Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 10 September 2015[1]

Case C-232/14

Portmeirion Group UK Limited
v
Commissioners for Her Majesty's Revenue and Customs(Request for a preliminary ruling

from the First-Tier Tribunal (Tax Chamber) (United Kingdom))

(Dumping — Validity of Implementing Regulation (EU) No 412/2013 — Imports of ceramic tableware and kitchenware originating in the People's Republic of China)

I – **Introduction**

1. This request for a preliminary ruling concerns the validity of Council Implementing Regulation (EU) No 412/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China[2] ('the contested regulation').

2. The action for annulment of the contested regulation brought before the General Court[3] by one of the exporters concerned by that regulation was dismissed by that Court. The appeal brought before the Court of Justice by that exporter is still pending at the time of delivery of the present Opinion.[4]

II – **Legal framework**

A – *EU law*

3. Article 236(1) of Chapter 5, entitled 'Repayment and remission of duty', of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[5] ('the Customs Code'), provides as follows:

'Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed …'

1 — Original language: French.
2 — OJ 2013 L 131, p. 1.
3 — See the judgment in *Photo USA Electronic Graphic* v *Council* (T-394/13, EU:T:2014:964).
4 — See *Photo USA Electronic Graphic* v *Council* (C-31/15 P).
5 — OJ 1992 L 302, p. 1.

4. The contested regulation was adopted on the basis of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [6] ('the basic regulation'). Article 1 of that regulation, entitled 'Principles', provides:

'1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

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. For the purpose of this Regulation, "like product" means a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.'

5. According to recitals 24, 25, 51, 52, and 54 to 57 in the preamble to Commission Regulation (EU) No 1072/2012 of 14 November 2012 imposing a provisional anti-dumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China ('the provisional regulation'): [7]

'(24) The product [under consideration] [8] is ceramic tableware and kitchenware currently falling within CN codes 6911 10 00, ex 6912 00 10, ex 6912 00 30, ex 6912 00 50 and ex 6912 00 90 and originating in the People's Republic of China ("the product [under consideration]"). It can be of porcelain or china, of common pottery, stoneware, earthenware or fine pottery or other materials. The main raw materials include minerals such as kaolin, feldspar and quartz and the composition of raw materials used determines the type of the final ceramic product produced.

(25) Ceramic tableware and kitchenware items are commercialised in a large variety of forms that have been evolving over time. They are used in a wide range of places, e.g. households, hotels, restaurants or care establishments.

…

(51) An importer claimed that the product scope of the investigation was too wide to allow for a reasonable comparison amongst product types. An importer with producing interests in China expressed a similar view. In this respect, some parties also referred to purely decorative items.

(52) … [t]he relevant criteria applied in order to determine whether or not the product, subject of an investigation, can be considered a single product, i.e. its basic physical and technical characteristics, are set out in detail below. Purely decorative items are thus not covered. Furthermore, even though the various types of ceramic tableware and kitchenware may indeed

6 — OJ 2009 L 343, p. 51.

7 — OJ 2012 L 318, p. 28. See also the corrigendum to that regulation (OJ 2013 L 36, p. 11).

8 — The relevant EU acts use the [French] terms 'produit considéré' (product under consideration) and 'produit concerné' (product concerned) interchangeably. The English-language versions of those acts use only the term 'product concerned'. In the law of the World Trade Organisation (WTO), the term used is 'product under consideration'. For the sake of consistency and uniformity, I shall use only the term 'product under consideration' in the present Opinion.

have certain different specific characteristics, the investigation showed that, with the exception of ceramic knives, their basic characteristics remain identical. In addition, the fact that the product [under consideration] can be produced with some variations in the manufacturing process is not in itself a criterion which could result in a finding of two or more distinct products. Finally, the investigation also revealed that the various types of the product [under consideration] were generally sold via the same sales channels. While some specialised shops may focus on certain specific types, a big share of the distributors (retailers, department stores, supermarkets) sell various types of ceramic tableware and kitchenware, in order to offer a wide choice range to their customers. Claims that the product scope of the investigation was too wide are therefore provisionally rejected.

…

(54) The investigation has shown that all types of ceramic tableware and kitchenware, despite the differences in terms of properties and style, have the same basic physical and technical characteristics, i.e. ceramic ware primarily aimed at being in contact with food, they are basically used for the same purposes, and can be regarded as different types of the same product.

(55) In addition to the fact that they share the same basic physical and technical characteristics, all those various styles and types are in direct competition and to a very large extent interchangeable. This is clearly illustrated by the fact that there are no clear dividing lines between them, i.e. there is quite some overlapping and competition between different product types and standard buyers do not often make a distinction for instance between porcelain versus non-porcelain goods.

