Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 February 2016*

(References for a preliminary ruling — Admissibility — Dumping — Imports of footwear with uppers of leather originating in China and Vietnam — Validity of Regulation (EC) No 1472/2006 and Implementing Regulation (EU) No 1294/2009 — WTO Anti-Dumping Agreement — Regulation (EC) No 384/96 — Article 2(7) — Determination of dumping — Imports from non-market economy countries — Claims for market economy treatment — Time limit — Article 9(5) and (6) — Claims for individual treatment — Article 17 — Sampling — Article 3(1), (5) and (6), Article 4(1) and Article 5(4) — Cooperation of the Union industry — Article 3(2) and (7) — Determination of injury — Other known factors — Community Customs Code — Article 236(1) and (2) — Repayment of duties not legally owed — Time limit — Unforeseeable circumstances or force majeure — Invalidity of a regulation which imposed anti-dumping duties)

In Joined Cases C-659/13 and C-34/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber) (United Kingdom) and the Finanzgericht München (Finance Court, Munich, Germany), made by decisions of 9 December 2013 and 24 October 2013, received at the Court on 13 December 2013 and 24 January 2014 respectively, in the proceedings

C & J Clark International Ltd

v

The Commissioners for Her Majesty's Revenue & Customs (C-659/13),

and

Puma SE

v

Hauptzollamt Nürnberg (C-34/14),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský (Rapporteur), M. Safjan, A. Prechal and K. Jürimäe, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

* Languages of the case: German and English.

having regard to the written procedure and further to the hearing on 8 July 2015,

after considering the observations submitted on behalf of:

— C & J Clark International Ltd, by A. Willems, S. De Knop, S. Mourabit and J. Charles, advocaten,

— Puma SE, by K. von Brocke, Rechtsanwalt, and E. Vermulst, J. Sud and S. Van Cutsem, advocaten,

— the Council of the European Union, by S. Boelaert and B. Driessen, acting as Agents, B. O'Connor, Solicitor, and S. Gubel, avocat,

— the European Commission, by L. Armati, L. Grønfeldt and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2015,

gives the following

Judgment

1 These requests for a preliminary ruling concern the validity and interpretation of Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1; 'the definitive regulation') and of Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96 (OJ 2009 L 352, p. 1; 'the prolonging regulation' and, together with the definitive regulation, 'the regulations in dispute') and the interpretation of Article 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code').

2 The requests have been made in two sets of proceedings, brought by C & J Clark International Ltd ('Clarks') against the Commissioners for Her Majesty's Revenue & Customs ('the Commissioners') and by Puma SE ('Puma') against Hauptzollamt Nürnberg (Principal Customs Office, Nuremberg), relating to the antidumping duty paid by Clarks and Puma, pursuant to the regulations in dispute, when importing footwear with uppers of leather into the European Union.

Legal context

International law

3 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 (OJ 1994 L 336, p. 1), the Council of the European Union approved the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April 1994, and the agreements in Annexes 1 to 3 to that agreement (collectively 'the WTO agreements'), one of which is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994, L 336, p. 103; 'the WTO Anti-Dumping Agreement').

4 Article 6.10 of the WTO Anti-Dumping Agreement provides:

'The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.'

5 Article 9.2 of the WTO Anti-Dumping Agreement states:

'When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.'

EU law

The Customs Code

6 Article 236 of the Customs Code provides:

'1. 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 ...

…

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or *force majeure*.

...'

Regulation No 384/96

7 At the time of the events giving rise to the main proceedings, the adoption of anti-dumping measures by the European Union was governed by Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12) ('Regulation No 384/96').

8 Article 1 of Regulation No 384/96, headed ‘Principles’, provided in paragraphs 1 and 2:

‘1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the [European Union] causes injury.

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

9 Article 2 of Regulation No 384/96, headed ‘Determination of dumping’, laid down in paragraphs 1 to 6 general rules relating to determination of the normal value of a product. In particular, Article 2(1) provided that the normal value was ‘normally [to] be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country’.

10 Article 2(7) of Regulation No 384/96 stated:

‘(a) 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 [European Union], or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the [European Union] for the like product, duly adjusted if necessary to include a reasonable profit margin.

...

(b) In anti-dumping investigations concerning imports from the People’s Republic of China, … Vietnam … and any non-market economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

...

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

11 Article 3 of Regulation No 384/96, headed ‘Determination of injury’, provided in paragraphs 1, 2 and 5 to 7:

‘1. Pursuant to this Regulation, the term “injury” shall, unless otherwise specified, be taken to mean material injury to the [Union] industry, threat of material injury to the [Union] industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the [Union] market for like products; and (b) the consequent impact of those imports on the [Union] industry.

...

5. The examination of the impact of the dumped imports on the [Union] industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry ...

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 [Union] 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 [Union] 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 [Union] producers, developments in technology and the export performance and productivity of the [Union] industry.'

12 Article 4 of Regulation No 384/96, headed 'Definition of [Union] industry', stated in paragraph 1:

'For the purposes of this Regulation, the term "[Union] industry" shall be interpreted as referring to the [Union] producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total [Union] production of those products ...

...'

13 Article 5 of Regulation No 384/96, headed 'Initiation of proceedings', provided in paragraphs 1 and 4:

'1. … an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the [Union] industry.

...

4. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by [Union] producers of the like product, that the complaint has been made by or on behalf of the [Union] industry. The complaint shall be considered to have been made by or on behalf of the [Union] industry if it is supported by those [Union] producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the [Union] industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when [Union] producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the [Union] industry.'

14 Article 9 of Regulation No 384/96, headed ‘Termination without measures; imposition of definitive duties’, stated in paragraphs 5 and 6:

‘5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

6. 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 for the parties in the sample. … Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.’

15 Article 11 of Regulation No 384/96, headed ‘Duration, reviews and refunds’, provided in paragraph 8:

‘... an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

In requesting a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

...’

16 Article 17 of Regulation No 384/96, headed ‘Sampling’, stated in paragraphs 1 to 3:

‘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.

2. The final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided such parties make themselves known and make sufficient information available, within three weeks of initiation of the investigation, to enable a representative sample to be chosen.

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.’

Regulation (EC) No 1972/2002

17 Regulation No 384/96 was amended a number of times after its adoption. In particular, Article 9(5) was amended by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, p. 1). That amendment consisted essentially in adding a second subparagraph to the first subparagraph of Article 9(5). Recital 7 of Regulation No 1972/2002 states the following reasons for that insertion:

‘Regulation (EC) No 384/96 does not indicate the criteria according to which an exporter for which a normal value is established pursuant to Article 2(7)(a) may be assigned an individual rate of duty calculated by comparing this normal value with the exporter’s individual export prices. It is appropriate in the interests of transparency and legal certainty to lay down clear criteria for the granting of such individual treatment. Export prices of exporters falling under Article 2(7)(a) of Regulation (EC) No 384/96 may therefore be taken into account where the export activities of the company are freely determined, where ownership and control of the company are sufficiently independent and where State interference is not such as to permit circumvention of individual anti-dumping measures. Such individual treatment may be granted to exporters for which it can be demonstrated, on the basis of substantiated claims, that, in the case of wholly or partly foreign owned firms or joint ventures, they are free to repatriate capital and profits; that export prices and quantities and conditions and terms of sale are freely determined and that exchange rate conversions are carried out at the market rate. It should also be demonstrated that the majority of shares belong to private persons and that State officials appearing on the Board of Directors or holding key management positions are either in a minority or that the company is sufficiently independent from State interference.’

Regulation (EC) No 1225/2009

18 After the events giving rise to the main proceedings, Regulation No 384/96 was repealed and replaced by 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), which entered into force on the 20th day following its publication in the *Official Journal of the European Union*, which took place on 22 December 2009.

19 The wording of Article 9(5) of Regulation No 1225/2009 corresponded, in its initial version, to that of Article 9(5) of Regulation No 384/96 as amended by Regulation No 1972/2002.

20 However, that provision was amended subsequently by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 amending Regulation No 1225/2009 (OJ 2012 L 237, p. 1). In accordance with Article 2 thereof, Regulation No 765/2012 entered into force on the third day following that of its publication in the *Official Journal of the European Union*, which took place on 3 September 2012, and applies only to investigations initiated pursuant to Regulation No 1225/2009 after Regulation No 765/2012 entered into force. The preamble to Regulation No 765/2012 states the following reasons for the amendment to Regulation No 1225/2009 made by it:

'(1) On 28 July 2011, the Dispute Settlement Body ("DSB") of the [WTO] adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report ("the Reports") in the dispute "European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China" ...

(2) In the Reports, it was found, inter alia, that Article 9(5) of [Regulation No 1225/2009] was inconsistent with Articles 6.10, 9.2 and 18.4 of the WTO Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement. Article 9(5) of [Regulation No 1225/2009] provides that individual exporting producers in non-market economy countries which do not receive market economy treatment pursuant to point (c) of Article 2(7) of [Regulation No 1225/2009] will be subject to a countrywide duty rate unless such exporters can demonstrate that they meet the conditions for individual treatment ("IT") set out in Article 9(5) of [Regulation No 1225/2009].

(3) The Appellate Body found that Article 9(5) of [Regulation No 1225/2009] establishes a presumption that exporting producers operating in non-market economy countries are not entitled to IT and that in order to qualify for IT, the onus is on them to demonstrate that they satisfy the criteria of the IT test. According to the Appellate Body, no legal basis for such a presumption is provided for in the relevant WTO agreements.

