11 Under Article 1(1) of the regulation at issue, a definitive anti-dumping duty is imposed on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels originating in or consigned from China and falling within certain codes established under the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), in the version applicable when the regulation at issue was adopted. Article 1(2) of that regulation establishes the rate of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the products described in Article 1(1) and manufactured by the companies listed in Article 1(2).

12 Pursuant to Article 3(1) of the regulation at issue, which applies to certain products the references of which are specified in terms of that Combined Nomenclature and which are invoiced by companies from which the Commission has accepted undertakings and whose names are listed in the Annex to Commission Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2013 L 325, p. 214), imports declared for release into free circulation are exempt from the anti-dumping duty imposed by Article 1 of the regulation at issue, subject to the fulfilment of certain conditions.

13 Article 3(2) of the regulation at issue provides that a customs debt is incurred at the time of acceptance of the declaration for release into free circulation whenever it is established that one or more of the conditions listed in Article 3(1) of that regulation are not fulfilled or when the Commission withdraws its acceptance of the undertaking.

Background to the dispute

14 The appellants are part of the Canadian Solar group. Canadian Solar Manufacturing (Changshu), Canadian Solar Manufacturing (Luoyang), Csi Cells Co. and Csi Solar Power are exporting producers of crystalline silicon photovoltaic cells and modules. Canadian Solar Emea is presented as their associated importer in the European Union.

15 On 6 September 2012, the Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China (OJ 2012 C 269, p. 5).

16 The Canadian Solar group cooperated in that proceeding.

17 On 21 September 2012, the appellants submitted a request for their selection in the sample provided for in Article 17 of the basic regulation. However, that request was not granted.

18 Alongside this, on 8 November 2012, the Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-subsidy proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China (OJ 2012 C 340, p. 13).

19 On 13 November 2012, the appellants, which are exporting producers, submitted market economy treatment ('MET') claims pursuant to Article 2(7)(b) of the basic regulation.

20 On 3 January 2013, the Commission informed the appellants that those MET claims would not be examined.

21 On 1 March 2013, the Commission adopted Regulation (EU) No 182/2013 making imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China subject to registration (OJ 2013 L 61, p. 2).

22 On 4 June 2013, the Commission adopted Regulation (EU) No 513/2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation No 182/2013 (OJ 2013 L 152, p. 5, 'the provisional regulation').

23 On 2 August 2013, the Commission adopted Decision 2013/423/EU accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China (OJ 2013 L 209, p. 26). That undertaking was offered by a group of Chinese cooperating exporting producers listed in the annex to that decision, including Canadian Solar Manufacturing (Changshu), Canadian Solar Manufacturing (Luoyang), Csi Cells Co. and Csi Solar Power, together with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('the CCCME').

24 On the same day, the Commission adopted Regulation (EU) No 748/2013 amending Regulation No 513/2013 (OJ 2013 L 209, p. 1) in order to take account of Decision 2013/423. In essence, subject to the fulfilment of certain conditions, Article 6 of Regulation No 513/2013, as amended by Regulation No 748/2013, provides, inter alia, that imports of certain products determined in that regulation, declared for release into free circulation and invoiced by companies from which undertakings have been accepted by the Commission and which are listed in the annex to Decision 2013/423, are to be exempt from the provisional anti-dumping duty imposed by Article 1 of that regulation.

25 On 27 August 2013, the Commission disclosed the essential facts and considerations on the basis of which it intended to propose the imposition of anti-dumping duties on imports of modules and key components (cells) originating in or consigned from China.

26 Subsequent to the definitive disclosure of the anti-dumping and anti-subsidy findings, the exporting producers together with the CCCME submitted a notification to amend their initial undertaking offer.

27 On 2 December 2013, the Council adopted the regulation at issue. Since they had cooperated in the anti-dumping investigation, but had not been selected in the sample provided for in Article 17 of the basic regulation, the exporting producers in the Canadian Solar group were listed in Annex I to the regulation at issue. Article 1 of that regulation imposes an anti-dumping duty of 41.3% on the companies included on that list. Subject to the fulfilment of certain conditions, Article 3 of that regulation provides that imports invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the annex to Implementing Decision 2013/707, including those exporting producers, are to be exempt from the anti-dumping duty imposed by Article 1 of the regulation at issue.

28 On 2 December 2013, in the context of the parallel anti-subsidy proceeding, the Council also adopted Implementing Regulation (EU) No 1239/2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 66).

29 On 4 December 2013, the Commission adopted Implementing Decision 2013/707, by which it accepted the amended undertaking offered by the exporting producers listed in the annex to that decision, together with the CCCME, in the context of the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from China for the period of application of definitive measures.

30 After the application for annulment was lodged in the case that gave rise to the judgment under appeal, the Commission adopted Implementing Regulation (EU) 2015/866 of 4 June 2015 withdrawing the acceptance of the undertaking for three exporting producers under Implementing Decision 2013/707 (OJ 2015 L 139, p. 30). Under Article 1 of that implementing regulation, the acceptance of the undertaking in relation to, inter alia, Canadian Solar Manufacturing (Changshu), Canadian Solar Manufacturing (Luoyang), Csi Cells Co. and Csi Solar Power, was withdrawn. That implementing regulation entered into force the day after its publication in the *Official Journal of the European Union*, that is to say, 6 June 2015.

31 The Commission adopted Commission Implementing Regulation (EU) 2017/367 of 1 March 2017 imposing a definitive anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council and terminating the partial interim review investigation pursuant to Article 11(3) of Regulation (EU) 2016/1036 (OJ 2017 L 56, p. 131).

The procedure before the General Court and the judgment under appeal

32 In support of their action, the appellants raised six pleas in law, alleging (i) infringement of Article 5(10) and (11) of the basic regulation, (ii) infringement of Articles 1 and 17 of the basic regulation, (iii) infringement of Article 2 of the basic regulation, (iv) infringement of Article 1(4) of the basic regulation, (v) infringement of Article 2(7)(c) of the basic regulation, and (vi) infringement of Article 3 and Article 9(4) of the basic regulation.

33 The General Court first rejected the plea of inadmissibility raised by the Council and the Commission, concluding, inter alia, that the acceptance of an undertaking offer affects neither the admissibility of an action brought against an act imposing an anti-dumping duty nor the assessment of the pleas in law put forward in support of that application and that the appellants maintained an interest in the annulment of the regulation at issue.

34 The General Court then examined the pleas raised by the appellants in support of their action. It rejected the first three pleas as inadmissible and the latter three as unfounded. Consequently, the General Court dismissed the action in its entirety.

Forms of order sought by the parties:

35 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal;

– uphold the application at first instance and annul the regulation at issue in so far as it concerns the appellants;

– order the defendant at first instance to pay the costs incurred by the appellants, and its own costs, both at first instance and on appeal;

– order any other parties to the appeal to pay their own costs; or, in the alternative,

– set aside the judgment under appeal;

– refer the case back to the General Court for judgment;

– reserve the costs incurred at first instance and on appeal for final judgment by the General Court; and

– order any other parties to the appeal to pay their own costs.