(56) However, as explained in recitals (29)-(34) above, it was also deemed appropriate to narrow down the product scope definition on the basis of which the current investigation has been initiated by excluding ceramic knives. Therefore, the product [under consideration] is provisionally defined as ceramic tableware and kitchenware, excluding ceramic knives, originating in the People's Republic of China, currently falling within CN codes ex 6911 10 00, ex 6912 00 10, ex 6912 00 30, ex 6912 00 50 and ex 6912 00 90.

(57) In conclusion, for the purposes of this proceeding and in accordance with consistent Union practice, it is therefore considered that all types of the product described above, with the exception of ceramic knives, should be regarded as forming one single product'.

6. Recitals 35 to 37 in the preamble to the contested regulation provide:

'(35) All types of ceramic tableware and kitchenware can be regarded as different types of the same product. Therefore, the claim made after provisional disclosure and again after final disclosure that the investigation covers a large range of like products and that, as a result, it would be necessary to conduct separate standing, dumping, injury, causation and Union interest analyses for each product segment, is found to be unfounded. One party that claimed that the product scope was too broad brought forward a comparison of products with different levels of decoration, but its statements as regards end-use (for the garden and children in one case, for decoration in the other case) are disputable because there is no clear-cut [demarcation] and those statements can rather be seen as a confirmation of the point made in recital (55) of the provisional Regulation. It should also be noted that an importer with production in the PRC submitted that over 99% of the ceramic tableware and kitchenware products sold in the Union were predominantly or exclusively white. Some parties contested recital (58) of the provisional Regulation on the basis that in the framework of the investigation the institutions did not carry out any test of whether certain merchandise was not suitable for free trade in the Union. However, this fact does not undermine the conclusion in recital (63) of the provisional Regulation.

(36) In view of the above, the product scope is definitively defined as ceramic tableware and kitchenware, excluding ceramic knives, ceramic condiment or spice mills and their ceramic grinding parts, ceramic peelers, ceramic knife sharpeners and cordierite ceramic pizza-stones of a kind used for baking pizza or bread, originating in the PRC, currently falling within CN codes ex 6911 10 00, ex 6912 00 10, ex 6912 00 30, ex 6912 00 50 and ex 69 12 00 90.

(37) In the absence of other comments regarding the product [under consideration] and the like product, all other determinations in recitals (24) to (63) of the provisional Regulation are hereby confirmed.'

B – *World Trade Organisation law*

7. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT)[9] ('the 1994 Anti-Dumping Agreement') is contained in Annex 1A to the Agreement establishing the World Trade Organisation (WTO), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).[10]

8. Article 2 of the 1994 Anti-Dumping Agreement, entitled 'Determination of dumping', provides as follows:

'2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

…

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.'

III – **The dispute in the main proceedings and the questions referred for a preliminary ruling**

9. The applicant, Portmeirion Group UK Limited ('Portmeirion'), is established in Stoke-on-Trent (United Kingdom). It is a producer of, and a market leader in, high-quality ceramic tableware which supplements its UK-produced products with imports, some 14% of which come from the People's Republic of China.

10. On 16 February 2012, the European Commission initiated an anti-dumping proceeding into the importation into the European Union of ceramic tableware and kitchenware originating in China.

11. On 14 November 2012, the Commission adopted the provisional regulation imposing provisional anti-dumping duties fixed at rates ranging from 17.6% to 58.8%.

9 — OJ 1994 L 336, p. 103.

10 — OJ 1994 L 336, p. 1.

12. On 18 December 2012, Portmeirion lodged initial observations contesting the product scope of the investigation and raising other factors which, in its view, prevented the imposition of anti-dumping duties. Following the Commission's submission of its disclosure document of 25 February 2013, a hearing between Portmeirion and the Commission took place on 5 March 2013. At that hearing, Portmeirion stated its views as to, inter alia, the scope of the 'product under consideration' in the investigation.

13. On 13 May 2013, upon the proposal of the Commission, the Council adopted the contested regulation imposing on the imports concerned a definitive anti-dumping duty ranging from 13.1% to 36.1% with effect from 16 May 2013.

14. On 2 August 2013, Portmeirion applied, in accordance with Article 236 of the Community Customs Code, to the Commissioners for Her Majesty's Revenue and Customs for repayment of the anti-dumping duties, claiming that those duties were not legally owed because the contested regulation was in breach of EU law.

15. On 16 December 2013, the Commissioners for Her Majesty's Revenue and Customs refused Portmeirion's application.

16. On 14 January 2014, Portmeirion appealed against that decision before the First-Tier Tribunal (Tax Chamber) in order to contest the validity of the contested regulation.

17. The referring tribunal, taking the view that Portmeirion had arguable grounds on which to challenge the validity of the contested regulation, has stayed the proceedings and referred the following questions to the Court:

'Is the contested regulation incompatible with EU law in so far as it:

(i) is based on manifest errors of assessment with respect to the definition of the product concerned, thereby invalidating the conclusions of the anti-dumping investigation; and

(ii) lacks adequate reasons as required under Article 296 TFEU?'