(4) However, the Appellate Body clarified that, when determining a single dumping margin and a single anti-dumping duty for a number of exporters, the consistency of that determination with Articles 6.10 and 9.2 of the WTO Anti-Dumping Agreement will depend on the existence of situations indicating that two or more exporters, albeit legally distinct, are in such a relationship that they should be treated as a single entity. ... In this regard, the terms in the proposed amendments to Article 9(5) of [Regulation No 1225/2009] reflecting these situations should be read in the light of the Appellate Body's clarifications without prejudice to terms using the same or a similar wording in other provisions of [Regulation No 1225/2009].

(5) On 18 August 2011, the Union notified the DSB that it intends to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations.

(6) For that purpose, it is necessary to amend the provisions of Article 9(5) of [Regulation No 1225/2009].'

Regulation (EC) No 1515/2001

21 Article 1 of Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ 2001 L 201, p. 10) provides in particular, in paragraph 1, that, whenever the DSB adopts a report concerning a measure of the European Union taken pursuant

to its anti-dumping legislation, the Council may, as the case may be, repeal or amend the disputed measure or adopt any other special measures which are deemed to be appropriate in the circumstances.

22 Article 3 of Regulation No 1515/2001 provides that 'any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

The regulations in dispute

23 On 7 July 2005 the Commission announced, by a notice published in the *Official Journal of the European Union* (OJ 2005 C 166, p. 14), the initiation of an anti-dumping proceeding concerning imports into the European Union of certain footwear with uppers of leather originating in China and Vietnam ('the products at issue').

24 On 23 March 2006 the Commission adopted Regulation (EC) No 553/2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 98, p. 3; 'the provisional regulation'). As provided in Article 3, that regulation entered into force on 7 April 2006, for a period of six months.

25 Recitals 119 and 120 of the provisional regulation state:

'(119) Interested parties also claimed that the cost structure between Brazil and the countries concerned is different since some costs (Research & Development (R&D), design, etc.) supported by the customers of the Chinese and Vietnamese exporters are incurred by the Brazilian producers and therefore included in their cost of production.

(120) It was indeed found that, in some cases, exporters in the countries concerned sold the product concerned to former [Union] manufacturers in the [European Union] which still support the abovementioned components of the cost of production and sell the product under their own brand name. However, this is not a reason to reject Brazil as a suitable analogue country as adjustments can be made for such costs when establishing normal value.'

26 On 5 October 2006 the Council adopted the definitive regulation, which imposed a definitive anti-dumping duty on those imports.

27 Recitals 132 to 135 of the definitive regulation state:

'(132) Some interested parties claimed that no research and development ("R&D") adjustment should have been applied on the normal value, because similar amounts of R&D were incurred by the Chinese and Vietnamese producers.

(133) However, it was found that R&D costs incurred by the sampled producers from the countries concerned related only to production R&D, whereas the Brazilian R&D covered design and samples of new footwear models, i.e. such type of R&D is different and therefore it is considered necessary to keep this adjustment.

(134) One other party also claimed that an adjustment should be made to take into account that the profit made with sales to original equipment manufacturers ("OEM") generates less profit than other sales.

(135) However, this allegation was not supported by the findings of the investigation in the Brazilian companies where such difference did not exist. Moreover, any difference between sales to OEM and own brand sales, is already taken into account in the adjustment made to allow for the R&D cost difference. The claim was therefore rejected.'

28 Article 1(3) of the definitive regulation set the rate of the definitive anti-dumping duty at 16.5% for the products at issue manufactured by all companies established in China with the exception of Golden Step, at 9.7% for those manufactured by Golden Step and at 10% for those manufactured by all companies established in Vietnam.

29 In addition, Article 3 of the definitive regulation provided that the latter would enter into force on the day following its publication in the *Official Journal of the European Union*, which took place on 6 October 2006, and that it would be in force for a period of two years.

30 On 5 September 2007 the Commission adopted Regulation (EC) No 1028/2007 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Regulation No 1472/2006 on imports of certain footwear with uppers of leather originating in the People's Republic of China by imports of certain footwear with uppers of leather consigned from Macao SAR, whether declared as originating in Macao SAR or not, and making such imports subject to registration (OJ 2007 L 234, p. 3).

31 On 29 April 2008 the Council adopted Regulation (EC) No 388/2008 extending the definitive anti-dumping measures imposed by Regulation No 1472/2006 on imports of certain footwear with uppers of leather originating in the People's Republic of China to imports of the same product consigned from the Macao SAR, whether declared as originating in the Macao SAR or not (OJ 2008 L 117, p. 1).

32 By a notice published in the *Official Journal of the European Union* on 3 October 2008 (OJ 2008 C 251, p. 21), the Commission announced the initiation of an expiry review of the anti-dumping measures applicable to imports of certain footwear with uppers of leather originating in China and Vietnam.

33 On 22 December 2009 the Council adopted the prolonging regulation, which imposed, following that review, a definitive anti-dumping duty on imports of the products at issue, as extended to imports consigned from the Macao SAR of the People's Republic of China whether declared as originating in that special administrative region or not.

34 Article 1(3) and (4) of the prolonging regulation set the rate of that duty at 16.5% for the products at issue manufactured by all companies established in China, with the exception of Golden Step, and for those consigned from Macao, at 9.7% for the products at issue manufactured by Golden Step and at 10% for those manufactured by all companies established in Vietnam.

35 In addition, Article 2 of the prolonging regulation provided that the latter would enter into force on the day following that of its publication in the *Official Journal of the European Union*, which took place on 30 December 2009, and that it would be in force for a period of 15 months.

Subsequent proceedings

36 By two judgments of 4 March 2010, in *Brosmann Footwear (HK) and Others* v *Council* (T-401/06, EU:T:2010:67) and *Zhejiang Aokang Shoes and Wenzhou Taima Shoes* v *Council* (T-407/06 and T-408/06, EU:T:2010:68), the General Court of the European Union dismissed three actions for annulment of the definitive regulation, brought by certain companies established in China which produce and export the products at issue.

37 By two judgments, of 2 February 2012 in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and 15 November 2012 in *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), the Court of Justice, before which appeals against those two judgments of the General Court had been brought, set aside the latter and annulled the definitive regulation in so far as it concerned the appellants in the cases giving rise to the judgments.

38 In the judgments, the Court held, first of all, that the definitive regulation was vitiated by an infringement of the obligation imposed upon the Commission to examine the claims of producers for market economy treatment and to adjudicate upon each of those claims within a period of three months from the initiation of its investigation, in accordance with Article 2(7)(b) and (c) of Regulation No 384/96, including where the Commission has decided to use sampling as provided for in Article 17 of that regulation to calculate the dumping margins and the producers which have submitted those claims are not included in the sample selected (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraphs 36 to 40, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraphs 29 to 34).

39 Next, the Court found that it could not be ruled out that such an examination might have led to the imposition on the appellants in the cases giving rise to those judgments of a definitive anti-dumping duty different from the 16.5% duty applicable to them pursuant to Article 1(3) of the definitive regulation. That provision imposed a definitive anti-dumping duty of 9.7% on the only Chinese producer which was in the sample selected by the Commission and obtained market economy treatment, namely Golden Step. Had the Commission found that market economy conditions prevailed also for the appellants, which were not included in the sample, but which had claimed market economy treatment, they ought also to have benefited from that rate when the calculation of an individual dumping margin was not possible (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 42, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraph 36).

40 Finally, the Court held that it was not appropriate to limit the temporal effects of the interpretation of Regulation No 384/96 that is referred to in paragraph 38 of the present judgment (judgment in *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraphs 39 to 41).

Case C-659/13

41 By a protective claim submitted to the Commissioners under Article 236 of the Customs Code on 30 June 2010, Clarks requested repayment of the anti-dumping duty that it had paid on account of importation of the products at issue into the European Union over a period from 1 July 2007 until April 2010. It stated by way of justification for the claim that the definitive regulation was invalid, while inviting the Commissioners to defer a decision on that issue until delivery of the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710).

42 By a claim submitted to the Commissioners under Article 236 of the Customs Code on 2 March 2012, Clarks reiterated its previous claim while extending the period in respect of which it sought repayment of the anti-dumping duty that it had paid to 31 August 2010. The sum concerned amounts to GBP 42592829.52 (approximately EUR 60 million).

43 By decision of 13 March 2013, the Commissioners rejected Clarks' claims. It based that decision on two grounds, to the effect that (i) by the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), the Court had only annulled the definitive regulation so far as concerns the appellants in the cases giving rise to those judgments and (ii) none of the products imported by Clarks into the European Union were from those appellants.

44 On 11 April 2013 Clarks brought an appeal against that decision before the First-tier Tribunal (Tax Chamber).

45 The First-tier Tribunal (Tax Chamber) has doubts as to the validity of the definitive regulation, in the light in particular of the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710). It is also uncertain as to the interpretation to be placed on Article 236 of the Customs Code.

46 In those circumstances, the First-tier Tribunal (Tax Chamber) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is [the definitive regulation] invalid in so far as it violates Articles 2(7)(b) and 9(5) of [Regulation No 384/96] given that the Commission did not examine the market economy treatment and individual treatment claims submitted by exporting producers in China and Vietnam that were not sampled in accordance with Article 17 of [Regulation No 384/96]?

2. Is [the definitive regulation] invalid in so far as it violates Article 2(7)(c) of [Regulation No 384/96] given that the Commission did not make a determination within three months of the initiation of the investigation of the market economy treatment claims submitted by exporting producers in China and Vietnam that were not sampled pursuant to Article 17 of [Regulation No 384/96]?

3. Is [the definitive regulation] invalid in so far as it violates Article 2(7)(c) of [Regulation No 384/96] given that the Commission did not make a determination within three months of the initiation of the investigation of the market economy treatment claims submitted by exporting producers in China and Vietnam that were sampled pursuant to Article 17 of [Regulation No 384/96]?