36 The Council claims that the Court should:

– dismiss the appeal, and

– order the appellants to pay the costs of the appeal and the costs of the proceedings before the General Court.

37 The Commission contends that the Court should:

– dismiss the appeal, and

– order the appellants to pay the costs.

38 By its cross-appeal, the Commission, supported by the Council, claims that the Court should:

– set aside the judgment under appeal;

– declare the action at first instance inadmissible; or

– in the alternative, declare the action at first instance devoid of purpose; or

– in the further alternative, declare the action at first instance unfounded and reverse the interpretation of causality, for the purpose of Article 3 of the basic regulation, given by the General Court in the context of the sixth plea in law at first instance; and

– order the appellants to pay the costs.

39 The appellants claim that the Court should:

– dismiss the cross-appeal in its entirety;

– order the Commission to pay the appellants' costs, and its own costs, both at first instance and on cross-appeal; and

– order the Council to pay its own costs.

The cross-appeal

40 The cross-appeal submitted by the Commission is intended, primarily, to contest the admissibility of the action at first instance, which is a preliminary issue as regards the substantive issues raised in the main appeal. It should therefore be examined first.

41 In support of its cross-appeal, the Commission, supported by the Council, relies on three grounds. The first, and primary, ground alleges an error of law in that the General Court considered that the regulation at issue was capable, in itself, of having legal consequences for the appellants. The second ground, relied on in the alternative, alleges a failure to state reasons and an error of law in that the General Court held that the appellants still had an interest in having the regulation at issue annulled at the time the judgment under appeal was delivered. The third ground, relied on in the further alternative, alleges an error of law in that the General Court held that Article 3 and Article 9(4) of the basic regulation required a two-step analysis: first, establishing that the causal link between dumping and injury was not broken and, secondly, modulating the dumping margin, and thus potentially the duty rate, based on an attribution of different injury factors.

The first ground of cross-appeal

Arguments of the parties

42 The first, and primary, ground of cross-appeal is divided into two parts.

43 By the first part of this ground, which refers to paragraphs 41 to 47 of the judgment under appeal, the Commission submits that the General Court did not give sufficient reasons for its conclusion that the regulation at issue, and not Implementing Decision 2013/707, affects the appellants' legal position, and that, in any event, in making that conclusion, the General Court infringed the general principle of EU law relating to institutional balance and Articles 8 and 9 of the basic regulation.

44 The Commission argues, first, that the General Court's finding that seeking the annulment of the regulation at issue is the appropriate way of challenging the findings of dumping, injury and causality completely fails to take into account that the appellants needed to challenge Implementing Decision 2013/707 if their aim was to contest those findings. The General Court's findings only support the conclusion that an action may lie against either the regulation at issue or Implementing Decision 2013/707. This constitutes a failure to state reasons, because it is impossible to understand, from the judgment under appeal, why an action would lie necessarily, or even usually, against the regulation at issue, and not against Implementing Decision 2013/707, from which the rights and/or obligations attaching to the importer in fact arise.

45 Secondly, according to the Commission, by deciding that an action lies against the regulation at issue, rather than against Implementing Decision 2013/707, the General Court infringed the general principle of institutional balance and the distribution of powers between the Council and the Commission as set out in Articles 8 and 9 of the basic regulation. The General Court's conclusion implies that that implementing decision is not self-sufficient, but requires validation by the independent rights and obligations created by the Council though the adoption of the regulation at issue.

46 Furthermore, the Commission submits that those errors of law cannot be remedied by the finding in paragraph 42 of the judgment under appeal, according to which the EU Courts 'implicitly but necessarily' upheld the admissibility of actions against regulations imposing definitive duties brought by interested parties whose undertaking had been accepted. That issue was simply not discussed in the case-law cited in that paragraph, and, moreover, that case-law is in direct contradiction to the judgment of 29 March 1979, *NTN Toyo Bearing and Others* v *Council* (113/77, EU:C:1979:91).

47 By the second part of the first ground of cross-appeal, the Commission submits that the acceptance of an undertaking is a favourable act, the adoption of which was requested by the appellants and which does not affect their legal position. The contrary conclusion of the General Court, in paragraph 46 of the judgment under appeal, even if it were correct, would only establish an interest in seeking the annulment of Implementing Decision 2013/707, but not the regulation at issue. Paragraph 46 of the judgment under appeal contains two errors of law.

48 First, that paragraph does not provide any reasons as to why acceptance of an undertaking by the Commission would be different from a Commission decision declaring a concentration that has been notified to it to be compatible with the internal market; a declaration from the Commission that an agreement does not infringe Article 101(1) TFEU; or a decision declaring notified State aid to be compatible with the internal market.

49 Secondly, the Commission submits that Article 8 of the basic regulation does not provide for the adoption of a separate act once the Commission has completed its investigation of dumping and injury. The conclusion of the General Court would mean that a company offering an undertaking would have to make a preemptive challenge to the decision accepting the undertaking, even before the anti-dumping investigation has been completed, several months later.

50 The Commission submits, for the sake of completeness, that paragraph 47 of the judgment under appeal contains two errors of law. First, the General Court's assertion that the regulation at issue altered the legal position of the appellants as regards 'anti-dumping duties on products not covered by the undertaking' is based on an error of law in relation to the interpretation of the undertaking offer or to a distortion of the evidence by the General Court, if that offer were to be classified as a 'matter of fact'. According to the Commission, it follows clearly and without ambiguity from the text of the offer of an undertaking that the appellants were not allowed to sell the product concerned except according to the provisions of the undertaking. Accordingly, there could only be duties on products that exceeded the annual level, but not duties on 'products not covered by the undertaking'.

51 Secondly, since the duties on 'products ... exceeding the annual level' were already included in the offer of an undertaking, that is not a new right or obligation created by the regulation at issue.

52 The appellants contend that the first ground of cross-appeal should be rejected.

Findings of the Court

53 By the first ground of cross-appeal, the Commission submits, in essence, that the General Court, in paragraphs 41 to 47 of the judgment under appeal, erred in law in finding that the regulation at issue was capable, by itself, of having legal consequences for the appellants.

54 The first part of this ground alleges, in essence, that the General Court did not give sufficient reasons for its conclusion that the regulation at issue — and not Implementing Decision 2013/707, by which the Commission accepted the undertaking offered by the exporting producers referred to in the annex thereto, including the exporting producers of the Canadian Solar Group — affects the legal position of the appellants and that, in any event, in making that finding, the General Court infringed the principle of institutional balance.

