JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

4 March 2010 *

In Case T-409/06,

Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd, established in Hui Yang City (China), represented by I. MacVay, Solicitor, R. Thompson QC, and K. Beal, Barrister,

applicant,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, and by G. Berrisch, lawyer,

defendant,

* Language of the case: English.

supported by

European Commission, represented by H. van Vliet and T. Scharf, acting as Agents,

by

Confédération européenne de l'industrie de la chaussure (CEC), established in Brussels, represented initially by P. Vlaemminck, G. Zonnekeyn and S. Verhulst, and then by P. Vlaemminck and A. Hubert, lawyers,

and by

BA.LA. di Lanciotti Vittorio & C. Sas, established in Monte Urano (Italy), and the 16 other interveners listed in the annex, represented by G. Celona, P. Tabellini and C. Cavaliere, lawyers,

interveners,

APPLICATION for partial annulment of Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively 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), in so far as it concerns the applicant,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas (Rapporteur) and A. Dittrich, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 18 February 2009,

gives the following

Judgment

Legal context

1 Article 1(1), (2) and (4) of 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 ('the basic regulation'), provides:

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

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

…

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

2 The first subparagraph of Article 2(1) of the basic regulation provides that '[t]he normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.

3 As regards the conditions for the grant of market economy treatment ('MET'), Article 2(7)(b) of the basic regulation provides:

'In anti-dumping investigations concerning imports from ... the People's Republic of China ..., 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 ... 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.'

4 According to Article 2(7)(c) of the basic regulation:

'A claim under [Article 2(7)(b)] must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

…

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 Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'

5 Under the second subparagraph of Article 9(5) and Article 9(6) of the basic regulation:

'5. …

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.'

6 Article 2(8) and the first subparagraph of Article 2(9) of the basic regulation provide:

'8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price ... , the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.'

7 The first subparagraph of Article 2(10) of the basic regulation provides:

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

8 According to Article 2(11) of the basic regulation:

'Subject to the relevant provision governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised. This paragraph shall not preclude the use of sampling in accordance with Article 17.'

9 As regards the determination of injury, Article 3(2), (3) and (6) of the basic regulation provides:

'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 Community market for like products; and (b) the consequent impact of those imports on the Community industry.

3. … With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

…

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

10 According to the final sentence of Article 9(4) of the basic regulation, '[t]he amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.'

11 As regards the sampling technique, Article 17(1) and (3) of the basic regulation provides:

'1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of the 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.

…

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.'

12 Under Article 18(1), (3), (4) and (6) of the basic regulation:

'1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

…

3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therfor and shall be granted an opportunity to provide further explanations within the time limit specified. If the explanations are considered

unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.

…

6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.'

13 According to paragraph 3 of Annex II to the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103; 'the 1994 anti-dumping code'), which is contained in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3):

'3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made ...'

14 Article 20(1), (2), (4) and (5) of the basic regulation provides:

'1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country, may request disclosure of the details

underlying the essential facts and considerations on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

…

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

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

Background to the dispute and the contested regulation

15 The applicant, Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd, is a company producing and exporting footwear, established in China in 2000.

16 Imports of footwear from China falling within certain categories of the combined nomenclature were subject to a quantitative quota scheme which lapsed on 1 January 2005.

17 Following a complaint lodged on 30 May 2005 by the Confédération européenne de l'industrie de la chaussure (CEC), the Commission of the European Communities (now 'the European Commission') initiated an anti-dumping proceeding concerning imports of certain footwear with uppers of leather originating in China and Vietnam. The notice of initiation of that proceeding was published in the *Official Journal of the European Union* of 7 July 2005 (OJ 2005 C 166, p. 14; 'the notice of initiation').

18 In view of the large number of parties involved, it was envisaged, at point 5.1(a) of the notice of initiation, to apply sampling, in accordance with Article 17 of the basic regulation. In addition, the Commission stated at point 5.1(b) of the notice of initiation that, in order to obtain the information which it deemed necessary for its investigation, it would send questionnaires to, among others, the sampled Chinese and Vietnamese exporting producers and to the authorities of the exporting countries concerned.