4. Is [the definitive regulation] invalid in so far as it violates Articles 3, 4(1), 5(4), and 17 of [Regulation No 384/96] given that insufficient [Union] industry producers cooperated so as to allow the Commission to make a valid injury assessment and, as a result, a valid causation assessment?

5. Is [the definitive regulation] invalid in so far as it violates Article 3(2) of [Regulation No 384/96] and Article [296 TFEU] given that evidence in the investigation file showed that the [Union] industry injury was assessed using materially flawed data, and given that the [definitive regulation] does not provide any explanation why this evidence was ignored?

6. Is [the definitive regulation] invalid in so far as it violates Article 3(7) of [Regulation No 384/96] given that the effects of other factors known to be causing injury were not properly separated and distinguished from the effects of the allegedly dumped imports?

7. To what extent may Member State courts rely on the interpretation of [the definitive regulation] made by the Court of Justice in the [judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710] to consider that duties were not legally owed within the meaning of Article 236 of the [Customs Code] for companies that, just as the [a]ppellants in the [cases giving rise to the judgments in *Brosmann Footwear (HK) and Others* v *Council* and *Zhejiang Aokang Shoes* v *Council*], were not sampled but did submit market economy treatment and individual treatment requests that were not examined?’

Case C-34/14

47 By three applications submitted on 21 December 2011 and 20 January 2012 to the Principal Customs Office, Nuremberg, under Article 236 of the Customs Code, Puma requested repayment of the anti-dumping duty that it had paid on account of importation of the products at issue into the European Union over a period from 7 April 2006 until 1 April 2011, on the ground that the regulations in dispute were invalid. The sum concerned amounted then to EUR 5100983.90.

48 By decision of 5 July 2012, the Principal Customs Office, Nuremberg, rejected the applications submitted by Puma. It based that decision on two grounds, to the effect that (i) by the judgment in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53), the Court had only annulled the definitive regulation so far as it related to the appellants in the case giving rise to that judgment and (ii) none of the products imported by Puma into the European Union were from those appellants.

49 By a notice of objection lodged with the Principal Customs Office, Nuremberg, on 18 July 2012, Puma again sought repayment of the anti-dumping duty that it had paid. However, it amended the sum concerned, which now amounts to EUR 5059386.70.

50 After that objection was rejected by decision of 13 November 2012, Puma brought an action before the Finanzgericht München (Finance Court, Munich).

51 That court has doubts as to the validity of the regulations in dispute, in the light in particular of the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710). In this context, it is also uncertain whether the regulations in dispute and certain of the provisions of Regulation No 384/96, which those regulations applied, are consistent with the WTO Anti-Dumping Agreement. It is unsure, finally, as to the interpretation to be placed on Article 236 of the Customs Code.

52 In those circumstances, the Finanzgericht München (Finance Court, Munich) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Are [the definitive regulation] and [the prolonging regulation] valid as a whole in so far as they were not annulled by the judgments [in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710)]?

2. In the event that the answer to question 1 is in the negative, but the abovementioned regulations are not invalid as a whole:

(a) In relation to which exporters and producers in [China] and in Vietnam from which the applicant purchased goods in the period from 2006 to 2011 are [the definitive regulation] and [the prolonging regulation] invalid?

(b) Does a declaration that the abovementioned regulations are invalid in whole or in part constitute unforeseeable circumstances or *force majeure* within the meaning of the second subparagraph of Article 236(2) of the Customs Code?’

Consideration of the questions referred

Admissibility

53 The Council and the Commission submit that Clarks and Puma are not entitled to plead before the referring courts that the regulations in dispute are invalid and that consequently the questions referred by them relating to the validity of those regulations must be declared inadmissible.

54 In the first place, the Commission contends that legal persons such as Clarks and Puma are individually concerned by the regulations in dispute and that they were therefore able to request the EU judicature directly to annul them.

55 In that regard, it should be noted first of all that the main proceedings have arisen from applications for the refund of anti-dumping duties paid pursuant to the regulations in dispute, which were submitted by Clarks and Puma under Article 236 of the Customs Code to the competent national customs authorities and then rejected by the latter. Following those decisions rejecting their applications, Clarks and Puma both exercised the right of appeal granted to them by Article 243 of the Customs Code, under the conditions laid down by domestic law.

56 It is settled case-law that the general principle which guarantees any litigant the right to plead, in an action brought against a national measure which adversely affects him, that the EU act forming the basis for that measure is invalid does not preclude such a right from being subject to the condition that the person concerned did not have the right to request the EU judicature directly to annul it, under Article 263 TFEU. However, it is only if it can be held that a person would undoubtedly have been entitled to request the annulment of the act in question that he is prevented from pleading its invalidity before the national court having jurisdiction (see, to this effect, judgments in *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraph 23; *Valimar*, C-374/12, EU:C:2014:2231, paragraphs 28 and 29; and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 18).

57 It is therefore only if it could be held that the regulations in dispute are undoubtedly of direct and individual concern to legal persons such as Clarks and Puma, within the meaning of the fourth paragraph of Article 263 TFEU, that they would be prevented from pleading before the referring courts that those regulations are invalid.

58 Next, it should be noted that regulations such as the regulations in dispute are of a legislative character inasmuch as they apply generally to the traders concerned (see, to this effect, judgments in *Allied Corporation and Others* v *Commission*, 239/82 and 275/82, EU:C:1984:68, paragraphs 11 and 12, and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 18).

59 Finally, it should be pointed out that in its case-law the Court has identified certain categories of traders that may be individually concerned by a regulation imposing an anti-dumping duty, without prejudice to the possibility that other traders are individually concerned by reason of certain attributes which are peculiar to them and which differentiate them from all other persons (see, to this effect, judgments in *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 16, and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 22).

60 First, those of the producers and exporters of the product in question which have been charged with practising dumping on the basis of information relating to their business activities may be individually concerned (judgment in *Valimar*, C-374/12, EU:C:2014:2231, paragraph 30 and the case-law cited).

61 Secondly, that may also be so in the case of importers of that product 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 (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; and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 20).

62 Thirdly, that may further be so in the case of importers associated with exporters of the product in question, particularly where the export price has been calculated on the basis of those importers' resale prices on the Union market and where the anti-dumping duty itself has been calculated on the basis of those resale prices (judgments in *Neotype Techmashexport* v *Commission and Council*, C-305/86 and C-160/87, EU:C:1990:295, paragraphs 19 and 20, and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 21).

63 In this instance, it is common ground that Clarks and Puma are not identified in the regulations in dispute as being producers or exporters of the product in question, within the meaning of the case-law cited in paragraph 60 of the present judgment. Furthermore, the Commission stated in its observations that it does not contend that Puma is an associated importer within the meaning of the case-law cited in paragraph 62 of the present judgment. On the other hand, it is apparent from its written and oral observations that it submits that Clarks and Puma are characterised by a specific economic model, that of 'original equipment manufacturer' (OEM), that is to say, that of an undertaking supplying under its own brand name products manufactured by other undertakings, a circumstance of which account was taken in the regulations in dispute.

64 It is true that, in particular circumstances, the Court has already held, in the light of the case-law cited in paragraph 61 of the present judgment, that a trader which opted for the abovementioned economic model had to be regarded as individually concerned by a regulation which imposed anti-dumping duties (see, to this effect, judgments in *Nashua Corporation and Others* v *Commission and Council*, C-133/87 and C-150/87, EU:C:1990:115, paragraphs 3 and 17 to 20, and *Gestetner Holdings* v *Council and Commission*, C-156/87, EU:C:1990:116, paragraphs 3 and 20 to 23).

65 In this instance, however, it is clear that recitals 119 and 120 of the provisional regulation and recitals 132 to 135 of the definitive regulation, on which the Commission supports its argument, do not enable it to be held either that Clarks and Puma are in a situation similar to that which gave rise to the judgments cited in the preceding paragraph of the present judgment or, consequently, that they could undoubtedly request the EU judicature directly to annul the regulations in dispute.

66 Whilst, in the judgments in *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115) and *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116), the individual situation of some of the suppliers of the applicants on which an anti-dumping duty was imposed had been directly taken into account by the Council, the recitals of the provisional regulation and the definitive regulation referred to in the preceding paragraph of the present judgment do not mention any trader in particular and refer, in part, to findings relating to Brazilian companies.

67 In the second place, the Council and the Commission submit that Clarks and Puma must not be granted the right to plead in actions such as those brought before the referring courts that the regulations in dispute are invalid since they had the right, under Article 11(8) of Regulation No 384/96, to request reimbursement of the anti-dumping duties that they paid, but did not exercise it within the period of six months laid down for that purpose.

68 However, it must be stated, first of all, that neither the wording of Article 11(8) of Regulation No 384/96 nor that of Article 236 of the Customs Code, the provision upon which Clarks and Puma relied in submitting the applications for repayment giving rise to the main proceedings, provides the slightest textual basis for the view that importers which have not relied on the procedure provided for

in Article 11(8) of Regulation No 384/96 within the period laid down for that purpose would not or would no longer be entitled to seek to benefit from the procedure established in Article 236 of the Customs Code.

69 Next, as the Advocate General has observed in points 53 and 54 of his Opinion, the procedure established in Article 11(8) of Regulation No 384/96 does not pursue the same objective as the procedure provided for in Article 236 of the Customs Code. The procedure governed by Article 11(8) of Regulation No 384/96 is intended to enable importers which have paid anti-dumping duties to request the Commission, through the competent national authorities, that the duties be refunded where it is shown that the dumping margin on the basis of which they were paid has been eliminated, or reduced to a level which is below the level of the duty in force. In that procedure, importers do not challenge the legality of the anti-dumping duties imposed, but claim that there has been a change in the situation having a direct impact on the dumping margin originally determined. By contrast, the procedure provided for in Article 236 of the Customs Code enables those importers to request the refund of the import or export duties that they have paid where it is established that when those duties were paid they were not legally owed.