55 It must be noted, in the first place, that, contrary to the Commission's arguments, in paragraphs 41 to 47 of the judgment under appeal, the General Court does not state that the regulation at issue must necessarily, or even usually, be the contested measure, nor that the action for annulment had to be brought against that regulation and not against Implementing Decision 2013/707. Thus, the Commission's argument is based on a misreading of the judgment under appeal. In those circumstances, the General Court cannot be criticised for failing to state reasons for an assertion that it did not make.

56 In the second place, it is appropriate, first, to note that, if the Commission's position were accepted, it would be tantamount to preventing companies whose minimum import price undertaking ('MIP') was accepted by the Commission from challenging a regulation imposing a definitive anti-dumping duty on them. As the General Court pointed out, in paragraph 42 of the judgment under appeal, neither the General Court nor the Court of Justice found, in their judgments cited in that paragraph, that the action for annulment brought by a company against a regulation imposing definitive anti-dumping duties on it was inadmissible because an MIP undertaking offered by that company had been accepted by the Commission.

57 Secondly, it must be observed that the regulation at issue necessarily affects the legal position of the appellants since, if that regulation were annulled, the undertaking offer would become null and void. That is precisely what the General Court stated in paragraph 45 of the judgment under appeal.

58 It should also be borne in mind that, as is apparent from paragraphs 44 and 45 of the judgment under appeal, the appellants are still subject to the anti-dumping duties provided for in the regulation at issue, in accordance with Articles 1 and 3 thereof, for imports which exceed the annual limit provided for in the MIP undertaking.

59 In that context, the Commission cannot validly claim that the General Court breached the principle of institutional balance. On the contrary, the Commission's position that the appellants needed to challenge Implementing Decision 2013/707, if their aim was to contest the findings relating to the existence of dumping, could be accepted only if the Council were required, once an MIP undertaking offered by an undertaking was accepted by the Commission, to adopt a regulation imposing definitive anti-dumping measures. However, the Council's power in that respect is not a circumscribed power, as is clear from Article 9(4) of the basic regulation, according to which the Commission's proposal is to be adopted by the Council, unless it decides to reject it.

60 It should be borne in mind, in that respect, that the Commission's role forms an integral part of the Council's decision-making process. It follows from the provisions of the basic regulation that the Commission is responsible for carrying out investigations and for deciding, on the basis of those investigations, whether to terminate the proceedings or, on the contrary, to continue them by adopting provisional measures and by proposing that the Council adopt definitive measures. However, it is the Council which has the power to give a final decision (see, to that effect, 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 8).

61 The first part of the first ground of cross-appeal must therefore be rejected.

62 As regards the second part of that first ground — according to which the acceptance of an MIP undertaking is a favourable act for the appellants, which does not affect their legal position, contrary to paragraph 46 of the judgment under appeal — it is sufficient to note that that issue is irrelevant since the application for annulment which the General Court held to be admissible was brought against the regulation at issue and not Implementing Decision 2013/707, by which the Commission accepted that undertaking.

63 As regards the two errors of law allegedly vitiating paragraph 47 of the judgment under appeal, which the Commission states it raises only for the sake of completeness, those errors cannot, in view of the considerations set out in paragraphs 53 to 60 above, have any bearing on the validity of the General Court's conclusion that the plea of inadmissibility raised by the Council and the Commission had to be rejected because the regulation at issue affects the legal position of the appellants.

64 It should be added that the Court has already held that the EU legislature, in adopting that regulation, put in place trade defence measures constituting a set or a 'package' intended to achieve a common goal, namely the removal of the injurious effect on the EU industry of Chinese dumping relating to the products concerned, while safeguarding the interests of that industry, and that Article 3 of that regulation was not severable from its remaining provisions (see, to that effect, judgment of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraphs 44 and 55).

65 It follows that the first ground of cross-appeal must be rejected.

The second ground of cross-appeal

Arguments of the parties

66 By the second ground of cross-appeal, the Commission, supported by the Council, submits that, even if the General Court had been right to consider, in paragraph 47 of the judgment under appeal, that the regulation at issue altered the legal position of the appellants because it was solely on account of that regulation that they had to pay duties on the solar panels in question that exceeded the annual volume, the action for annulment before the General Court became devoid of purpose on the day of entry into force of Implementing Regulation 2015/866, which withdrew the acceptance of the undertaking offered by the appellants.

67 The Commission notes that the annual level of imports of the product concerned, stipulated in the acceptance of the appellants' undertaking offer, had never been reached before the entry into force of that implementing regulation. Thus, even if the appellants had had an interest in bringing proceedings on the basis of the provision of the undertaking that envisaged the payment of duties for products imported in excess of that annual level, that interest in any event ceased to exist at the date of the

entry into force of that implementing regulation, and the action for annulment therefore become devoid of purpose on that date. The General Court failed to address that argument raised by the Commission at the hearing before the General Court.

68 The Commission adds that, even if the General Court did respond to that argument, in paragraph 47 of the judgment under appeal, its reply does not address the issue raised by the Commission. It is precisely because the Commission withdrew the acceptance of the undertaking offered by the appellants as a result of the failure to comply with the undertaking that the legal consequences of that acceptance could no longer provide them with a legitimate interest in bringing proceedings.

69 The appellants submit that this ground must be rejected since it is incomprehensible and, in any event, ineffective.

Findings of the Court

70 It should be noted that the rejection of the first ground of cross-appeal entails the rejection of the second ground. It is clear from the assessment which led to the rejection of the first ground that the regulation at issue affects the legal position of the appellants, irrespective of the existence of Implementing Decision 2013/707.

71 Thus, the fact that Implementing Regulation 2015/866 withdrew the acceptance of the undertaking offered by the appellants provided for in Implementing Decision 2013/707, where the annual level of imports of the product concerned, stipulated in that undertaking, had never been reached, cannot have any bearing on the finding that the regulation at issue affects the appellants' legal position, and that, accordingly, they were entitled to bring an action before the General Court seeking the annulment of the regulation at issue.

72 The second ground of cross-appeal must therefore be rejected.

The third ground of cross-appeal

73 By the third ground of cross-appeal, raised in the further alternative, the Commission submits that the General Court erred in its interpretation of Article 3 and Article 9(4) of the basic regulation, in the context of the examination of the sixth plea raised before it by the appellants, by stating that those provisions required that the attribution analysis be carried out 'in order to avoid granting the EU industry protection beyond that which is necessary'.

74 It suffices to note, in that respect, that, in accordance with Article 169(1) and Article 178(1) of the Rules of Procedure of the Court of Justice, any appeal, whether it be a main appeal or a cross-appeal, must seek to have set aside, in whole or in part, the decision of the General Court.

75 In the present case, since the plea in law in question was rejected, the Commission obtained, before the General Court, the dismissal of the application for annulment of the regulation at issue, in accordance with the form of order sought in its pleadings. The third ground of cross-appeal, which in fact merely seeks a substitution of the grounds relating to the interpretation of Article 3 and Article 9(4) of the basic regulation cannot, therefore, be upheld (see, to that effect, judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 33 and the case-law cited).