IV – **Procedure before the Court**

18. The request for a preliminary ruling in the present case was lodged at the Court on 12 May 2014. Written observations have been submitted by the Italian Government, the Council and the Commission.

19. On 15 July 2015, a hearing took place at which Portmeirion, the Council and the Commission presented oral argument.

V – **Analysis**

A – *Admissibility*

20. In the view of the Italian Government, the request for a preliminary ruling is inadmissible because Portmeirion was entitled to challenge the contested regulation before the General Court of the European Union in accordance with Article 263 TFEU.

21. In this regard, according to the case-law of the Court, 'the general principle which is intended to ensure that every person has, or will have had, the opportunity to challenge a[n EU] measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual with respect to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article [263 EC], a fact which prevents that individual from pleading the unlawfulness of that regulation before the national court. Such a conclusion applies to regulations instituting anti-dumping duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders'. [11]

22. According to the Court, '[r]egulations imposing an anti-dumping duty, although by their nature and scope of a legislative nature, may be of direct and individual concern to those producers and exporters of the product in question who are charged with practising dumping on the basis of information originally from their business activities'. [12]

23. Generally, that is the case with the following entities:

— those exporters and producers which are able to establish that they were identified in the measures adopted by the Commission and Council or were concerned by the preliminary investigations; [13]

— importers of the product under consideration whose resale prices were taken into account for the construction of export prices and which are consequently concerned by the findings relating to the existence of dumping; [14] and

— importers associated with exporters in third countries on whose products anti-dumping duties have been imposed, particularly where the export price has been calculated on the basis of those importers' resale prices on the EU market and where the anti-dumping duty itself is calculated on the basis of those resale prices. [15]

24. Furthermore, the recognition of the right of certain categories of traders to bring an action for the annulment of an anti-dumping regulation cannot prevent other traders from also being able to claim that they are individually concerned by such a regulation by reason of certain attributes which are peculiar to them and which differentiate them from all other persons. [16]

25. With regard to the case in the main proceedings, the Italian Government has not established that Portmeirion must be regarded as belonging to one of the categories of traders identified above.

26. After all, as the Commission confirmed at the hearing, Portmeirion is an importer of the product under consideration whose resale prices were not taken into account for the construction of the export prices or in the calculation of the anti-dumping duty. Nor is there any question as to its being associated with exporters. Moreover, it does not appear to exhibit attributes which are peculiar to it and which differentiate it from all other persons.

11 — Judgment in *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 18). See also, to this effect, the judgment in *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 37 and the case-law cited).

12 — Judgment in *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 19).

13 — See the judgments in *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:68, paragraphs 11 and 12); *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 21); *Valimar* (C-374/12, EU:C:2014:2231, paragraph 30); and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 19).

14 — See the judgments in *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115, paragraph 15); *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116, paragraph 18); *Valimar* (C-374/12, EU:C:2014:2231, paragraph 31); and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 20).

15 — See the judgments in *Neotype Techmashexport* v *Commission and Council* (C-305/86 and C-160/87, EU:C:1990:295, paragraphs 19 and 20); *Valimar* (C-374/12, EU:C:2014:2231, paragraph 32); and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 21).

16 — See the judgments in *Extramet Industrie* v *Council* (C-358/89, EU:C:1991:214, paragraph 16); *Valimar* (C-374/12, EU:C:2014:2231, paragraph 33); and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 22).

27. It follows from the foregoing that Portmeirion was entitled to raise the plea as to the illegality of the contested regulation before the referring tribunal, which was not therefore bound by the definitive nature of the anti-dumping duty imposed by that regulation and was entitled to ask the present questions.

28. The Court is consequently under an obligation to answer those questions.

B – *Merits*

1. The first question referred

29. By its first question, the referring tribunal asks whether the contested regulation is valid in so far as it is based on manifest errors of assessment with respect to the definition of the product under consideration, thereby invalidating the conclusions of the anti-dumping investigation.

a) Arguments of the parties

30. Portmeirion and the Commissioners for Her Majesty's Revenue and Customs have not submitted any written observations. However, in its request for a preliminary ruling, the referring tribunal sets out in a very clear and detailed fashion the arguments put forward by Portmeirion, while the Commissioners for Her Majesty's Revenue and Customs take the view that they are not competent to comment or decide upon the validity of a regulation which is binding on them.

31. Portmeirion submits that the contested regulation was adopted on the basis of a manifest error of assessment in the definition of the product under consideration which vitiated the conduct of the entire anti-dumping investigation leading to the adoption of the contested regulation. There are, it argues, no grounds under EU law to support the conclusion that the distinct products covered by the investigation could be regarded as a 'single product', which would have justified a single investigation.

32. According to Portmeirion, the investigation covered, and the contested regulation imposed, duties on ceramic products which are as diverse as a rolling pin, a plate, a teacup, a salt shaker, a casserole, a teapot or an oven dish and which, contrary to the assertions of the EU institutions, do not have the same basic physical and technical characteristics (such as, for example, size, weight, shape, heat resistance, etc.).