70 Finally, the scheme of those two procedures is fundamentally different. In particular, the procedure established in Article 11(8) of Regulation No 384/96 falls within the competence of the Commission and can be applied only within a period of six months from the date on which the definitive amount of the duties to be levied was duly determined by the competent authorities, whereas the procedure provided for in Article 236 of the Customs Code falls within the remit of the national customs authorities and recourse may be had to it within a period of three years from the date on which the amount of those duties was communicated to the debtor.

71 In the third place, the Council and the Commission assert that Clarks and Puma must not be accorded the possibility of invoking, in the context of a plea of invalidity such as that challenging the regulations in dispute, breach of the provisions of Regulation No 384/96 relating to claims for market economy treatment or individual treatment. That would amount to permitting importers to rely on individual rights established by that regulation for the benefit solely of the producers and exporters to which an anti-dumping investigation relates.

72 That line of argument is irrelevant in the present context. The situation in which Clarks and Puma are placed is not that of a person seeking from the EU judicature the annulment of a regulation which has imposed an anti-dumping duty, but that of a person pleading, before a national court, that such a regulation is invalid in an action brought against a national measure adopted on the basis of that act, an act which that person would not have been manifestly entitled to challenge before the EU judicature.

73 As the Advocate General has noted in point 59 of his Opinion, importers such as Clarks and Puma, who have paid an anti-dumping duty, have a clear interest and capacity of their own to submit, in actions such as those in the main proceedings, that the regulations imposing that duty are invalid on the ground that the duty was imposed without the Commission having first adjudicated, in accordance with the rules laid down by Regulation No 384/96, upon the claims for market economy treatment or individual treatment submitted by the producers or exporters of the products concerned. Failure to take account of those claims is liable to have an adverse effect on the anti-dumping duty that will be imposed, at the end of the procedure, on the products of the traders concerned (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 42, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraph 36).

74 In the light of all the foregoing considerations, it is to be concluded that Clarks and Puma must be regarded as being entitled to plead before the referring courts that the regulations in dispute are invalid, so that the questions referred for a preliminary ruling in this regard are admissible.

The questions relating to the validity of the definitive regulation

75 By questions 1 to 6 in Case C-659/13 and questions 1 and 2(a) in Case C-34/14, which it is appropriate to examine together, each of the two referring courts asks whether the definitive regulation infringes, for various reasons, Article 296 TFEU and Article 2(7)(b), Article 2(7)(c), Article 3(1), (2) and (5) to (7), Article 4(1), Article 5(4), Article 9(5), Article 9(6) and Article 17 of Regulation No 384/96, considered in isolation in the case of some of those articles or provisions and jointly in the case of others.

Preliminary observations

76 By way of preliminary observations, it should be stated, first of all, that some of the grounds prompting the referring court in Case C-659/13 to ask whether the definitive regulation is invalid relate to the Commission's investigation which led to the adoption of that regulation (questions 1 to 4). The other grounds relate to that regulation itself (questions 5 and 6). The regulation at issue is an act of the Council. Furthermore, that regulation confirmed, for the most part, both the methodological and procedural choices made by the Commission in the course of that investigation and the findings and conclusions reached on its basis by the Commission in the provisional regulation.

77 That being so, the referring court in Case C-659/13 must be considered to be concerned, in that body of questions, not only with the Commission's action, as is expressly clear from the questions, but also with the Council's action. The questions referred in Case C-34/14 should, moreover, be understood in the same way. Whilst the wording of those questions does not set out precisely the various grounds of invalidity about which the referring court is uncertain, its order for reference shows that, likewise, some of those grounds relate to the investigation conducted by the Commission and the others to the conclusions which were drawn therefrom by the Council in the definitive regulation.

78 Next, in Case C-34/14, the referring court also raises in questions 1 and 2(a) the issue of the prolonging regulation's validity. However, it is apparent from its order for reference that it does not put forward in this connection any possible ground of invalidity other than those that lead it to have doubts as to the validity of the definitive regulation.

79 That being so, it is only in so far as examination of the questions relating to the definitive regulation leads to the conclusion that that regulation is wholly or partially invalid that the prolonging regulation will be capable, as the case may be, of being regarded as invalid to the same extent.

80 Finally, in Case C-34/14, the referring court, in the context of its questions relating to the validity of the definitive regulation, relies on, first, the WTO Anti-Dumping Agreement and, secondly, certain rulings and recommendations of the DSB, which could, in its view, affect the validity of that regulation.

81 That being so, it should be determined, as a preliminary point, whether that agreement and those rulings and recommendations of the DSB are capable of being relied upon in this case and, therefore, whether the validity of the definitive regulation must be examined while having regard to them.

82 In the first place, it is clear from Article 216(2) TFEU that international agreements concluded by the European Union are binding upon the EU institutions and, consequently, prevail over the measures which they lay down (judgment in *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 42 and the case-law cited).

83 In this instance, since the European Union is a party to the WTO Anti-Dumping Agreement, that agreement does bind the EU institutions.

84 In the second place, it is apparent from settled case-law that the provisions of an international agreement to which the European Union is a party can be relied upon in support of an action for annulment of a measure of secondary EU legislation, of a plea that such a measure is invalid or of an action for compensation only if, first, the nature and the broad logic of the agreement in question do not preclude this and, secondly, the provisions relied upon appear, as regards their content, to be unconditional and sufficiently precise (see, to this effect, judgments in *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 43 and 45, and *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 110 and 120).

85 The Court has repeatedly held that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed (see, to this effect, judgments in *Portugal* v *Council*, C-149/96, EU:C:1999:574, paragraph 47, and *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 38).

86 The Court has pointed out that to accept that the EU judicature has the direct responsibility for ensuring that EU law complies with the WTO agreements would effectively deprive the European Union's legislative or executive bodies of the discretion which the equivalent bodies of the European Union's trading partners enjoy. It is not in dispute that some of the contracting parties, including the European Union's most important trading partners, have concluded from the subject matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if accepted, would risk introducing an imbalance in the application of the WTO agreements (judgments in *Portugal* v *Council*, C-149/96, EU:C:1999:574, paragraphs 43 to 46, and *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 39).

87 Nonetheless, in two situations the Court has accepted, by way of exception, that it is for the EU judicature, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements. The first such situation is where the European Union intended to implement a particular obligation assumed in the context of those agreements and the second is where the EU measure at issue refers explicitly to specific provisions of those agreements (see, to this effect, judgment in *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraphs 40 and 41 and the case-law cited).

88 It must therefore be determined how matters stand in this instance.

89 It should be stated first of all that neither the second subparagraph of Article 9(5) of Regulation No 384/96, to which the uncertainty of the referring court in Case C-34/14 relates, nor indeed any other article of that regulation refers to any specific provision of the WTO agreements.

90 Next, whilst it is true that recital 5 of Regulation No 384/96 states that the language of the WTO Anti-Dumping Agreement should be brought into EU legislation 'as far as possible', that expression must be understood as meaning that, even if the EU legislature intended to take into account the rules of that agreement when adopting Regulation No 384/96, it did not, however, show the intention of transposing each of those rules in that regulation (judgment in *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 52).

91 In particular, the Court has already observed that Article 2(7) of Regulation No 384/96 is the expression of the EU legislature's intention to adopt an approach specific to the EU legal order, by laying down a special regime of detailed rules relating to the calculation of normal value for imports from non-market economy countries (see, to this effect, judgment in *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraphs 47 to 50 and 53). The second subparagraph of Article 9(5) of Regulation No 384/96 refers to Article 2(7) of that regulation and constitutes an integral part of the regime which it lays down.

92 Therefore, it is to be concluded that the WTO Anti-Dumping Agreement cannot be relied upon to contest the legality of the definitive regulation.

93 In the third place, it should be determined whether that conclusion might be called into question by the two DSB reports relied upon by the referring court. The first of those reports relates to the case 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R)', as mentioned in paragraph 20 of the present judgment. The second of those reports, which takes up in certain regards the substance of the first report, relates to the case 'European Union — Anti-Dumping Measures on Certain Footwear from China (WT/DS405/R)' and rules, inter alia, on the compatibility of the regulations in dispute with the WTO agreements.

94 It is clear from the case-law that, having regard to the nature and the broad logic of the dispute settlement system established by the WTO agreements and the considerable importance which that system accords to negotiation between the contracting parties, the EU judicature cannot, in any event, review the legality or validity of EU measures in the light of the WTO rules as long as the reasonable period granted to the European Union for complying with rulings and recommendations of the DSB finding non-compliance with those rules has not expired, as otherwise grant of that period would be ineffective (see, to this effect, judgments in *Biret International* v *Council*, C-93/02 P, EU:C:2003:517, paragraph 62, and *X and X BV*, C-319/10 and C-320/10, EU:C:2011:720, paragraph 41).

95 Furthermore, the mere fact that that period has expired does not mean that the European Union has exhausted the possibilities under that dispute settlement system of finding a solution to the dispute between it and other parties. Accordingly, to require the EU judicature, merely because the period has expired, to review the legality or validity of the EU measures concerned in the light of the WTO rules and of the rulings and recommendations of the DSB finding non-compliance with them could have the effect of undermining the European Union's position in its attempt to reach a solution which is both consistent with the WTO rules and mutually acceptable to the parties to the dispute (see, to this effect, judgments in *Van Parys*, C-377/02, EU:C:2005:121, paragraphs 51 and 54; *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 117 and 125 to 130; and *X and X BV*, C-319/10 and C-320/10, EU:C:2011:720, paragraphs 36 and 37).