19 The applicant contacted the Commission and on 23 and 25 July 2005 provided it with the information required by points 5.1(a)(i) and 5.1(e) of the notice of initiation in order to form part of the sample of exporting producers which the Commission proposed to establish pursuant to Article 17 of the basic regulation and in order to be granted MET or, failing that, to be given individual treatment ('IT').

20 Having been chosen to form part of the sample of Chinese exporting producers, the applicant was requested to respond to the Commission's questionnaire by 12 September 2005, on which date it communicated its response to that questionnaire.

21 The Commission carried out an on-site verification at the applicant's premises between 4 and 7 October 2005. By email of 21 October 2005, the applicant submitted to the Commission a final transaction-by-transaction list of its sales on the Community market.

22 By fax of 12 December 2005, the Commission notified to the applicant its preliminary findings on the applicant's MET/IT claim. As regards the criterion relating to decisions of firms (see paragraph 4 above), the Commission observed that, with respect to its sales, the applicant was required, by its articles of association and its business licence, to export its entire production and that it had taken no steps to change that situation. It followed that the applicant was subject to significant State interference, since its business licence limited the applicant's activities to exports. Furthermore, as regards the same criterion, the Commission observed that the applicant could not repatriate its profits without prior administrative approval. In those circumstances, and notwithstanding that the applicant satisfied the other criteria laid down in Article 2(7)(c) of the basic regulation, the Commission proposed to reject the MET claim in question.

23 The Commission invited the applicant to submit any comments it might wish to make on that document by 19 December 2005; the applicant submitted its comments on that date. As regards the obligation to export its entire production, the applicant emphasised that that was the applicant's own choice and was based on considerations of 'administrative convenience' connected with its liability to pay VAT and on the fact that its products were intended solely for the European and United States markets. In addition, the applicant produced a certificate of the Foreign Trade & Economic Cooperation Bureau of Hui Yang in the town of Hui Zhou (Guangdong Province, China), which stated that the applicant was free to amend its articles of association in order to alter the provision relating to the destination of its production and that the

Chinese authorities imposed no restrictions in that regard. As concerns the repatriation of profits, the applicant emphasised that the administrative approval procedure was purely formal, since its sole purpose was to check the validity of the associated documentation, that is to say, the statement of profits, payment of the relevant taxes, the fact that the company's administration has actually decided on the distribution of profits, etc. As proof of its assertions, the applicant produced a circular of the Chinese Administration and a legal opinion giving details of the application of the circular in question.

24 The Commission replied by fax of 23 February 2006, in which it stated that it refused to alter its initial assessment. As regards the destination of the applicant's production, the Commission emphasised that the observations submitted did not alter the fact that during the investigation period the applicant was prohibited from selling on the Chinese market, while any change in that situation was subject to the prior approval of the State. As regards the repatriation of profits, the Commission acknowledged, in the light of the applicant's explanations in that regard, that the relevant administrative procedure did not amount to significant State interference within the meaning of Article 2(7)(c) of the basic regulation. However, in the light of the findings relating to the destination of the applicant's production, the Commission maintained that the applicant did not satisfy the criterion in question. The applicant was therefore refused MET.

25 By fax of 24 February 2006, the Commission informed the applicant that it had been unable to obtain a reliable sample of sales transactions on the Community market in order to calculate export prices and c.i.f. prices at the Community border. Its inability to do so stemmed from the fact that the data in the applicant's transaction-by-transaction list of its sales on the Community market were substantially overstated by comparison with actual total figures, a fact which, according to the Commission, had been confirmed by the applicant. In those circumstances, the dumping margins would be calculated on the basis of information available, in accordance with Article 18 of the basic regulation.