33. In this regard, Portmeirion relies on three findings.

34. First, the only common element between the products subject to the anti-dumping duties is that they are (partially) produced from ceramics. That by itself cannot, in its view, be sufficient to consider that all the products covered by the investigation are different types of the same product. Otherwise, a window frame and a car would be a single product just because they are (mostly) manufactured from aluminium.

35. Second, the contention that all the products are primarily aimed at being in contact with food and aimed at retaining foodstuffs is, in its view, manifestly wrong, because products that are not primarily aimed at being in contact with food (such as beer mugs) and that are not aimed at retaining foodstuffs (such as rolling pins) are also covered by the investigation.

36. Third, the same is true of the assertion that the products subject to the anti-dumping duties 'are in direct competition and to a very large extent interchangeable'. After all, it asks, how can one serve tea from a rolling pin, serve a meal in a salt shaker, or use a coffee pot to serve spaghetti, for example?

37. Portmeirion also calls into question the consistency of the Council's assessment, in so far as:

— some ceramic products were excluded from the scope of the investigation and of the contested regulation on the basis of their different shape, strength and design;

— a rolling pin and a plate are treated as the same product just because they are made from ceramics, whereas two identical and directly interchangeable plates are treated as different products just because they are made from different materials (for example, glass or ceramics);

— the investigation covered products that do not share physical, technical or chemical characteristics, and do not have a common purpose, however defined (for example, teapots and rolling pins).

38. The Italian Government, the Council and the Commission take the view that the definition of the 'product under consideration' is not vitiated by a manifest error of assessment.

39. First of all, they state that the institutions enjoy a wide discretion when defining the product under consideration in anti-dumping investigations. In this regard, the institutions may take account of a number of factors, such as the physical, technical and chemical characteristics of the products, their use, their interchangeability, the consumer's perception of them, distribution channels, the manufacturing process, costs of production, quality, and so on.

40. It follows from this that different products may fall within the definition of the 'product under consideration' and form the subject of the same investigation provided that they share the same essential characteristics. In this instance, the products all share the same basic physical and technical characteristics inasmuch as they are ceramic ware and are designed to be in contact with or to retain food.

41. Portmeirion, the Council and the Commission also disagree on the conclusions that might be drawn from the WTO Panel reports on the interpretation of the concept of 'product under consideration'.

b) Assessment

i) Preliminary observations

42. The first question concerns the interpretation of the concept of 'product under consideration', that is to say, the product regarded 'as being dumped'[17] and forming the subject of an investigation by the EU institutions.

43. In this regard, it should be noted at the outset that, unlike the General Court, the Court of Justice has never been called upon to rule on the interpretation of that concept.

44. Given that that concept derives from WTO law, namely Article 2 of the 1994 Anti-Dumping Agreement, which was transposed into EU law by Article 1 of the basic regulation, it is appropriate to take account of the case-law of the WTO Dispute Settlement Body, of which the WTO Panel is the authority of first instance, particularly since the referring tribunal and the parties cite the reports of that Panel.

17 — See Article 1(2) of the basic regulation.

ii) Case-law of the General Court

45. The General Court has held that '[t]he basic anti-dumping regulation does not specify exactly how the product or range of products which may be subject to an anti-dumping investigation is to be defined or require an intricate classification of the product'. [18]

46. According to its settled case-law, 'the purpose of the definition of the product [under consideration] in an anti-dumping investigation is to aid in drawing up the list of products which will, if necessary, be subject to the imposition of anti-dumping duties. For the purposes of that process, the institutions may take account of a number of factors, such as the physical, technical and chemical characteristics of the products, their use, interchangeability, consumer perception, distribution channels, manufacturing process, costs of production and quality'. [19]

47. According to the General Court, '[i]t necessarily follows that products which are not identical may be grouped together under the same definition of "the product [under consideration]" and, together, be subject to an anti-dumping investigation. On that basis, the applicants' argument alleging that "the product [under consideration]" can only refer to a single product or to identical products must therefore be rejected'. [20]

48. It is also settled case-law that, although, 'in the sphere of measures to protect trade, the [EU] institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine', [21] it is none the less incumbent on the General Court to ascertain 'whether the applicants are in a position to show either that the institutions made an error of assessment with regard to the factors which they decided were relevant, or that the application of other, more relevant factors would have required the exclusion of a product from the definition of "the product [under consideration]"'. [22]

49. None the less, so far as specifically concerns the concept of 'product under consideration', the General Court has never accepted [23] arguments aimed at establishing that the 'product under consideration' forming the subject of an investigation must cover only 'like products' within the meaning of Article 1(4) of the basic regulation, namely 'product[s] which [are] identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such product[s], other product[s] which, although not alike in all respects, ha[ve] characteristics closely resembling those of the product under consideration'.