96 Therefore, even after that period has expired, a person cannot rely on such rulings and recommendations of the DSB in order to secure a review of the legality or validity of the EU institutions' action, at any rate outside situations where, following those rulings and recommendations, the European Union has intended to assume a particular obligation (see, to this effect, judgments in *Van Parys*, C-377/02, EU:C:2005:121, paragraphs 40 and 41; *Ikea Wholesale*, C-351/04, EU:C:2007:547, paragraphs 30 to 35; and *X and X BV*, C-319/10 and C-320/10, EU:C:2011:720, paragraph 37).

97 In this instance, first, by the report relating to the case 'European Union — Anti-Dumping Measures on Certain Footwear from China (WT/DS405/R)', the DSB admittedly decided that some of the provisions of Article 9(5) of Regulation No 384/96 were incompatible with certain of the WTO rules both 'as such' and 'as applied' in the regulations in dispute. However, it merely recommended that Regulation No 1225/2009, which had in the meantime repealed and replaced that regulation, be brought by the European Union into conformity with those rules. Thus, it made no specific recommendation relating to the regulations in dispute.

98 Secondly, there is nothing which enables the view to be taken that the EU legislature intended to assume a particular obligation as regards the regulations in dispute following that report or the DSB report relating to the case 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R)' by which it had already been concluded, on the same ground, that Article 9(5) of Regulation No 384/96 was incompatible with the WTO rules and it had been recommended that that provision be brought into conformity.

99 While expressing, in recitals 5 and 6 of Regulation No 765/2012, its 'inten[tion] to implement' those rulings and recommendations of the DSB 'in a manner that respects its WTO obligations', the EU legislature decided that the amendment of Regulation No 1225/2009 made for that purpose would apply only to investigations initiated pursuant to that regulation after Regulation No 765/2012 entered into force, as is clear from Article 2 of Regulation No 765/2012. Thus, the legislature did not lay down that such an amendment applies to an investigation initiated on the basis of Regulation No 384/96 before Regulation No 765/2012 entered into force, such as the investigation giving rise to the adoption of the regulations in dispute.

100 It follows from all of the foregoing that neither the WTO Anti-Dumping Agreement nor the two reports referred to in paragraph 93 of the present judgment can be relied upon in the present cases and that, consequently, the validity of the definitive regulation cannot be examined by taking them into account.

The validity of the definitive regulation in the light of Article 2(7)(b) of Regulation No 384/96

101 By question 1 in Case C-659/13 and, in essence, by questions 1 and 2(a) in Case C-34/14, the referring courts ask whether the definitive regulation is invalid in so far as it infringes, according to them, Article 2(7)(b) of Regulation No 384/96 given that the Council and the Commission did not adjudicate upon the claims for market economy treatment submitted by the Chinese and Vietnamese exporting producers not sampled pursuant to Article 17 of that regulation.

102 Here, three findings can be made upon examination of the definitive regulation. First, certain Chinese and Vietnamese exporting producers covered by the investigation at the end of which the definitive regulation was adopted claimed market economy treatment, on the basis of Article 2(7)(b) of Regulation No 384/96. Secondly, the Commission decided to have recourse to the possibility of sampling in the investigation, on the basis of Article 17 of that regulation, in the light of the large number of traders at issue. Thirdly, the Commission, whose position was confirmed in this regard by the Council, decided, given the recourse to sampling and the large number of claims for market economy treatment that had been submitted to it, to adjudicate upon the claims of the Chinese and Vietnamese exporting producers included in its sample and not upon those of the exporting producers not sampled.

103 It is in the light of those findings and having regard to the relevant case-law that it must be determined whether the procedure which led to the adoption of the regulations in dispute is compatible with Article 2(7)(b) of Regulation No 384/96.

104 It should be noted first of all that Article 17(1) of Regulation No 384/96 provides that, where the number of traders concerned by an anti-dumping investigation is large, the investigation may be limited to a reasonable number of parties, by using statistically valid samples. By virtue of Article 17(2), the final selection of the parties included in such samples is a matter for the Commission. Under Article 17(3), an individual dumping margin must, nevertheless, be calculated for any exporter or producer not included in the sample which so requests, except where the number of them is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.

105 Next, Article 2(1) of Regulation No 384/96 lays down a basic rule that the determination of a product's normal value, which constitutes one of the essential steps for proving the existence of any dumping, must normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting countries (see, to this effect, judgment in *GLS*, C-338/10, EU:C:2012:158, paragraph 19).

106 However, in the case of imports from non-market economy countries, Article 2(7)(a) of Regulation No 384/96 provides that, in derogation from the basic rule referred to in the preceding paragraph of the present judgment, normal value is, as a rule, to be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces (judgments in *GLS*, C-338/10, EU:C:2012:158, paragraph 20, and *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 66).

107 In addition, in the case of imports from, in particular, China, Vietnam and any non-market economy country which is a member of the WTO at the date of the initiation of an anti-dumping investigation, Article 2(7)(b) of Regulation No 384/96 provides that normal value will be determined in accordance with Article 2(1) to (6) of that regulation if it is shown, on the basis of properly substantiated claims by one or more producers established in those countries and subject to the investigation, that market economy conditions prevail for this producer or these producers.

108 As is apparent from the various regulations from which Article 2(7)(b) of Regulation No 384/96 stems, that arrangement is intended to enable producers subject to market economy conditions who have emerged in the countries concerned to obtain treatment corresponding to their individual situation, rather than to the overall situation of the country in which they are established (see, to this effect, judgments in *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraphs 67 to 69, and *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 49).

109 In this context, the Court has held that, where claims under Article 2(7)(b) and (c) of Regulation No 384/96 are addressed to the Council and the Commission, it is incumbent upon them to assess whether the evidence supplied by the producers concerned is sufficient to show that the requisite criteria are fulfilled (see, to this effect, judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraphs 70 and 107).

110 Furthermore, the Council and the Commission are obliged to adjudicate upon a claim for market economy treatment made by any producer established in a non-market economy country which is a member of the WTO at the date of the initiation of an anti-dumping investigation, including where they have recourse to sampling as provided for in Article 17 of Regulation No 384/96 (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraphs 32 and 36 to 38, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraphs 24, 29, 30 and 32).

111 Finally, the Court has held that the consequence of infringing that obligation is that the regulation by which the Council imposed anti-dumping duties, at the end of the investigation, is unlawful in so far as it imposes definitive anti-dumping duties, and definitively collects provisional anti-dumping duties, on the products from the producers concerned (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 43, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraph 37).

112 It follows that the fact that the Council and the Commission did not adjudicate upon the claims for market economy treatment submitted by the Chinese and Vietnamese exporting producers not sampled pursuant to Article 17 of Regulation No 384/96 constitutes an infringement of Article 2(7)(b) of that regulation. Accordingly, the definitive regulation must be declared invalid to that extent.

The validity of the definitive regulation in the light of Article 9(5) of Regulation No 384/96

113 By question 1 in Case C-659/13, the referring court also asks whether the definitive regulation is invalid in so far as it infringes Article 9(5) of Regulation No 384/96 given that the Council and the Commission did not adjudicate upon the claims for individual treatment submitted by the Chinese and Vietnamese exporting producers not sampled pursuant to Article 17 of that regulation.

114 It can be found upon examination of the definitive regulation that, whilst certain Chinese and Vietnamese exporting producers covered by the investigation at the end of which the definitive regulation was adopted claimed individual treatment on the basis of Article 9(5) of Regulation No 384/96, the Commission, whose position was confirmed in this regard by the Council, decided, in the same way and on the same grounds as in the case of the claims for market economy treatment, to adjudicate only upon the claims for individual treatment of the exporting producers sampled pursuant to Article 17 of that regulation.

115 Accordingly, it must be examined whether, in so doing, the Council and the Commission infringed Article 9(5) of Regulation No 384/96.

116 A number of findings can be made upon examination of that provision.

117 First of all, it is apparent from its very wording that anti-dumping duties imposed by the Council or the Commission must be set at an amount appropriate in each case and they must be imposed, on a non-discriminatory basis, on every supplier of the imports being dumped and causing injury, whatever their source.

118 Next, it is apparent from that provision that, when the Council and the Commission adopt a regulation imposing anti-dumping duties, they are, in principle, obliged to specify in the regulation the amount of the anti-dumping duty imposed on each supplier covered by it, save where that individual treatment is impracticable.

119 However, the first subparagraph of Article 9(5) of Regulation No 384/96 derogates from that principle in the situation, referred to in Article 2(7)(a) of the regulation, where the Council or the Commission adopts a regulation imposing anti-dumping duties on imports from a particular source, namely non-market economy countries. In that situation, the EU legislature laid down a different ‘general rule’, that it is both necessary and sufficient for the regulation adopted by the Council or the Commission to specify the amount of the anti-dumping duty at the level of the supplying country concerned.

120 Nonetheless, the second subparagraph of Article 9(5) of Regulation No 384/96 provides that an individual anti-dumping duty is to be specified for suppliers established in a non-market economy country, if they also have the status of exporter, where they demonstrate on the basis of properly substantiated claims that they meet the criteria justifying such individual treatment. That individual anti-dumping duty will then be applied to them instead of the anti-dumping duty set countrywide which would have been applicable to them in the absence of such a claim.