26 The Commission invited the applicant to submit any comments it might wish to make on that document by 6 March 2006; the applicant submitted its comments on that date. In that regard, the applicant contended that the Commission's objections were

formulated in such a vague manner that the applicant was unable to understand in what way the data were overstated. Furthermore, according to the applicant, it had never confirmed that the data were overstated and had explained repeatedly that its exports were made through intermediate trading companies, which made it impossible for the applicant to know the final destination of the product in every case. In addition, all the applicant's sales were f.o.b., so that the applicant did not have the data on c.i.f. prices at the Community border. The Commission had not claimed that the data were inaccurate during the on-site verification and had not questioned the accuracy of the data collected. In those circumstances, the applicant opposed the application of Article 18 of the basic regulation for the purposes of calculating the export price or the dumping margin.

27 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').

28 According to recital 9 in the preamble to the provisional regulation, the investigation of dumping and injury covered the period from 1 April 2004 to 31 March 2005 ('the investigation period'). The examination of factors relevant for the assessment of injury covered the period from I January 2001 to 31 March 2005 ('the period considered').

29 In the light of the need to establish a normal value for the products of the Chinese and Vietnamese exporting producers which could not be granted MET, a verification to establish normal value on the basis of data from an analogue country, in this case the Federal Republic of Brazil, took place at the premises of three Brazilian companies (recital 8 to the provisional regulation).

30 As regards the product concerned, it follows from recitals 10, 11, 40 and 41 to the provisional regulation that it covered essentially sandals, boots, urban footwear and

city shoes, all manufactured with uppers of leather or composition leather. It follows, moreover, from recitals 12 to 31 to the provisional regulation that the Commission excluded Special Technology Athletic Footwear from the definition of the product concerned and that it included children's footwear.

31 As regards the like product, the Commission concluded at recital 46 to the provisional regulation that the product concerned and the footwear with uppers of leather manufactured and sold domestically in China and Vietnam as well as footwear with uppers of leather produced and sold in the Community by the Community industry were similar as far as their basic physical and technical characteristics and uses were concerned and that they were perceived by users as being interchangeable. Therefore, according to recital 52 to the provisional regulation, all types of footwear with uppers of leather or composition leather produced and sold in the countries concerned and in Brazil and those produced and sold by the Community industry on the Community market are similar to those exported from the countries concerned to the Community.

32 It follows from recital 57 to the provisional regulation that, for the purpose of determining dumping, the Commission employed sampling. To that end, it selected a sample consisting of 13 Chinese exporting producers representing more than 20% of the Chinese export volume to the Community. According to recital 8(c) to the provisional regulation, the applicant was the 11th company on the list of Chinese exporting producers in the sample.

33 According to recital 69 to the provisional regulation, the applicant was refused MET on the ground that it did not meet the first criterion, concerning the taking of decisions without significant State interference (see paragraphs 22 to 24 above).

34 As regards the claim for IT, the Commission observed at recital 94 to the provisional regulation that the requirement that an undertaking export all or a significant part

of its production also meant that it did not meet the criterion set out in the second subparagraph of Article 9(5)(b) of the basic regulation (see paragraph 5 above).

35 As regards the export price, the Commission stated at recital 130 to the provisional regulation that where export sales to the Community were made through unrelated trading companies, export prices were established on the basis of the prices of the product when sold for export to the trading companies by the producers concerned, in accordance with Article 2(9) of the basic regulation (see paragraph 6 above).

36 According to recital 131 to the provisional regulation, the comparison between normal value and export price was made on an ex-factory basis. For the purpose of a fair comparison, due allowance in the form of adjustments was made for differences affecting prices and price comparability, in accordance with Article 2(10) of the basic regulation (recital 132 to the provisional regulation).

37 As regards injury, the Commission examined, inter alia, undercutting of the import prices. To that end, c.i.f. Community frontier import prices, plus customs duties, were adjusted upwards to take account of the costs incurred in the Community by the importers, such as design, selection of raw material, etc., and were compared with the ex-factory prices of the Community industry at the same business stage. That comparison resulted in an undercutting margin of 12.8% for footwear from China (recitals 167 and 168 to the provisional regulation).