50. It should also be noted that, in paragraphs 36 to 51 of its judgment in *Photo USA Electronic Graphic* v *Council* (T-394/13, EU:T:2014:964), the General Court rejected the arguments put forward by one of the exporters covered by the contested regulation to the effect that '[f]irst, the institutions made a manifest error in their assessment of the factors to be taken into account in deciding that those products should be covered by [the definition of the product under consideration]: the appearance, the end-use and the existence within the European Union of producers of plain polyester coated ceramic mugs. Secondly, if other factors had been taken into account — in these

18 — Judgment in *Shanghai Bicycle* v *Council* (T-170/94, EU:T:1997:134, paragraph 61). See also, to this effect, the judgment in *Photo USA Electronic Graphic* v *Council* (T-394/13, EU:T:2014:964, paragraph 28).

19 — Judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532, paragraph 59). See also, to this effect, the judgments in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 131); *Whirlpool Europe* v *Council* (T-314/06, EU:T:2010:390, paragraph 138); *EWRIA and Others* v *Commission* (T-369/08, EU:T:2010:549, paragraph 82); and *Photo USA Electronic Graphic* v *Council* (T-394/13, EU:T:2014:964, paragraph 29).

20 — Judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532, paragraph 60). See also, to this effect, the judgment in *Photo USA Electronic Graphic* v *Council* (T-394/13, EU:T:2014:964, paragraph 30).

21 — Judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532, paragraph 62).

22 — *Ibidem* (paragraph 61). See also, to this effect, the judgments in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 132); and *EWRIA and Others* v *Commission* (T-369/08, EU:T:2010:549, paragraph 83).

23 — See the judgment in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 133). See also, to this effect, the judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532, paragraphs 66 and 67).

circumstances, physical, technical and chemical characteristics, distribution channels, consumer perception and interchangeability — it would have been clear that such mugs should be excluded from the products concerned' (see also paragraph 27). However, its rejection of those arguments is being challenged on appeal by the exporter at issue in the pending case of *Photo USA Electronic Graphic* v *Council* (C-31/15 P).

iii) Case-law of the WTO Dispute Settlement Body

51. According to the case-law of the Court of Justice, 'having regard to their nature and structure, the WTO Agreement and the agreements and understandings annexed to it are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the [EU] institutions, pursuant to the first paragraph of Article [263 TFEU]'. [24]

52. However, as the Court of Justice held in paragraph 40 of its judgment in *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494), '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, … it is for the Courts of the European Union, 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'.

53. According to the Court, '[t]he 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 where the EU act at issue refers explicitly to specific provisions of those agreements'. [25]

54. In the present case, the exchange of argument and evidence between Portmeirion and the institutions centres on the concept of 'product under consideration' that serves to determine the 'dumped product' as referred to in Article 1(1) of the basic regulation.

55. The basic regulation transposes the terms of the 1994 Anti-Dumping Agreement into EU law. As recital 3 in the preamble to that regulation states, '[that agreement] contains detailed rules, relating in particular to the calculation of dumping, procedures for initiating and pursuing an investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the public disclosure of information relating to anti-dumping investigations. In order to ensure a proper and transparent application of those rules, the language of the agreement should be brought into [EU] legislation as far as possible'.

56. According to recital 4 in the preamble to the same regulation, '[i]n applying the rules it is essential, in order to maintain the balance of rights and obligations which the GATT establishes, that the [European Union] take account of how they are interpreted by the [European Union's] major trading partners'.

24 — Judgment in *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 53). See also, to this effect, the judgments in *Portugal* v *Council* (C-149/96, EU:C:1999:574, paragraph 47); *Van Parys* (C-377/02, EU:C:2005:121, paragraph 39); *LVP* (C-306/13, EU:C:2014:2465, paragraph 44); and *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 38), as well as the order in *OGT Fruchthandelsgesellschaft* (C-307/99, EU:C:2001:228, paragraph 24).

25 — Judgment in *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 41). See also, to this effect, the judgments in *Fediol* v *Commission* (70/87, EU:C:1989:254, paragraph 19); *Nakajima* v *Council* (C-69/89, EU:C:1991:186, paragraph 31); *Portugal* v *Council* (C-149/96, EU:C:1999:574, paragraph 49); and *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 54).

57. As the Court has already held in connection with a previous version of the basic regulation, namely Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, [26] as amended by Council Regulation (EC) No 2331/96 of 2 December 1996, [27] '[i]t is therefore established that the [European Union] adopted the basic regulation in order to satisfy its obligations arising from the 1994 Anti-dumping [Agreement]' [28] and that, by means of Article 1 of that regulation, it intended to implement the particular obligations laid down by Article 2 of that agreement.

58. To that extent, as is clear from the case-law cited in point 52 of the present Opinion, it is for the Court to review the legality of the contested regulation in the light of Article 2 of the aforementioned agreement.