76 Accordingly, the third ground of cross-appeal must be rejected as inadmissible.

77 In the light of the foregoing considerations, the cross-appeal must be dismissed in its entirety.

The appeal

78 The appellants rely on four grounds in support of their appeal.

The first ground of appeal

Arguments of the parties

79 By the first ground of appeal, the appellants submit that the General Court erred in law, in paragraphs 64 to 74 of the judgment under appeal, by requiring the appellants to demonstrate their interest in raising the first and second pleas in their action for annulment and, in any event, that the General Court erred in law in its legal characterisation of the facts, since the appellants have such an interest.

80 The appellants argue, in the first place, that, by applying, by analogy, the case-law of the Court of Justice according to which every applicant must show that it has an interest in bringing proceedings — that is to say, an interest in the annulment of the contested act — to the possibility of raising individual pleas, the General Court erred in law for four reasons.

81 First, the General Court's finding goes against the Court's case-law, which requires applicants to show only an interest in the annulment of the contested act.

82 Moreover, the General Court failed to distinguish the first and second pleas in the action for annulment from the circumstances in which a plea is inadmissible because the applicant has no legal interest in raising it. These circumstances, as identified in the Court's case-law, are when a plea (i) does not relate to the applicant, but pursues a public interest or the interests of the law, or (ii) concerns rules that are not intended to ensure protection for individuals, such as the rules of procedure of an institution. The first and second pleas in the action for annulment do not concern such circumstances, and the General Court did not claim that they did.

83 Secondly, the appellants allege that the General Court infringed their rights of defence by preventing them from raising the pleas which they considered appropriate, in breach of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

84 Thirdly, the appellants consider that, even if they were required to show an interest in raising the first and second pleas in the action for annulment, the General Court's conclusion that those pleas are inadmissible breaches their right to an effective remedy, as provided for in Article 47 of the Charter. The appellants had to bring an action for annulment within the period laid down in the sixth paragraph of Article 263 TFEU in order to avoid being time-barred from exercising their rights, since, otherwise, in the light of the case-law stemming from the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), they risked being deprived of the possibility of contesting the validity of the regulation at issue before the court of a Member State with a view to obtaining a request for a preliminary ruling.

85 In that regard, the appellants submit that, according to the General Court, their interest in raising the first two pleas in the action for annulment is hypothetical, which implies that, if their interest in raising those pleas arose after the expiry of the two-month period referred to in the sixth paragraph of Article 263 TFEU, they would be denied access to justice. That situation is all the more problematic since one of the appellants, Canadian Solar Emea, an importing company, would have been able to challenge the validity of the regulation at issue before a national court at any time if it had not been linked to the other appellants, which are exporting companies.

86 Fourthly, the appellants argue that the General Court breached their right to be heard because the question of the admissibility of the first two pleas in the action for annulment was not fully discussed before the General Court. That issue was not invoked by the Council and the Commission during the written proceedings, nor fully addressed during the hearing before the General Court, which prevented the appellants from proving that they produced and exported to the European Union, and imported into the European Union, modules originating in a third country, but consigned from China, and imported into the European Union modules originating in China, but consigned from a third country.

87 In the second place, the appellants submit that the General Court erred in its legal characterisation of the facts by finding, in paragraphs 69 to 73 of the judgment under appeal, that the appellants did not have an interest in raising the first and second pleas in the action for annulment.

88 First, it follows from settled case-law of the Court that the appellants have an interest in bringing proceedings to prevent the institutions from repeating errors based on an incorrect interpretation of the provisions of the basic regulation, which would have occurred in the present case, since the Commission adopted a new regulation, Implementing Regulation 2017/367, which extends the duration of the regulation at issue by a further 18 months and which repeats the same errors.

89 Secondly, the pleas raised by the appellants concerned the scope of the anti-dumping investigation, which in turn affects the dumping, injury, causation, and Union interest assessments that led the Council to adopt the regulation at issue.

90 The Council and the Commission contend that the first ground should be rejected as partly inadmissible and partly unfounded and, in any event, as a whole, unfounded.

Findings of the Court

91 First of all, the General Court rightly noted in paragraph 64 of the judgment under appeal that, according to the Court's settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it. The proof of such an interest, which is evaluated at the date on which the action is brought and which is an essential and fundamental prerequisite for any legal proceedings, must be adduced by the applicant (judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council*, C-100/17 P, EU:C:2018:842, paragraph 37).

92 As the General Court also stated in paragraphs 65 and 66 of the judgment under appeal, an applicant's interest in bringing proceedings must be vested and current. It may not concern a future and hypothetical situation. That interest must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible, and continue until the final decision, failing which there will be no need to adjudicate (judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 56 and 57 and the case-law cited). The Court hearing the case may raise of its own motion and at any stage of the proceedings the objection that a party has no interest in maintaining its application, by reason of the occurrence of a fact subsequent to the date on which the document instituting the proceedings was lodged (see, to that effect, judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council*, C-100/17 P, EU:C:2018:842, paragraph 38).

93 As regards the allegation that the General Court wrongly required the appellants to prove their interest in raising the first and second pleas in their action for annulment, it should be noted, first, that the Court has already held that a plea for annulment is inadmissible on the ground of lack of interest in

bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction (see, to that effect, judgment of 9 June 2011, *Evropaïki Dynamiki* v *ECB*, C-401/09 P, EU:C:2011:370, paragraph 49 and the case-law cited).

94 As regards the allegation that the General Court erred in its legal characterisation of the facts, it should be noted that it indeed follows from the Court's case-law that, in certain circumstances, an applicant may retain an interest in seeking the annulment of an act repealed in the course of proceedings, in order to induce the author of the contested act to make suitable amendments in the future, and thereby avoid the risk that the unlawfulness alleged in respect of that act will be repeated (judgment of 6 September 2018, *Bank Mellat* v *Council*, C-430/16 P, EU:C:2018:668, paragraph 64).

95 However, the possible persistence of such an interest, in order to prevent the institutions from repeating errors based on an incorrect interpretation of a provision of EU law, cannot be accepted in a situation where the applicant never had an interest in bringing proceedings.

96 Thus, since the appellants did not demonstrate their interest in raising the first two pleas when they lodged their application for annulment, and since, in accordance with the case-law cited in paragraphs 91 and 92 above, that interest must be evaluated at the date on which the action is brought and may not concern a future and hypothetical situation, they cannot justify such an interest by invoking the need to prevent the institutions from repeating errors based on an incorrect interpretation of a provision of EU law.

97 As regards the allegation that, since the first and second pleas in the application for annulment related to the scope of the anti-dumping investigation, those pleas should be declared admissible, that allegation cannot be accepted. The fact that, as regards their substance, those pleas concern elements of that investigation, such as, in particular, the dumping, the injury or the causal link, cannot by itself entail the admissibility of those pleas in a situation where the appellants have not demonstrated an interest in raising those pleas.