38 By letter of 7 April 2006, the Commission sent the applicant, pursuant to Article 14(2) and Article 20(1) respectively of the basic regulation, a copy of the provisional regulation and a document containing information on the details underlying the essential facts and considerations on the basis of which the anti-dumping duties were imposed

('the general disclosure document'). The Commission invited the applicant to submit any comments which it might have on those documents by 8 May 2006.

39 By email of 27 April 2006, the applicant objected to the incomplete nature of the information in the general disclosure document, particularly the data relating to the adjustments made to the prices for the purposes of the dumping calculation and the undercutting calculation. The applicant reiterated those objections in written observations of 8 May 2006.

40 By email of 16 May 2006, the applicant emphasised, in particular, that the adjustment of its export price by 15% to reflect research and development costs understated the actual research and development costs incurred since it failed to take into account the significant costs and margins of the trading companies through which certain Chinese producers dispatch their production to the Community market.

41 By fax of 7 July 2006, the Commission sent the applicant, pursuant to Article 20(2) to (4) of the basic regulation, a final disclosure document concerning the essential facts and considerations underlying the proposal to impose definitive anti-dumping duties.

42 In section H of that document, the Commission set out its considerations concerning the definitive anti-dumping measures which were proposed to the Council of the European Union. As regards the type of measures, the Commission explained, first, that undertakings given by producers not to sell at below the price level which would have eliminated the significant injury sustained by the Community industry did not constitute appropriate measures and, second, that it was appropriate to apply a delayed duty system (paragraphs 278 to 291 of the final disclosure document).

43 As regards that delayed duty system, the Commission observed that the volume of imports had had a materially damaging effect on Community industry since 1 January 2005, the date on which the quota regime lapsed (see paragraph 16 above). During the first quarter of 2005, which was included in the investigation period (see paragraph 28 above), the Community industry underwent, proportionally, the most significant decline during the period considered with respect to a number of economic indicators such as profitability, sales prices, market share, sales, employment and production. In those circumstances, the Commission paid particular attention to the quantitative aspect of dumping practices in determining whether there was injury. Thus, it found that only imports above a certain volume were causing injury, and that, therefore, an intervention in the form of additional duties was not necessary to re-establish fair competition. Accordingly, anti-dumping duties would be applied only to imported goods above a specific annual volume. In this instance, such a delayed duty system would be adequate to remove the injury, inasmuch as it would take the quota effects into consideration and would balance the concerns of the interested parties. The proposed anti-dumping duty was therefore to apply to imports from China in excess of 140 million pairs per annum. That volume reflected the Commission's assessment of the imports from China in 2005, and took account of the level of imports in 2004 (paragraphs 285 to 287 and 291 of the final disclosure document).

44 Thus, the Commission proposed imposing a definitive anti-dumping duty, equal to the injury elimination margin, on imports over 140 million pairs of footwear per annum from China. That margin was set at the level of underselling, namely 23% (paragraph 293 of the final disclosure document).

45 The Commission invited the applicant to submit its comments on the final disclosure document by 17 July 2006.

46 By letter of 13 July 2006, the applicant sent the Commission a copy of its business licence and also of the decision amending its articles of association, according to which its products would henceforward be intended for both the export market and

the Chinese market. By letter of 22 August 2006, the Commission refused to reopen the subject of the grant of MET, on the ground that the deadline set for that purpose had expired.