121 It is to be noted that, whilst the French version of that provision could be read as indicating that the Council and the Commission have only the power to apply an individual duty where the conditions set out in it are met, it is apparent from other language versions of the provision, in particular the German, English, Danish and Italian versions, that those institutions are indeed bound to apply an individual duty in such a situation.

122 It is settled case-law that the need for the uniform application of an EU measure and, accordingly, for a uniform interpretation of that measure makes it impossible to consider one language version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim which the latter seeks to achieve, in the light, in particular, of all the versions of it (judgment in *X*, C-486/12, EU:C:2013:836, paragraph 19 and the case-law cited).

123 Accordingly, the Council and the Commission are, in principle, bound to examine claims for individual treatment which are addressed to them on the basis of the second subparagraph of Article 9(5) of Regulation No 384/96 and to adjudicate upon those claims, as they must in the case of claims for market economy treatment, as has been stated in paragraph 110 of the present judgment.

124 That said, these various factors resulting from the wording of Article 9(5) of Regulation No 384/96 do not enable the question to be answered whether, nevertheless, the Council and the Commission may not be so obliged when they have recourse to sampling. That provision should therefore be interpreted by considering not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, to this effect, judgment in *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited). In this context, it is appropriate, in particular, to examine the relationship between, on the one hand, that provision and, on the other, Article 17 of Regulation No 384/96, which provides for sampling.

125 In that regard, it must be stated first of all that Article 9(5) of Regulation No 384/96 does not contain any express reference providing for the application of Article 17 of that regulation in the context of its provisions.

126 The wording of Article 9(5) of Regulation No 384/96 differs from that of Article 9(6), which does contain an express reference of that kind.

127 That difference between the wording of Article 9(5) of Regulation No 384/96 and that of Article 9(6) of the regulation may constitute a factor that justifies interpreting Article 9(5) as meaning that, in the context thereof and in contrast to Article 9(6), Article 17 of the regulation is not relevant.

128 Such an interpretation is borne out by the context of Article 9(5) of Regulation No 384/96, in particular by Article 17(3) of the regulation, and by the objectives pursued by the rules of which those provisions are part.

129 Whilst Article 17(3) of Regulation No 384/96 is intended, in particular, to prevent the calculation of individual dumping margins from giving rise to an excessive administrative burden for the Council and the Commission, it is not designed to lessen or eliminate the administrative burden that would result, for those institutions, from examining claims submitted pursuant to the second subparagraph of Article 9(5) of that regulation, as that examination does not involve, in itself, calculating the individual dumping margins of the exporting producers concerned.

130 Furthermore, as recital 7 of Regulation No 1972/2002 states, the second subparagraph of Article 9(5) was incorporated into Regulation No 384/96 with the objective of laying down clear and specific criteria, set out in points (a) to (e) of that subparagraph, which an exporting producer established in a non-market economy country must satisfy in order to be able to claim the application to it of an individual anti-dumping duty calculated by comparing the normal value applicable to all the exporting producers established in that country with its 'individual export prices'.

131 Consequently, where an exporting producer established in a non-market economy country invokes the second subparagraph of Article 9(5) of Regulation No 384/96, on the ground that its individual export prices are determined in a manner sufficiently independently from the State, it seeks to obtain from the Council and the Commission recognition of the fact that it is, in that respect, in a situation

fundamentally different from that of the other exporting producers established in that country. On that basis, it asks to be treated in an individualised manner, while those other exporting producers are treated, in practice, as a single entity.

132 If it had to be accepted that the Council and the Commission may apply to an exporting producer placed in the situation referred to in the preceding paragraph of the present judgment an anti-dumping duty set countrywide and calculated on the basis of the weighted average dumping margin established for the sampled exporting producers, without having first adjudicated upon the exporting producer's claim, that would effectively permit them to treat that exporting producer in the same way as the sampled exporting producers, although the latter are prima facie in a different situation.

133 Moreover, such treatment would not be capable of being justified by the fact that the investigation involves a large number of parties, inasmuch as it is not possible to know before having examined the claims submitted pursuant to the second subparagraph of Article 9(5) of Regulation No 384/96 whether the number of exporting producers that are to be entitled to an individual duty is so large that, like what Article 17(3) of that regulation provides, it permits the calculation of individual dumping margins to be ruled out. That interpretation of Article 9(5) of Regulation No 348/96 would fail to have regard to the principle of equal treatment, in conformity with which any EU act must be interpreted (judgment in *Chatzi*, C-149/10, EU:C:2010:534, paragraph 43).

134 It follows that, in the light of the objective pursued in Article 9(5) of Regulation No 384/96, the conclusion which the Court reached provisionally in paragraph 127 of the present judgment should be confirmed.

135 Therefore, the fact that the Council and the Commission did not adjudicate upon the claims for individual treatment submitted by the Chinese and Vietnamese exporting producers not sampled pursuant to Article 17 of Regulation No 384/96 constitutes an infringement of Article 9(5) of that regulation. Accordingly, the definitive regulation must be declared invalid to that extent.

The validity of the definitive regulation in the light of Article 2(7)(c) of Regulation No 384/96

136 First of all, by question 3 in Case C-659/13 and, in essence, by questions 1 and 2(a) in Case C-34/14, the referring courts ask whether the definitive regulation is invalid in so far as it infringes Article 2(7)(c) of Regulation No 384/96 given that the Council and the Commission did not adjudicate within the period of three months prescribed in that provision upon the claims for market economy treatment submitted by the Chinese and Vietnamese exporting producers sampled pursuant to Article 17 of that regulation.

137 It can be found upon examination of the definitive regulation that, whilst the Council and the Commission did in fact adjudicate upon the claims for market economy treatment which had been submitted to them by the Chinese and Vietnamese exporting producers included in the sample, they did not do so until after the period prescribed in Article 2(7)(c) of Regulation No 384/96 had expired.

138 That being so, it must be determined whether the failure to comply with that time limit results in the definitive regulation being invalid.

139 It is clear from the very wording of Article 2(7)(c) of Regulation No 384/96 that a determination whether a producer which has claimed market economy treatment meets the criteria for its grant is to be made within three months of the initiation of the investigation (see, to this effect, judgments in *Brosmann Footwear (HK) and Others* v Council, C-249/10 P, EU:C:2012:53, paragraph 39, and *Zhejiang Aokang Shoes* v *Council*, C-247/10 P, EU:C:2012:710, paragraph 31).

140 However, it follows from the Court's case-law that failure to comply with the time limit imposed in that article can result in the regulation adopted at the end of the procedure being annulled only if there is a possibility that, due to that irregularity, the procedure could have resulted in a different outcome. In addition, whilst the person who relies on such an irregularity cannot be required to show that, but for it, the regulation concerned would have had a content more favourable to its interests, that person must nevertheless demonstrate by concrete proof that such a possibility cannot be totally ruled out (see, to this effect, judgments in *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraphs 81, 94 and 114, and *Ningbo Yonghong Fasteners* v *Council*, C-601/12 P, EU:C:2014:115, paragraphs 34, 40 and 42).

141 It follows from that case-law, which can be applied to examination of the validity of such a regulation, that, in principle, the latter can likewise not be declared invalid, in so far as it imposes anti-dumping duties on imports of certain products, on the sole ground that the Council and the Commission did not adjudicate within the time limit prescribed in Article 2(7)(c) of Regulation No 384/96 on the claims for market economy treatment which were submitted to them. The importer which relies on that irregularity must additionally demonstrate by concrete proof that it cannot be totally ruled out that, but for the irregularity, the regulation adopted at the end of the procedure would have had a content more favourable to its interests.

142 In this instance, it is not apparent from the documents before the Court that the importers which rely on the failure to comply with the time limit prescribed in that provision demonstrate by concrete proof, each so far as it is concerned, that it cannot be totally ruled out that, but for that irregularity, the definitive regulation would have had a content more favourable to their interests.

143 It follows that the fact that the Council and the Commission did not adjudicate within the period of three months prescribed in Article 2(7)(c) of Regulation No 384/96 upon the claims for market economy treatment submitted by the Chinese and Vietnamese exporting producers sampled pursuant to Article 17 of that regulation does not affect the validity of the definitive regulation.

144 Next, as regards question 2 in Case C-659/13, by which the referring court asks, in essence, whether the definitive regulation is invalid in so far as it infringes Article 2(7)(c) of Regulation No 384/96 given that the Council and the Commission did not adjudicate within the period of three months prescribed in that provision upon the claims for market economy treatment submitted by the Chinese and Vietnamese exporting producers not sampled pursuant to Article 17 of that regulation, it must be stated that the interpretation adopted in the preceding paragraph of the present judgment applies irrespective of whether or not the exporting producers concerned were so sampled.

The validity of the definitive regulation in the light of Article 9(6) of Regulation No 384/96

145 By questions 1 and 2(a) in Case C-34/14, the referring court asks, in essence, whether the definitive regulation is invalid in so far as the dumping margin applied to the Chinese and Vietnamese exporting producers not sampled was determined in breach of Article 9(6) of Regulation No 384/96.

146 More specifically, according to the grounds of the order for reference, the referring court seeks to ascertain, first, whether the Council and the Commission were entitled to calculate a weighted average dumping margin for the Chinese and Vietnamese exporting producers that were sampled but not granted market economy treatment and then to determine on that basis the duty to be imposed on products of the traders not sampled. It is uncertain, secondly, whether the individual dumping margin of the sole exporting producer which was sampled and obtained market economy treatment, namely Golden Step, was taken into account correctly in that calculation.

147 Article 9(6) of Regulation No 384/96 provides that, when the Commission has limited its examination in accordance with Article 17 of that regulation, 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 is not to exceed the weighted average dumping margin established for the parties in the sample. Article 9(6) also provides that individual duties are to be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.