59. In this regard, it should be noted that, unlike the Court of Justice, the WTO Panel has often had occasion to consider arguments similar to those put forward by Portemeirion in the present case, which seek to show that the product under consideration must consist of 'like products', on the basis of Articles 2.1 and 2.6 of the 1994 Anti-Dumping Agreement. [29]

60. Indeed, Canada, the Kingdom of Norway and the People's Republic of China have argued before the Panel that the 'product under consideration' covered by the anti-dumping investigation could not consist of a broad range of products not constituting one and the same homogeneous product but had to consist of products similar to each other. [30]

61. The WTO Panel has never endorsed that argument. It has based its analysis on the finding that the 1994 Anti-Dumping Agreement did not contain any definition of the 'product under consideration' [31] and that the wording of Articles 2.1 and 2.6 of that agreement did not enable it to read into those articles a condition to the effect that the 'product under consideration' must consist of 'like products'. [32]

26 — OJ 1996 L 56, p. 1.

27 — OJ 1996 L 317, p. 1.

28 — Judgment in *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 56).

29 — See disputes DS264 'United States — Final Dumping Determination on Softwood Lumber from Canada', DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway', and DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China'. The WTO Panel reports in these disputes are available on the WTO website at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

30 — See the WTO Panel report of 13 April 2004 in dispute DS264 'United States — Final Dumping Determination on Softwood Lumber from Canada' (paragraph 7.155). This report was only partially reversed by the WTO Appellate Body and, in any event, not on this point (see paragraphs 99 and 183 of the Appellate Body Report of 11 August 2004, available on the WTO website at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds264_e.htm). See also, to this effect, the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway', paragraph 7.44, and the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraphs 7.246 and 7.247). This report was only partially reversed by the WTO Appellate Body and, in any event, not on this point (see paragraph 624 of the Appellate Body Report of 11 July 2011, available on the WTO website at https://www.wto.org/english/tratop_e/dispu_e/ cases_e/ds397_e.htm).

31 — See the WTO Panel report of 13 April 2004 in dispute DS264 'United States — Final Dumping Determination on Softwood Lumber from Canada' (paragraph 7.156); the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.43); and the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.271).

32 — See the WTO Panel report of 13 April 2004 in dispute DS264 'United States — Final Dumping Determination on Softwood Lumber from Canada' (paragraph 7.157); the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.48); the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.271).

62. After all, according to the WTO Panel, '[w]hile there might be room for discussion as to whether such an approach [namely that advocated by Canada, the Kingdom of Norway and the People's Republic of China] might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the *AD Agreement* itself'. [33]

63. On the basis of that finding, the WTO Panel considers that, 'while Article 2.1 establishes that a dumping determination is to be made for a single product under consideration, there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article'. [34]

64. In the view of that Panel, 'even assuming Article 2.6 requires an assessment of likeness with respect to the product under consideration "as a whole" in determining like product, … this would not mean that an assessment of "likeness" between categories of goods comprising the product under consideration is required to delineate the scope of the product under consideration. Merely to say that the product under consideration must be treated "as a whole" in addressing the question of like product does not entail the conclusion that the product under consideration must itself be an internally homogenous product'. [35]

65. Moreover, the WTO Panel rejected the argument put forward by the Kingdom of Norway to the effect that 'the absence of limits on the scope of the product under consideration might result in erroneous dumping determinations by investigating authorities'. [36]

66. In that context, the Kingdom of Norway argued that, 'if products that are not 'like' are treated as the product under consideration in a single investigation, a dumping determination cannot reveal whether some or all of those products are dumped. Norway g[ave], as an example, an investigation in which cars and bicycles are treated as one product under investigation'. [37]

67. Unpersuaded by that argument, the WTO Panel held that '[a]ny grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the [1994] AD Agreement. Thus, it seem[ed] to [it] that the possibility of an erroneous determination of dumping based on an overly broad product under consideration is remote. That possibility [was] certainly not enough to persuade [it] to read obligations into the [1994] AD Agreement for which [it] can find no basis in the text of the Agreement'. [38]

33 — See the WTO Panel report of 13 April 2004 in dispute DS264 'United States — Final Dumping Determination on Softwood Lumber from Canada' (paragraph 7.157).

34 — See the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.49).

35 — *Ibidem* (paragraph 7.53).

36 — *Ibidem* (paragraph 7.58).

37 — Idem.

38 — *Ibidem* (paragraph 7.58). See also, to this effect, the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.271).

iv) Application to the present case

68. In my view, the juxtaposition of the General Court's case-law and WTO law concerning the concept of 'product under consideration' shows there to be a significant difference between the two, inasmuch as, unlike the General Court, the WTO Panel has no power of review over the definition of the 'product under consideration' used by the authority responsible for the anti-dumping investigation. That difference exists only in principle, however, since the power of review which the General Court reserves for itself has not yet prompted it, in a specific case, to call into question a definition by the EU institutions of the 'product under consideration'.