98 It follows that the General Court was right to conclude, in paragraph 74 of the judgment under appeal, on the basis of the Court's case-law referred to in paragraphs 91 and 92 above, that those first two pleas in the action for annulment should be rejected as inadmissible.

99 Secondly, in relation to the argument that the General Court infringed Article 47 of the Charter, it must be observed that, having regard to the protection conferred by that article, it is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, as is apparent also from the Explanation on Article 47 of the Charter, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97 and the case-law cited).

100 Consequently, the protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of EU legislative acts directly before the Courts of the European Union (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 105).

101 In those circumstances, the appellants cannot validly allege that the requirement to show an interest in putting forward a plea for annulment infringes their right to an effective remedy, as provided for in Article 47 of the Charter.

102 In addition, as regards the allegation that the General Court infringed the appellants' right to be heard, flowing from that article of the Charter, it must be noted that the appellants do not dispute that, at the hearing before the General Court, the various interveners discussed the plea of inadmissibility lodged by the Council relating to the first two pleas in the application for annulment. Thus, the appellants cannot validly allege that the General Court did not allow them to discuss all the elements of law that were decisive for the outcome of the proceedings or to adduce the necessary evidence in support of their position.

103 Thirdly, as regards the argument that, in view of the case-law flowing from the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), the General Court's conclusion would deny the appellants access to justice if their interest in raising the first and second pleas arose after the expiry of the two-month period referred to in the sixth paragraph of Article 263 TFEU, it is sufficient to note that, in such a case, the case-law in question would not, in principle, constitute an obstacle to their raising such pleas before a national court.

104 It follows from the foregoing considerations that the first ground of appeal must be rejected.

The second ground of appeal

105 The second ground of appeal alleges that the General Court erred in law, on the one hand, by requiring the appellants to demonstrate their interest in raising the third plea in the action for annulment and, on the other hand, by misinterpreting Article 2(7)(a) of the basic regulation, read in conjunction with Article 1(3) thereof.

106 First, for the same reasons as set out in paragraphs 91 to 98 of this judgment, the allegation that the General Court erred in law by requiring the appellants to demonstrate their interest in raising the third plea in the action for annulment must be rejected.

107 Secondly, as regards the allegation that the General Court erred in the interpretation of Article 2(7)(a) of the basic regulation, read in conjunction with Article 1(3) thereof, it suffices to note that paragraphs 90 to 95 of the judgment under appeal, to which that allegation refers, are part of an assessment carried out by the General Court for the sake of completeness. It follows that that allegation is ineffective.

108 The second ground of appeal must therefore be rejected.

The third ground of appeal

109 By the third ground of appeal, the appellants allege that the General Court erred in law by finding, first, that Regulation No 1168/2012 applies to the anti-dumping investigation that led to the adoption of the regulation at issue and, secondly, that the regulation at issue is not vitiated by an error of law, even though the Commission did not make a determination on the appellants' MET claim.

Arguments of the parties

110 As regards, in the first place, the application of Regulation No 1168/2012, the appellants submit that that regulation, which amended the basic regulation, was a reaction to the judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53), in which the Court held that the failure by the Commission to make a determination on an MET claim constituted an infringement of the basic regulation that thus vitiated the regulation imposing anti-dumping duties at issue in the case that gave rise to that judgment.

111 They submit that the amendment introduced in the present case by Regulation No 1168/2012 limited the right to claim MET to only the sampled exporting producers in the anti-dumping investigation concerned. However, the General Court wrongly held that that amendment was applicable to the present anti-dumping investigation and that it was not a retroactive application of the law since the expiry of the applicable deadline to make a determination on an MET claim had not created a definitive situation vis-à-vis the appellants.

112 According to the appellants, that finding of the General Court deprives them of the right to have their MET claim examined, and unduly permits the Commission to avoid its obligation to make a determination on that claim. Since obtaining MET would have resulted in the use of the appellants' prices and costs, instead of those of an analogue country producer, to determine the applicable normal value, the Commission's failure to make a determination created a definitive change that negatively and irrevocably affected the appellants' rights.

113 The appellants argue that the wording of Article 2(7) of the basic regulation, before and after the amendment introduced by Regulation No 1168/2012, leaves no room for doubt. Before that amendment, that provision specified that non-sampled exporting producers, like the appellants, had the right to claim MET and that the Commission had an obligation to make a determination on whether or not to grant it.

114 Following that amendment, Article 2(7) of the basic regulation applies to all new or pending investigations as from 15 December 2012. In the present case, the deadline for the Commission to make a determination on the appellants' MET claim expired on 6 December 2012, that is to say before the entry into force of the amendment introduced by Regulation No 1168/2012. The failure to complete the step of making a determination on the grant of MET cannot be remedied *ex post* by applying the latter regulation.

115 The appellants submit that the amendment introduced by Regulation No 1168/2012, by the very terms of its transitory provision, does not apply to that step in the present anti-dumping investigation, particularly since the Commission's obligation to make a determination on the grant of MET is a substantive rule and not a procedural rule. Thus, the case-law of the Court of Justice on the temporal application of procedural rules, on which the General Court relies in paragraphs 157, 159 and 160 of the judgment under appeal, is inappropriate.

116 Contrary to the General Court's assertion, the expiry of the deadline to make a determination on the MET claim did create a definitive situation vis-à-vis the appellants, namely that the Commission failed to comply with its obligation to take the step of making a determination on whether or not to grant MET.

117 The appellants submit that, if the Commission had made a determination on that matter, that determination could not have been changed at a later stage of the anti-dumping investigation to the appellants' detriment, unless new information arose which was not available at the time of the determination on the grant of MET. The application of Regulation No 1168/2012 to the appellant's MET claim thus removes, *ex post*, their right to have that claim examined, even though it is undisputed that they had that right at the time the Commission should have made a determination on that claim.

118 In that respect, the appellants' interpretation concerning the application of Regulation No 1168/2012 is not contrary to the wording of the provisions of that regulation and, even if it were, the amendment introduced by that regulation is invalid, in so far as it applies to the appellants, because it is incompatible with the principles of legal certainty and non-retroactivity.

119 In the second place, the appellants argue that the General Court erred in law in finding, in paragraphs 162 to 165 of the judgment under appeal, that the fact that the Commission did not make a determination on the appellants' MET claim did not vitiate the regulation at issue. Since the amendment introduced by Regulation No 1168/2012 was not applicable to the present anti-dumping investigation, the Commission should have made a determination on the appellants' MET claim.

120 The Council and the Commission contend that the third ground of appeal is, in part, inadmissible and, in part, unfounded.