148 In addition, Article 17(3) of Regulation No 384/96, to which Article 9(6) of that regulation refers, provides, as noted in paragraph 104 of the present judgment, that an individual dumping margin is to be calculated for any exporter or producer not included in the sample which so requests, except where the number of them is so large that the proper conduct of the investigation is compromised.

149 In this instance, the following matters are apparent upon examination of the definitive regulation. First of all, the Commission indicated to the Chinese and Vietnamese exporting producers not included in its sample that the size of the investigation was such that granting them individual treatment could not be envisaged. Next, the anti-dumping duty applied to those traders' products was determined on the basis of the weighted average dumping margin established for the exporting producers included in the sample. Finally, that margin, which was initially calculated at a time when Golden Step had not yet obtained market economy treatment, was subsequently adjusted to take account of the grant of such treatment.

150 It follows that there is nothing in the definitive regulation that enables the view to be taken that the dumping margin applied to the Chinese and Vietnamese exporting producers not sampled was determined in breach of Article 9(6) of Regulation No 384/96.

The validity of the definitive regulation in the light of Article 3(1), (5) and (6), Article 4(1), Article 5(4) and Article 17 of Regulation No 384/96

151 By question 4 in Case C-659/13, the referring court asks, in essence, whether the definitive regulation is invalid given that insufficient Union producers cooperated in the investigation to have allowed the Commission to make a valid assessment of the injury suffered by the Union industry and, therefore, of the causal link between the imports concerned and the injury suffered by the Union industry, in breach of Article 3(1), (5) and (6), Article 4(1), Article 5(4) and Article 17 of Regulation No 384/96.

152 First of all, Article 5 of Regulation No 384/96, as its heading indicates, merely governs the 'initiation of [dumping investigation] proceedings' under that regulation. In this respect, it provides in particular, in Article 5(4), that, in order to be considered to have been made by the Union industry, a complaint must satisfy each of two conditions relating to the size of the support for it. First, the complaint must be supported by Union producers whose collective output constitutes more than 50% of the total production of that portion of the Union industry expressing either support for or opposition to the complaint. Secondly, the complaint must be supported by Union producers accounting for at least 25% of total production of the Union industry (judgment in *Philips Lighting Poland and Philips Lighting* v *Council*, C-511/13 P, EU:C:2015:553, paragraph 49).

153 On the other hand, there is no provision in Regulation No 384/96 relating to the measures to be taken, during the course of the investigation, if the support of the producers for the complaint falls, so that the Council and the Commission must be able to continue with the investigation, including where the degree of support for it falls and even if such a fall means that that support corresponds to a level of production which is below one of the two thresholds laid down in Article 5(4) of the regulation (see, to this effect, judgment in *Philips Lighting Poland and Philips Lighting* v *Council*, C-511/13 P, EU:C:2015:553, paragraphs 51 to 54).

154 In the present instance, the fact that the investigation — which, it is not disputed, was initiated in circumstances that satisfy the requirements of Article 5(4) of Regulation No 384/96 — continued without necessarily still having, at a subsequent stage, the support of Union producers accounting for at least 25% of total production of the Union industry does not therefore in itself enable the view to be taken that the definitive regulation infringes that article.

155 Next, it is clear from Article 3(1), (5) and (6) of Regulation No 384/96, relating to 'determination of injury', that the Council and the Commission must be able to establish, taking account of all the relevant facts of the case, that the imports under investigation cause material injury to 'the [Union] industry'. This term is itself defined in Article 4(1) of that regulation as 'the [Union] producers as a whole of the like products or … those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total [Union] production of those products' (see, to this effect, judgment in *Philips Lighting Poland and Philips Lighting* v *Council*, C-511/13 P, EU:C:2015:553, paragraphs 69 and 70).

156 Under Article 17(1) and (2) of Regulation No 384/96, the Commission is authorised in large-scale cases to limit the investigation to a reasonable number of parties, provided, in particular, that it uses a sample which is statistically valid according to the information available at the time when it selects that sample.

157 In this instance, the mere fact that the Commission chose to limit the investigation that resulted in the definitive regulation to the sample which it selected does not in itself, in the absence of factors capable of calling the representativeness of that sample into question, enable the view to be taken that the definitive regulation does not satisfy the requirements laid down in Articles 3, 4(1) and 17 of Regulation No 384/96.

158 It follows that there is nothing in the definitive regulation that enables the view to be taken that insufficient Union producers cooperated in the investigation to have allowed the Commission to make a valid assessment of the injury suffered by the Union industry and, therefore, of the causal link between the imports concerned and the injury suffered by the Union industry, in breach of Article 3(1), (5) and (6), Article 4(1), Article 5(4) and Article 17 of Regulation No 384/96.

The validity of the definitive regulation in the light of Article 3(2) of Regulation No 384/96 and Article 296 TFEU

159 By question 5 in Case C-659/13, the referring court asks, in essence, whether the definitive regulation is invalid in so far as it infringes Article 3(2) of Regulation No 384/96 and Article 296 TFEU given that evidence in the investigation file shows that the injury was assessed using materially flawed data and given that the definitive regulation does not state why this evidence was not taken into account.

160 Article 3(2) of Regulation No 384/96 provides that a determination of the injury liable to have been suffered by the Union industry is to be based on positive evidence and is to involve an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the Union market for like products, and also of the consequent impact of those imports on the Union industry.

161 In this context, it is clear from the case-law that the wide discretion which the Council and the Commission enjoy in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade does not relieve them of the obligation to have due regard to the evidence which has been submitted to them by the parties to the investigation (see, to this effect, judgments in *GLS*, C-338/10, EU:C:2012:158, paragraphs 30 and 32, and *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 107).

162 However, judicial review of the exercise of such a discretion must, in the context of an action founded on Article 263 TFEU as in that of a request for a preliminary ruling on validity submitted pursuant to Article 267 TFEU, be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see, to this effect, judgment in *Valimar*, C-374/12, EU:C:2014:2231, paragraph 51 and the case-law cited).

163 In this instance, it is apparent from the arguments which the order for reference mentions that Clarks relies on two documents according to which some of the Union producers covered by the investigation engaged in fraudulent practices such as to call into question the reliability of the information gathered by the Commission concerning various economic data relating to employment by the Union industry and its investment, turnover and sales.

164 It is true that, as the referring court has pointed out, the definitive regulation does not make reference to those documents.

165 However, as the Advocate General has observed in point 104 of his Opinion, those two documents, which essentially do no more than set out allegations that appeared in the press relating to a limited number of Union producers, do not enable the view to be taken, having regard to all the other matters on which the Council relied in recitals 144 to 201 of the definitive regulation in order to conclude that there was injury to the Union industry, that that conclusion is vitiated by a manifest error of assessment or that it would have been necessary for the Council to explain specifically in the definitive regulation why it did not find such documents convincing.

166 It follows that the definitive regulation cannot be considered to infringe Article 3(2) of Regulation No 384/96 and Article 296 TFEU on the ground that evidence in the investigation file shows that the injury was assessed using materially flawed data and that the definitive regulation does not explain why this evidence was not taken into account.

The validity of the definitive regulation in the light of Article 3(7) of Regulation No 384/96

167 By question 6 in Case C-659/13, the referring court asks whether the definitive regulation is invalid in so far as it infringes Article 3(7) of Regulation No 384/96 on the ground that the Council and the Commission did not properly distinguish between the effects of the dumped imports and the other factors injuring the Union industry.

168 Article 3(7) of Regulation No 384/96 provides that known factors other than the dumped imports which at the same time are injuring the Union industry are also to be examined to ensure that injury caused by these other factors is not attributed to the dumped imports.

169 In this context, the Council and the Commission are under an obligation to consider 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 Union producers themselves. To that end, it is for those institutions 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 concerned and, on the other, the injury suffered by the Union industry. It is also for them to verify that the injury attributable to those other factors is not taken into account in the determination of injury. However, if the Council and the Commission find that, despite such factors, the injury caused by the dumped imports is material, the causal link between those imports and the injury suffered by the Union industry can consequently be established (see, to this effect, judgments in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraphs 23 to 25, and *TMK Europe*, C-143/14, EU:C:2015:236, paragraphs 35 to 37).

170 In addition, it is for the persons pleading the illegality of an anti-dumping regulation to adduce arguments and evidence to show that factors other than those relating to the imports could have had such importance that they called into question the causal link between the injury suffered by the Union industry and the dumped imports (judgments in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 28, and *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 42).

171 In this instance, the Council and the Commission assessed the effects of the other factors liable to cause injury to the Union industry in recitals 222 to 240 of the definitive regulation. In this respect, they assessed in particular the export performance of the Union industry, the impact of imports from third countries and the impact of the lifting of the quota on imports from China, before concluding that the impact of those factors did not call into question the material injury caused to the Union industry by the dumped imports.

172 It is apparent from the order for reference and the arguments to which it refers that Clarks does no more than, first, propose an alternative assessment of those various factors and, secondly, challenge, without further detail, some of the methodological choices made by the Council and the Commission. On the other hand, it does not put forward any argument enabling the view to be taken that the definitive regulation is vitiated by a manifest error of assessment.

173 Therefore, the definitive regulation cannot be considered to infringe Article 3(7) of Regulation No 384/96 on the ground that the Council and the Commission did not properly distinguish the effects of the dumped imports from the other factors injuring the Union industry.