47 By letter of 28 July 2006, the Commission sent the applicant an additional final disclosure document. According to the first two paragraphs, the purpose of that document was to provide all interested parties with information about a change with regard to the envisaged form of the definitive anti-dumping duties. The 'Trade' Directorate General (DG) in the Commission had considered the comments submitted by interested parties with regard to the originally envisaged delayed duty system (see paragraphs 42 to 44 above). By that document, the Commission dropped the idea of a delayed duty system. In the context of its new approach, the Commission stated that the real materially injurious increase in imports took place in 2004 and until the end of the investigation period, and that 2005 was the first year in which imports of footwear from China were no longer subject to a quota. Furthermore, the Commission established a volume of non-materially injurious imports on the basis of the import levels from China and Vietnam in 2003, namely 109 million pairs of shoes. Under that new approach, the economic impact of that volume needed to be reflected in the injury elimination level. Thus, first, the injury elimination level was lowered in order to take account of the volume of non-injurious imports and, second, the definitive duties were applied from the first pair imported. According to that methodology, following four steps set out in that document, the Commission concluded, for imports from China, on the basis of 'the lesser duty rule', that a definitive anti-dumping duty equal to the level required to eliminate injury should be imposed, in this case 16.5%.

48 In order to formalise that new proposal, the Commission annexed to its letter of 28 July 2006 the paragraphs which were to be included in the new section H of the final disclosure document and to replace those in the corresponding section of the original final disclosure document (see paragraph 42 above). The Commission stated, in paragraphs 278 and 279 which were to be included in the new section H of the final disclosure document, that only imports above a certain volume prior to the lapsing of

the quota regime could cause material injury, so that, the injury threshold determined on the basis of the results of the investigation period had to reflect the fact that certain import quantities had not caused such material injury. Consequently, the non-materially injurious import quantities had to be reflected in the injury elimination levels. In paragraph 280 of that document, the Commission set out the methodology which had been used.

49 The applicant submitted its comments on the additional final disclosure document on 2 August 2006.

50 On 5 October 2006, the Council adopted Regulation (EC) No 1472/2006 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 contested regulation'). By the contested regulation, the Council established a definitive anti-dumping duty on imports of footwear with uppers of leather or composition leather, excluding sports footwear, footwear involving special technology, slippers and other indoor footwear and footwear with a protective toecap, originating in China and falling within a number of the combined nomenclature codes (Article 1 of the contested regulation). The rate of the definitive anti-dumping duty applicable, before duty, to the net free-at-Community-frontier price of footwear from the applicant's production was set at 16.5%. Pursuant to Article 3 of the contested regulation, that rate was to remain in force for a period of two years.

51 As regards the definition of the like product, the Council confirmed, at recitals 40 and 41 in the preamble to the contested regulation, the findings made by the Commission at recital 52 to the provisional regulation (see paragraph 31 above).

52 According to recital 77 to the contested regulation, the submission by two Chinese exporting producers of changed articles of association no longer containing sales restrictions was made too late to be taken into consideration. In effect, there was no

longer sufficient time for verification in accordance with Article 16(1) of the basic regulation. In any event, those restrictions did not constitute the only reason why those companies had been refused MET.

53 Thus, the negative finding reached in the provisional regulation concerning the grant of MET to the applicant was confirmed at recital 78 to the contested regulation.

54 As regards the IT claim, the Council confirmed at recital 83 to the contested regulation the negative finding which the Commission had reached at recital 94 to the provisional regulation (see paragraph 34 above).

55 As regards the export price and its comparison with normal value, the Council confirmed, at recitals 123 and 138 to the contested regulation, the Commission's findings at recitals 128 to 133 to the provisional regulation (see paragraphs 35 and 36 above).

56 As regards the level of duty necessary to eliminate the injury caused by imports from China, the Council stated at recitals 296 to 301 to the contested regulation, reiterating paragraphs 275 to 280 of the new section H of the final disclosure document and annexed to the additional final disclosure document (see paragraph 47 above), that it was appropriate to take account of the particularities of the present proceeding and in particular of the fact that a quota regime had been in force until 1 January 2005. As that quota regime had prevented any material injury being caused to the Community industry, whereas the increase in imports after the lapse of that system had had a particularly decisive injurious effect on the Community industry, the Council considered that only imports above a certain volume before the lapsing of the quota regime could cause material injury. Consequently, the injury threshold, determined on the basis of

the results of the investigation period had to take into account the fact that certain import quantities had not caused material injury. That operation, which was based on the value of the import volumes in 2003, led, for imports from China, to an injury threshold of 16.5% whereas a threshold of 23% would have been applied, according to recital 295 to the contested regulation, if the Council had not taken account of the particularities of the present case.