121 As regards the admissibility of this ground of appeal, they submit, in essence, that the appellants' allegation, according to which the General Court overlooked the fact that the time limit for the Commission to make a determination on the appellants' MET claim had expired before the entry into force of that amendment, is inadmissible, since the appellants repeat the same arguments as those put forward before the General Court. Moreover, the argument that the amendment could be unlawful, in so far as it applies to the appellants, constitutes a new ground of appeal and is, accordingly, inadmissible. The appellants did not raise before the General Court any plea of illegality, pursuant to Article 277 TFEU, against Article 2 of the basic regulation, as worded following the amendment introduced by Regulation No 1168/2012.

Findings of the Court

– *Admissibility*

122 The pleas of inadmissibility raised by the Council and the Commission cannot be upheld.

123 First, the appellants' allegation that the General Court erred in law by overlooking the fact that the time limit for the Commission to make a determination on the appellants' MET claim had expired before the entry into force of Regulation No 1168/2012, is intended, as the Advocate General states in point 43 of his Opinion, to call into question the application, by the General Court, of the transitional rule laid down in Article 2 of that regulation, and, in particular, paragraph 152 of the judgment under appeal.

124 It should be noted, in that respect, that where an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be raised again in the course of an appeal. If an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgment of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 23 and the case-law cited).

125 It cannot therefore be argued that the appellants are seeking a mere re-examination of the application submitted to the General Court.

126 Secondly, without there being any need to rule on the plea of inadmissibility raised by the Council and the Commission according to which the appellants' allegation concerning the illegality of Regulation No 1168/2012 constitutes a new plea, it must be pointed out that that claim is, in any event, inadmissible since the appellants merely assert that that regulation is unlawful because it is incompatible with the principles of legal certainty and non-retroactivity, without providing any evidence to substantiate that assertion.

127 Elements of the appeal that contain no argument specifically identifying the error of law allegedly vitiating the judgment under appeal must be rejected as inadmissible (see, to that effect, order of 18 October 2018, *Alex* v *Commission*, C-696/17 P, not published, EU:C:2018:848, paragraph 23 and the case-law cited).

128 It follows that, apart from the allegation relating to the illegality of Regulation No 1168/2012, the third ground of appeal is admissible.

– *Substance*

129 By their third ground of appeal, the appellants allege that the General Court erred in law by considering, first, that Regulation No 1168/2012 applied to the anti-dumping investigation that led to the adoption of the regulation at issue and, secondly, that the regulation at issue was not vitiated by an error, even though the Commission did not make a determination on the appellants' MET claim.

130 It should be noted, in the first place, as the General Court rightly observed in paragraph 153 of the judgment under appeal, the wording of Article 2 of Regulation No 1168/2012 precludes the interpretation of the scope of that regulation advocated by the appellants. That article clearly specifies that that regulation applies to any future or pending investigation as from 15 December 2012. However, the appellants do not dispute that, by that date, the anti-dumping investigation which led to the adoption of the regulation at issue was pending. On that date, the Council had neither adopted definitive measures on the basis of Article 9(4) of the basic regulation nor a decision under Article 9(2) of that regulation.

131 In addition, since Article 2 of Regulation No 1168/2012 refers, without further indication, to 'all pending investigations', the appellants cannot validly argue that that article refers only to pending investigations in which the time limit for making a determination on an MET claim has not yet elapsed.

132 In the second place, it should be noted that, contrary to the appellants' assertions, the expiry of the applicable time limit under Article 2(7)(c) of the basic regulation, in the version prior to Regulation No 1168/2012, for the Commission to make a determination on an MET claim, without the Commission having adopted a decision on that claim, did not create a definitive situation vis-à-vis the appellants.

133 First, as the Advocate General states in point 74 of his Opinion, the Commission could validly make a determination on the MET claim after the expiry of the three-month time limit set out in Article 2(7)(c) of the basic regulation, in the version prior to Regulation No 1168/2012.

134 In that respect, the Court has held that, even if the Commission has made a determination on the MET claim under Article 2(7)(c), it can alter its determination (see, to that effect, judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraphs 111 to 113).

135 Secondly, as the General Court rightly pointed out, in paragraph 160 of the judgment under appeal, the appellants' situation was definitively determined only upon the entry into force of the regulation at issue and, until that regulation was adopted, the appellants had no certainty as regards their potential rights and obligations stemming from the application of the basic regulation.

136 It must be borne in mind, in that regard, that, as already noted in paragraph 60 above, the Commission's role forms an integral part of the Council's decision-making process, since the Commission is responsible, as follows from the provisions of the basic regulation, for carrying out investigations and for deciding, on the basis of those investigations, whether to terminate the proceedings or to continue them by adopting provisional measures and by proposing that the Council adopt definitive measures. However, it is the Council which has the power to take a final decision.

137 Thus, at the time of the entry into force of Regulation No 1168/2012, the appellants' situation had not become definitive.

138 It follows that the expiry of the applicable time limit under Article 2(7)(c) of the basic regulation, in the version prior to Regulation No 1168/2012, for the Commission to make a determination on an MET claim, without the Commission having adopted a decision on that claim, had no impact on the applicability of the latter regulation to the anti-dumping investigation which led to the adoption of the regulation at issue.

139 It follows from the foregoing that the General Court did not err in law by considering, in essence, that the fact that the Commission did not rule on the appellants' MET claim was not capable of leading to the annulment of the regulation at issue.

140 Accordingly, it follows from the considerations above that the third ground of appeal must be rejected.

The fourth ground of appeal

141 By their fourth ground of appeal, the appellants allege that, in paragraphs 202 and 205 to 216 of the judgment under appeal, the General Court erred in law by permitting the Council to set the anti-dumping duty at the level to counter injury caused by factors other than dumped imports and by unduly reversing the burden of proof.

Arguments of the parties

142 In the first place, the appellants submit that the test applied by the General Court, in which the injurious effect of other factors must be taken into account only where that effect is of such magnitude that it breaks the causal link between the injury suffered and the dumped imports, is based on an incorrect interpretation of Article 3(7) of the basic regulation, read in conjunction with Article 9(4) thereof.

143 First, the appellants argue that, in calculating the injury margin, and thus setting the anti-dumping duty on the basis of Article 9(4) of the basic regulation, the Council must disregard any injury caused by factors other than the dumped imports. The Council's obligation in that respect plays a role in two distinct procedural steps, namely in determining the existence of injury and in setting the level of the anti-dumping duty in accordance with Article 9(4) of the basic regulation. Those obligations serve to balance the interests of EU importers, industry, and consumers, as well as EU exporting producers, and express, in respect of EU trade defence measures, the general principle of proportionality.

144 First, in determining the existence of injury under Article 3(7) of the basic regulation, the Council and the Commission must verify that the injury caused by dumped imports, after disregarding injury from other factors, is still 'material' and that other factors have not broken the causal link between those imports and the injury.