174 It follows from all the foregoing considerations that the answer to questions 1 to 6 in Case C-659/13 and questions 1 and 2(a) in Case C-34/14 is as follows:

— the definitive regulation is invalid in so far as it infringes Article 2(7)(b) and Article 9(5) of Regulation No 384/96;

— examination of those questions has disclosed no factor of such a kind as to affect the validity of the definitive regulation in the light of Article 296 TFEU and Article 2(7)(c), Article 3(1), (2) and (5) to (7), Article 4(1), Article 5(4), Article 9(6) and Article 17 of Regulation No 384/96, considered in isolation in the case of some of those articles or provisions and jointly in the case of others.

Questions 1 and 2(a) in Case C-34/14 in so far as they also relate to the prolonging regulation

175 As has been stated in paragraphs 78 and 79 of the present judgment, in Case C-34/14 the referring court also raises, in questions 1 and 2(a), the issue of the validity of the prolonging regulation, in the light of the same grounds as those put forward regarding the definitive regulation.

176 It need merely be stated that the prolonging regulation does not contain any indication establishing to the requisite legal standard that, before its adoption, the Council and the Commission carried out a fresh assessment of the position of the various Chinese and Vietnamese exporting producers covered by the definitive regulation, in order to determine whether those which had claimed at the beginning of the initial investigation market economy treatment pursuant to Article 2(7)(b) of Regulation No 384/96 or individual treatment on the basis of Article 9(5) of that regulation could request such treatment in the context of the review.

177 Therefore, it should be stated in answer to those questions that the prolonging regulation is invalid to the same extent as the definitive regulation.

The questions relating to the interpretation of Article 236 of the Customs Code

Duties legally owed within the meaning of Article 236(1) of the Customs Code

178 By question 7 in Case C-659/13, the referring court asks in essence whether, in a situation such as that at issue in the main actions, the courts of the Member States may rely on judgments in which the EU judicature annulled a regulation that had imposed anti-dumping duties, in so far as it related to certain exporting producers covered by it, in order to hold that the duties imposed on the products of other exporting producers covered by that regulation, and in the same situation as the exporting producers in respect of which the regulation was annulled, are not legally owed within the meaning of Article 236(1) of the Customs Code.

179 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to him. In addition, the first paragraph of Article 264 TFEU provides that, if the action is well founded, the EU judicature is to declare the act concerned to be void.

180 In this context, it must be pointed out first of all that, where a person seeks annulment of an act from the EU judicature, the matter to be considered by the latter relates only to those provisions of the act which concern him. Provisions concerning other persons which have not been challenged do not form part of the matter to be decided by the EU judicature (judgments in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 53, and *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 25).

181 Next, the scope of the annulment which the EU judicature pronounces in such an action, where appropriate, may not go further than that sought by the applicant (judgments in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 52, and *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 24).

182 Finally, although the authority *erga omnes* exerted by annulling judgments of the EU judicature attaches to both their operative part and their *ratio decidendi*, it cannot entail annulment of an act not challenged before the EU judicature even if that act is vitiated by the same illegality (judgments in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 54, and *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 26).

183 On those grounds, if, in an action for annulment brought by a person directly and individually concerned by an act of general application, such as a regulation which imposed anti-dumping duties, the EU judicature annuls that act in so far as it concerns that person, such partial annulment does not affect the legality of the act's other provisions, including the provisions which imposed anti-dumping duties on products other than those manufactured, exported or imported by that person (see, to this effect, judgment in *Nachi Europe*, C-239/99, EU:C:2001:101, paragraphs 10, 24 and 27).

184 On the contrary, where such provisions have not been challenged within the time limit laid down in Article 263 TFEU by the persons who would have standing to seek their annulment, they are definitive as against those persons (judgment in *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 29 and the case-law cited). Furthermore, until such time as they are withdrawn or declared invalid following a reference for a preliminary ruling or a plea of illegality, those provisions are presumed to be lawful, which means that they have full legal effect in relation to any other person (see, to this effect, judgment in *CIVAD*, C-533/10, EU:C:2012:347, paragraph 39 and the case-law cited).

185 Accordingly, the answer to question 7 in Case C-659/13 is that, in a situation such as that at issue in the main actions, the courts of the Member States may not rely on judgments in which the EU judicature annulled a regulation that had imposed anti-dumping duties, in so far as it related to certain exporting producers covered by it, in order to hold that the duties imposed on the products of other exporting producers covered by that regulation, and in the same situation as the exporting producers in respect of which the regulation was annulled, are not legally owed within the meaning of Article 236(1) of the Customs Code. As such a regulation has not been withdrawn by the institution which adopted it, annulled by the EU judicature or declared invalid by the Court in so far as it imposes duties on the products of those other exporting producers, those duties remain legally owed within the meaning of that provision.

The existence of unforeseeable circumstances or *force majeure* within the meaning of Article 236(2) of the Customs Code

186 By question 2(b) in Case C-34/14, the referring court asks, in essence, whether Article 236(2) of the Customs Code must be interpreted as meaning that the fact that a regulation which imposed anti-dumping duties is declared invalid in whole or in part by the EU judicature constitutes unforeseeable circumstances or *force majeure* within the meaning of that provision.

187 First of all, it is apparent from the very wording and scheme of Article 236 of the Customs Code that, whilst anti-dumping duties which, when they were paid, were not legally owed must, in principle, be repaid by the customs authorities in accordance with Article 236(1), such repayment can, however, take place only if the conditions to which it is subject, including the condition set out in Article 236(2), are satisfied (judgments in *Ikea Wholesale*, C-351/04, EU:C:2007:547, paragraph 67; *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 25; and *CIVAD*, C-533/10, EU:C:2012:347, paragraph 20).

188 It follows, in particular, that the trader which has paid those duties is able, in principle, to claim their repayment only if and in so far as the three-year period laid down for that purpose in the first subparagraph of Article 236(2) of the Customs Code has not expired (see, to this effect, judgment in *CIVAD*, C-533/10, EU:C:2012:347, paragraph 21).

189 However, the second subparagraph of Article 236(2) of the Customs Code expressly provides that that period is to be extended if the applicant provides evidence that he was prevented from meeting the deadline as a result of unforeseeable circumstances or *force majeure*. It follows that any person seeking to obtain such an extension must, for that purpose, show that at least one of those situations existed.

190 Next, it is clear from Article 236 of the Customs Code, interpreted in its context, that repayment of anti-dumping duties that have been paid by traders is made only under certain conditions and in cases specifically provided for, so that it is an exception to the normal import and export procedure laid down by the Customs Code and, therefore, the provisions which govern it are to be interpreted strictly (judgments in *Netherlands* v *Commission*, C-156/00, EU:C:2003:149, paragraph 91, and *CIVAD*, C-533/10, EU:C:2012:347, paragraph 24).

191 Therefore, the concepts of unforeseeable circumstances and *force majeure* in the second subparagraph of Article 236(2) of the Customs Code, allowing an extension of the three-year period during which a trader may claim repayment of anti-dumping duties, starting from the date on which their amount was communicated to it, must be interpreted strictly (see, to this effect, judgment in *CIVAD*, C-533/10, EU:C:2012:347, paragraph 25).

192 In the context of that legislation, those concepts are both characterised, in particular, by an objective element relating to the fact that they involve the existence of abnormal circumstances extraneous to the person relying on them (see, to this effect, judgment in *CIVAD*, C-533/10, EU:C:2012:347, paragraphs 27 and 28 and the case-law cited).

193 Neither the fact that one of the two regulations in dispute was annulled in part by the Court, in so far as it concerned persons other than Puma, in the judgments in *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53) and *Zhejiang Aokang Shoes* v *Council* (C-247/10 P, EU:C:2012:710), nor the fact that one or other of those acts may be declared invalid in whole or in part in response to the questions referred to the Court in the present cases can be regarded as amounting to an abnormal or extraneous circumstance, within the meaning required in order to establish the existence of unforeseeable circumstances or *force majeure* (see, to this effect, judgment in *CIVAD*, C-533/10, EU:C:2012:347, paragraph 30).

194 Accordingly, the answer to question 2(b) in Case C-34/14 is that Article 236(2) of the Customs Code must be interpreted as meaning that the fact that a regulation imposing anti-dumping duties is declared invalid in whole or in part by the EU judicature does not constitute unforeseeable circumstances or *force majeure* within the meaning of that provision.

Costs

195 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam is invalid in so far as it infringes Article 2(7)(b) and Article 9(5) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, as amended by Council Regulation (EC) No 461/2004 of 8 March 2004.**

   Examination of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Regulation No 1472/2006 in the light of Article 296 TFEU and Article 2(7)(c), Article 3(1), (2) and (5) to (7), Article 4(1), Article 5(4), Article 9(6) and Article 17 of Regulation No 384/96 as amended by Regulation No 461/2004, considered in isolation in the case of some of those articles or provisions and jointly in the case of others.

2. **Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96, is invalid to the same extent as Regulation No 1472/2006.**

3. **In a situation such as that at issue in the main actions, the courts of the Member States may not rely on judgments in which the judicature of the European Union annulled a regulation that had imposed anti-dumping duties, in so far as it related to certain exporting producers**

covered by it, in order to hold that the duties imposed on the products of other exporting producers covered by that regulation, and in the same situation as the exporting producers in respect of which the regulation was annulled, are not legally owed within the meaning of Article 236(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. As such a regulation has not been withdrawn by the institution of the European Union which adopted it, annulled by the judicature of the European Union or declared invalid by the Court of Justice of the European Union in so far as it imposes duties on the products of those other exporting producers, those duties remain legally owed within the meaning of that provision.

4. **Article 236(2) of Regulation No 2913/92 must be interpreted as meaning that the fact that a regulation imposing anti-dumping duties is declared invalid in whole or in part by the judicature of the European Union does not constitute unforeseeable circumstances or *force majeure* within the meaning of that provision.**

[Signatures]