69. After all, as I indicated in point 48 of this Opinion, while it recognises that the Commission enjoys a wide discretion, the General Court considers itself bound to ascertain 'whether the applicants are in a position to show either that the institutions made an error of assessment with regard to the factors which they decided were relevant, or that the application of other, more relevant factors would have required the exclusion of a product from the definition of 'the product [under consideration]'.[39]

70. The WTO Panel, on the other hand, has never agreed to exercise such a power of review. Unlike the General Court, the WTO Panel considers that the authorities responsible for the anti-dumping investigation have full discretion when it comes to defining the 'product under consideration', even in the case of hypothetical examples, described as 'extreme',[40] where those authorities group together cars and bicycles[41] or apples and tomatoes[42] within the definition of the 'product under consideration'.

71. The WTO Panel considers that the possibility of an erroneous determination of dumping arising as a result of there being no limits on the scope of the 'product under consideration' is 'remote',[43] because a 'mix' of completely heterogeneous products in the definition of the 'product under consideration' would make the work of the investigating authority excessively difficult. The authority therefore takes great care to avoid such a mix.

72. After all, '[a]ny grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the [1994] AD Agreement'.[44] For example, 'this would clearly be of concern with respect to the determination of injury to the domestic industry producing the like product'.[45]

39 — Judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532, paragraph 61). See also, to this effect, the judgments in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67, paragraph 132), and *EWRIA and Others* v *Commission* (T-369/08, EU:T:2010:549, paragraph 83).

40 — See the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.58).

41 — Idem.

42 — See the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.269).

43 — See the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.58), and the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.270).

44 — See the WTO Panel report of 16 November 2007 in dispute DS337 'European Communities — Anti-Dumping Measure on Farmed Salmon from Norway' (paragraph 7.58). See also to this effect the WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.270).

45 — WTO Panel report of 3 December 2010 in dispute DS397 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' (paragraph 7.270).

73. As I see it, where, as in this instance, the European Union has adopted provisions such as Article 1 of the basic regulation in order to discharge a particular obligation assumed within the framework of the WTO, such as Article 2 of the 1994 Anti-Dumping Agreement, the Court must, when reviewing the legality of the EU measure, give to those provisions the meaning that they have in WTO law. The same is true where, as in this instance, the EU measure, namely Article 1 of the basic regulation, uses the same terms as the agreements and memoranda contained in the annexes to the WTO Agreement, such as the 1994 Anti-Dumping Agreement.

74. Indeed, it would make no sense to impose on the institutions a burden greater than that imposed on the competent authorities under the WTO Agreement, in particular where the wording of the provision at issue, in this instance Article 1 of the basic regulation, contains no indication that the EU legislature intended to depart from the wording of that agreement.

75. As the Council stated at the hearing, there are no constraints when it comes to defining the 'product under consideration' in WTO law or, therefore, in EU law.

76. Consequently, it is for the investigating authority to define the 'product under consideration', the EU courts having no jurisdiction to review whether the institutions made an erroneous assessment of the factors which they deemed relevant when including certain products in the 'product under consideration' or whether the application of other, more relevant factors would have required the exclusion of certain products from the definition of the 'product under consideration'.

77. Given that, as regards the definition of the 'product under consideration' set out in recital 36 in the preamble to the contested regulation, [46] Portmeirion simply puts forward arguments of the same type as those that were advanced by Canada, the Kingdom of Norway and the People's Republic of China in the course of the disputes mentioned above and rejected by the Panel, those arguments should be dismissed in their entirety.

78. I therefore propose that the Court's answer to the first question should be that the definition of the 'product under consideration' used in recital 36 in the preamble to the contested regulation does not adversely affect the validity of that regulation.

2. The second question

79. By its second question, the referring tribunal seeks to ascertain whether the contested regulation is invalid because it does not contain an adequate statement of reasons as required by Article 296 TFEU.

a) Arguments of the parties

80. It is clear from the order for reference that, according to Portmeirion, the institutions did not identify or define sufficiently precisely the factors which they considered relevant to the definition of the 'product under consideration'. This, it claims, constitutes an infringement of Article 296 TFEU.

81. Portmeirion further submits that the information given in the contested regulation is neither clear nor unambiguous in so far as it does not provide a means of systematically ascertaining whether a given product should or could have been included in the light of the criteria which the institutions considered relevant.

46 — '… the product scope is definitively defined as ceramic tableware and kitchenware, excluding ceramic knives, ceramic condiment or spice mills and their ceramic grinding parts, ceramic peelers, ceramic knife sharpeners and cordierite ceramic pizza-stones of a kind used for baking pizza or bread, originating in the PRC, currently falling within CN codes ex 6911 10 00, ex 6912 00 10, ex 6912 00 30, ex 6912 00 50 and ex 6912 00 90.'