145 Secondly, the appellants submit that, even where that causal link is not broken, anti-dumping duties may compensate the EU industry only for the injury caused by the dumped imports, and not for the 'separate injury' caused by other factors. To do otherwise would amount to granting the EU industry protection beyond what is necessary. It follows that, in setting the anti-dumping duty in accordance with Article 9(4) of the basic regulation, the Council must make corrections for injury caused by other factors.

146 Secondly, the appellants add, first of all, that although the General Court recognised that at least three other factors contributed to the injury suffered by the EU industry, and the Council conceded that neither it nor the Commission had disregarded the injury caused by those factors, the General Court failed to state the reasons why the impact of those three other factors was insignificant and therefore breached its duty to state reasons, for the purposes of Article 296 TFEU. Next, it follows from the

General Court's own conclusions regarding the contribution of those three factors to the injury sustained by the EU industry that the General Court should have required the Council to reduce the anti-dumping duty by an amount equivalent to the cumulative effect of those other factors. Lastly, by recognising that those three factors had had an effect, and then finding, without any basis in the established facts, that this effect was insignificant, the General Court erred in the characterisation of the facts.

147 In the second place, as regards the alleged reversal of the burden of proof, the appellants argue that the General Court required them to prove the quantitative effect of the three other factors that caused injury to the EU industry.

148 First of all, the Council and the Commission are required to base their determination on positive evidence and on an objective examination of all relevant facts before them. In the appellants' submission, those institutions bear the burden of proof as regards the corrections to be made for injury caused by other factors. There is no basis for shifting that burden to exporting producers, especially not when the shifting of the burden occurs only because the institutions find the assessment too complex to undertake themselves.

149 Next, the General Court imposed an impossible burden of proof on the appellants. They state that they do not have access to the information necessary to calculate the impact of other factors.

150 Lastly, the appellants submit that, in accordance with the principle of sound administration, within the meaning of Article 41 of the Charter, the General Court cannot allow the Council and the Commission to invoke complexity as a reason for not conducting an assessment required by law, especially to the detriment of economic actors.

151 The Council and the Commission contend that the fourth ground of appeal should be rejected, while asking the Court to make a substitution of grounds.

152 These institutions argue, in essence, that the General Court's findings in paragraphs 185 and 191 to 193 of the judgment under appeal wrongly suggest that the level of anti-dumping duties should be reduced due to the existence of factors, other than the dumped imports, capable of affecting the injury.

153 They submit that the calculation of the injury margin, in accordance with Article 9(4) of the basic regulation, and the determination of injury, within the meaning of Article 3 of that regulation, are two different steps. In order to determine the injury margin, the Council and the Commission make their calculation on the basis of prices, profits and costs of production of the EU industry, without taking into account 'known factors other than the dumped imports', that might have contributed to the injury suffered by the EU industry, since those factors are relevant only for the examination of the breaking of the causal link, under Article 3 of the basic regulation.

154 According to the Court's case-law, there is no place for an attribution analysis when determining the injury margin under Article 9(4) of the basic regulation. In that case-law, the Court held that, even though the Council and the Commission had failed to include a factor that could have contributed to the injury in their attribution analysis pursuant to Article 3(7) of the basic regulation, that mistake was not such that it could to lead to the annulment of the contested regulations in the proceedings concerned, since those institutions had demonstrated that the other factor in question could not break the causal link. It follows that the Court allows only one attribution analysis, which takes place at the stage of establishing the causal link.

155 Thus, Article 9(4) of the basic regulation cannot be interpreted as meaning that the anti-dumping duty should be reduced in order to take account of the effect of other factors. No such obligation exists in the World Trade Organisation (WTO) system or in the practice of the European Union's major trading partners, which the European Union takes into account, in line with recital 4 of the basic regulation.

156 In the alternative, the Council submits that this fourth ground of appeal is inadmissible and, in any event, unfounded. The Commission submits, in the alternative, that this ground of appeal is ineffective and, in any event, unfounded.

Findings of the Court

157 The appellants allege that the General Court, in paragraphs 205 to 216 of the judgment under appeal, erred in law by allowing the Council to set the anti-dumping duty at a level to counter injury caused by factors other than the dumped imports, in breach of Article 3(7) of the basic regulation, read in conjunction with Article 9(4) of that regulation. They also submit that, in paragraphs 202 and 205 of the judgment under appeal, the General Court unduly reversed the burden of proof.

158 The Council and the Commission request a substitution of reasons, arguing that the General Court's assessment, contained in paragraphs 185 and 191 to 193 of the judgment under appeal, contains an incorrect interpretation of Article 9(4) of the basic regulation, in that it implies that the level of anti-dumping duties should be reduced due to the existence of factors, other than the dumped imports, which might affect the injury.

159 As a preliminary point, it should be noted that that request for a substitution of grounds is admissible since it constitutes a defence to the appellants' fourth ground of appeal (see, to that effect, judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 42), and that that request concerns paragraphs 185 and 191 to 193 of the judgment under appeal, which contain, as can be seen from paragraph 196 of that judgment, the principles on the basis of which the General Court examined the merits of the appellants' arguments relating to their sixth plea in law, the assessment of which is called into question in the context of the fourth ground of appeal.

160 Accordingly, in the context of the analysis of that fourth ground of appeal, it is necessary to examine, in the first place, the merits of that application for a substitution of grounds.

161 In paragraph 191 of the judgment under appeal, the General Court stated that although Article 9(4) of the basic regulation did not impose any specific methodology on the EU institutions in order to ensure that the anti-dumping duty does not exceed what is necessary to counter the injurious effects of the dumped imports of the product concerned, those institutions were required, in that context, to take into account the conclusions they reached in the analyses carried out pursuant to Article 3(6) and (7) of that regulation.

162 The General Court added, in paragraph 192 of the judgment under appeal, that if that were not so, there would be a risk of the trade defence measures in question going beyond what is necessary in the light of their objective, that is to say removal of the injurious effects, so that they may also confer protection against the negative effects of factors other than dumped imports.

163 That reasoning is not vitiated by any error of law.

164 It should be noted that Article 3(7) of the basic regulation provides that known factors other than the dumped imports which at the same time are injuring the EU industry must be examined in order to ensure that injury caused by those other factors is not attributed to the dumped imports under Article 3(6). Article 3(6) specifies that it must be demonstrated, from all the relevant evidence presented, that the dumped imports are causing material injury to the EU industry.

165 In determining injury, the EU institutions are under an obligation to examine whether the injury on which they intend to base their conclusions does in fact derive from the dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of the Union producers themselves (judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 35 and the case-law cited).

166 In that regard, it is for the Council and the Commission to ascertain whether the effects of those other factors were not such as to break the causal link between, on the one hand, the imports in question and, on the other, the injury suffered by the EU industry. It is also for them to verify, as the General Court rightly noted in paragraph 185 of the judgment under appeal, that the injury attributable to those other factors is not taken into account in the determination of injury, within the meaning of Article 3(7) of the basic regulation, and, consequently, that the anti-dumping duty imposed does not go beyond what is necessary to offset the injury caused by the dumped imports (judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 36 and the case-law cited).

167 That requirement is based on the aim of the rules referred to in Article 3(6) and (7) of the basic regulation, according to which the EU industry cannot be granted protection beyond that which is necessary to counter the injurious effects of the dumped imports (see to that effect, in relation to subsidies, judgment of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraph 90, and, in relation to anti-dumping measures, judgment of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 39).

168 In that context, it should be noted that the General Court rightly held that Article 9(4) of the basic regulation is also intended to achieve that aim. According to that provision, where the facts as finally established show that there is dumping and injury caused thereby, and the EU interest calls for intervention, a definitive anti-dumping duty is to be imposed by the Council and the amount of the anti-dumping duty is not to exceed the margin of dumping established and should even be less than the margin if such lesser duty would be adequate to remove the injury to the EU industry.

169 In order to ensure that the amount of the anti-dumping duty imposed in accordance with Article 9(4) of the basic regulation does not exceed that which is necessary to counter the injurious effects of the dumped imports, that amount should not take into account injurious effects caused by factors other than those imports. In other words, as follows, in essence, from paragraphs 191 and 192 of the judgment under appeal, the Council and the Commission are to take into account, for the purposes of determining that amount, the conclusions reached by those institutions following the examination of the determination of injury, within the meaning of Article 3(6) and (7) of that regulation.

170 That conclusion is, moreover, confirmed by the wording of Article 9(4) of the basic regulation, which, in its first sentence, refers to 'dumping and [the] injury caused thereby'. Thus, as the General Court rightly noted, in paragraph 189 of the judgment under appeal, the term 'injury' in the third sentence of Article 9(4) of the basic regulation must be understood in the same way, as a reference to the injury arising from dumping, that is to say to the injury caused only by the dumped imports.

171 The same finding is further supported by Article 9(5) of the basic regulation, from which it follows that anti-dumping duties must be set at an amount appropriate to each case and imposed, on a non-discriminatory basis, on imports of a product from all sources found to be dumped and causing injury.

172 The request for the substitution of grounds submitted by the Council and the Commission must therefore be rejected.

173 As regards the appellants' ground of appeal, it should be borne in mind, in the first place, that, as is clear from paragraphs 164 to 172 above, the General Court did not interpret Article 9(4) of the basic regulation as allowing the Council to set the anti-dumping duty at a level to counter injury caused by factors other than the dumped imports.

174 In addition, it should be noted that the General Court stated, in paragraph 206 of the judgment under appeal, that, in any event, the examination of the relevant passages of the provisional regulations and the regulations at issue does not reveal that factors other than dumped imports were taken into account in determining the injury. The General Court added that this is reinforced by the fact that the appellants have not invoked any manifest error of assessment as regards the analysis of those factors.

175 In the sphere of the European Union's commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (judgment of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraph 85 and the case-law cited).

176 In the present case, the appellants do not dispute in detail and specifically the General Court's assertion, in paragraph 206 of the judgment under appeal, that they did not invoke before it any manifest error of assessment by the institutions in so far as concerns the analysis, in the determination of injury, of factors other than the dumped imports.

177 In those circumstances, the appellants' allegation that the General Court allowed the Council and the Commission to impose a level of anti-dumping duty eliminating both the injury caused by the imports at issue and the injury caused by other factors cannot be accepted.

178 In the second place, as regards the allegation concerning the reversal of the burden of proof, it should be noted that the Council and the Commission are indeed obliged to consider whether the injury they intend to rely on for the adoption of the anti-dumping measure in fact derives from the dumped imports and to put aside any harm deriving from other factors. However, as the General Court rightly pointed out in paragraph 188 of the judgment under appeal, it must be borne in mind that it is for the parties pleading the illegality of an anti-dumping regulation to adduce evidence to show that the factors other than those relating to the imports could have had such an impact that they called into question the causal link between the injury suffered by the EU industry and the dumped imports (see, to that effect, judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraphs 41 and 42 and the case-law cited).

179 In that regard, in paragraph 205 of the judgment under appeal, the General Court observed that the appellants had not put forward before it any argument, let alone evidence, capable of showing that the factors to which they referred had an effect of such significance that the existence of injury caused to the EU industry, and that of the causal link between that injury and the dumped imports, were no longer reliable in terms of the obligation of the Council and the Commission to disregard any injury resulting from other factors. That statement has not been challenged before the Court.

180 Moreover, the General Court noted, in paragraph 202 of the judgment under appeal, that the appellants had not disputed before it, let alone proved to be incorrect, the Council's assertion that it was not possible to quantify the effects of other known factors. In their appeal, the appellants do not challenge the General Court's statement concerning their failure to challenge the Council's assertion in the action at first instance.

181 Thus, contrary to the appellants' submissions, the General Court did not err in law in relation to the application of the criteria on the taking of evidence.

182 It follows that the fourth ground of appeal must be rejected.

183 In the light of the foregoing, the appeal must be dismissed.

Costs

184 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

185 Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

186 Since Canadian Solar Emea, Canadian Solar Manufacturing (Changshu), Canadian Solar Manufacturing (Luoyang), Csi Cells Co. and Csi Solar Power have been unsuccessful in their main appeal, and the Council and the Commission have applied for costs to be awarded against them, those companies must be ordered to pay the costs relating to that appeal.

187 In accordance with Article 140(1) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 184(1) thereof, the Commission, which intervened in the proceedings relating to the main appeal, is to bear its own costs.

188 Since the Commission has been unsuccessful in its cross-appeal and Canadian Solar Emea, Canadian Solar Manufacturing (Changshu), Canadian Solar Manufacturing (Luoyang), Csi Cells Co. and Csi Solar Power have applied for costs to be awarded against the Commission, it must be ordered to pay the costs relating to the cross-appeal.

189 In accordance with Article 140(1) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 184(1) thereof, the Council, which intervened in the proceedings relating to the cross-appeal, is to bear its own costs.

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

1. **Dismisses the appeals;**

2. **Orders Canadian Solar Emea GmbH, Canadian Solar Manufacturing (Changshu) Inc., Canadian Solar Manufacturing (Luoyang) Inc., Csi Cells Co. Ltd and Csi Solar Power Group Co. Ltd to pay the costs relating to the main appeal;**

3. **Orders the European Commission to bear its own costs relating to the main appeal;**

4. **Orders the Commission to pay the costs relating to the cross-appeal;**

5. **Orders the Council of the European Union to bear its own costs relating to the cross-appeal.**

von Danwitz Jürimäe Lycourgos

Juhász Vajda

Delivered in open court in Luxembourg on 27 March 2019.

A. Calot Escobar
Registrar

K. Lenaerts
President