82. That approach, in so far as it does not enable the interested parties to challenge the institutions' assessment of the factors which they deem relevant or to argue that other relevant factors could have been taken into account, constitutes, in its view, a failure to fulfil the obligation to state reasons laid down in Article 296 TFEU.

83. The Council and the Commission take the contrary view that the contested regulation satisfies the requirements of Article 296 TFEU by enabling the persons concerned to ascertain the grounds for the measure adopted and defend their rights and enabling the Courts to exercise their powers of review. After all, the underlying reasons for the definition of the product under consideration were provided both in the provisional regulation and in the contested regulation. In particular, recitals 24, 25, 54 and 55 in the preamble to the provisional regulation and recital 35 in the preamble to the contested regulation clearly illustrate the relevant factors.

84. According to the Italian Government, there is no doubt that the contested regulation states the reasons on which it is based. The institutions make it clear in that regulation that the various items must be grouped into a single product defined as 'ceramic tableware and kitchenware' because of the technical affinity that exists between those items, because they are requested by consumers and distributed by retailers as a whole and because they are all primarily aimed at being in contact with food.

85. The Commissioners for Her Majesty's Revenue and Customs consider, as in relation to the first question, that they cannot comment or decide upon the validity of a particular EU regulation as they are not competent to do so and are obliged to apply the contested regulation since it is binding on them.

b) Assessment

86. In my view, Portmeirion's arguments alleging infringement of the obligation to state reasons contained in Article 296 TFEU can easily be dismissed inasmuch as those arguments again seek to call into question the definition of the 'product under consideration'.

87. Although, according to the case-law of the WTO Dispute Settlement Body analysed in points 51 to 67 of this Opinion, Article 2.1 and Article 2.6 of the 1994 Anti-Dumping Agreement do not impose any particular constraints with respect to the definition of the 'product under consideration' inasmuch as the investigating authority is not required to include only similar or homogeneous products in that definition, the institutions are under no obligation to state particular reasons for the factors which they considered relevant to the definition of the 'product under consideration'. The fact that they have defined the product under consideration in such a way as to make it possible to identify the articles that make up that product and that they have stated the reason why those articles were grouped together should be sufficient to satisfy the conditions laid down in Article 296 TFEU.

88. In any event, according to settled case-law, '[t]he statement of reasons required by Article [296 TFEU] must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent … Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article [296 TFEU] must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the

matter in question'. [47]

89. In the present case, the contested regulation, read in the light of the provisional regulation, does indeed appear to contain a sufficient statement of reasons, in the light of the criteria recalled in the previous point.

90. After all, as the Commission states in recital 54 in the preamble to the provisional regulation, 'all types of ceramic tableware and kitchenware, despite the differences in terms of properties and style, have the same basic physical and technical characteristics, *i.e. ceramic ware primarily aimed at being in contact with food, they are basically used for the same purposes, and can be regarded as different types of the same product*'. [48]

91. In recital 55 in the preamble to that regulation, the Commission goes on to say that, '[i]n addition to the fact that they share the same basic physical and technical characteristics, all those various styles and types are in direct competition and to a very large extent interchangeable. This is clearly illustrated by the fact that there are no clear dividing lines between them, i.e. there is quite some overlapping and competition between different product types and standard buyers do not often make a distinction for instance between porcelain versus non-porcelain goods'.

92. The substance of that statement of reasons is reiterated in recital 35 in the preamble to the contested regulation, according to which '[a]ll types of ceramic tableware and kitchenware can be regarded as different types of the same product. Therefore, the claim made after provisional disclosure and again after final disclosure that the investigation covers a large range of like products and that, as a result, it would be necessary to conduct separate standing, dumping, injury, causation and Union interest analyses for each product segment, is found to be unfounded. One party that claimed that the product scope was too broad brought forward a comparison of products with different levels of decoration, but its statements as regards end-use (for the garden and children in one case, for decoration in the other case) are disputable because there is no clear-cut [demarcation] and *those statements can rather be seen as a confirmation of the point made in recital (55) of the provisional Regulation*'. [49]

93. I consequently propose that the Court's answer to the second question should be that the statement of reasons contained in the contested regulation satisfies the conditions laid down in Article 296 TFEU.

VI – **Conclusion**

94. I therefore propose that the Court's answer to the First-Tier Tribunal (Tax Chamber) should be that the examination of the questions which it has raised has disclosed no factor such as to affect adversely the validity of Council Implementing Regulation (EU) No 412/2013 of 13 May 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China.

47 — Judgment in *Nuova Agricast* (C-390/06, EU:C:2008:224, paragraph 79). See also, to this effect, the judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 63); *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2006:130, paragraph 73); *Sison* v *Council* (C-266/05 P, EU:C:2007:75, paragraph 80); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 44).

48 — Emphasis added.

49 — Emphasis added.