Procedure and forms of order sought by the parties

57 By application lodged at the Registry of the Court on 21 December 2006, the applicant brought the present action.

58 By document lodged at the Court Registry on 2 April 2007, the Commission sought leave to intervene in the present case in support of the form of order sought by the Council. By letter of 4 October 2007, the Commission informed the Court that it waived the right to lodge a statement in intervention, but that it would take part in the hearing.

59 By document lodged at the Court Registry on 5 April 2007, CEC sought leave to intervene in the present case in support of the form of order sought by the Council.

60 By documents lodged at the Court Registry on 13 April 2007, the Provincia di Ascoli Piceno (Italy), the Comune di Monte Urano (Italy), BA.LA. di Lanciotti Vittorio & C. Sas and 16 other interveners listed in the annex ('the Italian producers') sought leave to intervene in the present case in support of the form of order sought by the Council.

61 By order of 4 September 2007, the President of the Second Chamber of the Court granted the applications for leave to intervene lodged by the Commission, CEC and the Italian producers. However, the applications of the Provincia di Ascoli Piceno and the Comune di Monte Urano were dismissed.

62 As the composition of the Chambers of the Court had been altered, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was therefore assigned.

63 By application lodged at the Registry of the Court of Justice on 4 October 2007, the Provincia di Ascoli Piceno and the Comune di Monte Urano lodged an appeal under the first paragraph of Article 57 of the Statute of the Court of Justice, seeking to have the order of 4 September 2007 set aside in so far as it dismissed their applications to intervene. By order of 25 January 2008 (Case C-461/07 P(I) *Provincia di Ascoli Piceno and Comuna di Monte Urano* v *Council*, not published in the ECR) the President of the Court of Justice dismissed that appeal.

64 CEC and the Italian producers lodged their statements in intervention on 15 and 18 October 2007 respectively.

65 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure, the applicant, the Council and the Commission were called on to reply in writing to a number of questions.

66 By letters received on 2 February 2009, those parties complied with the measures of organisation of procedure taken by the Court.

67 By letter of 17 February 2009, the Council requested that some parts of the applicant's reply concerning the second plea in law and the documents annexed thereto be removed from the case-file, on the ground that those replies bore no relation to the questions asked but constituted new pleas in law.

68 The parties presented oral argument and replied to the questions put by the Court at the hearing on 18 February 2009.

69 At the hearing, the Court requested the applicant to produce a document and to provide written information. The applicant complied with those requests by letter of 25 February 2009.

70 The applicant claims that the Court should:

— annul the contested regulation in so far as it concerns the applicant;

— order the Council to pay the costs.

71 The Council contends that the Court should:

— dismiss the action as inadmissible or as unfounded;

— order the applicant to pay the costs.

72 The Commission contends that the Court should dismiss the action.

73 CEC and the Italian producers contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

74 In support of its action, the applicant puts forward six pleas in law, alleging respectively:

— breach of Article 2(7)(c) of the basic regulation;

— breach of Article 18 of the basic regulation;

— breach of Article 3 of the basic regulation;

— breach of Article 20 of the basic regulation, breach of the rights of the defence, failure to state reasons concerning the injury sustained by the Community industry;

— error of law and manifest error of assessment concerning the injury sustained by the Community industry, and

— breach of Article 2(10) of the basic regulation and manifest error of assessment concerning the comparison between export price and normal value.

First plea: breach of Article 2(7)(c) of the basic regulation

Arguments of the parties

75 The applicant disputes the Commission's finding that the first criterion set out in Article 2(7)(c) of the basic regulation was not met in its case. It emphasises in that regard that the documentary evidence supplied during the administrative procedure shows that it was free to decide whether to market its products on the domestic market or to export them. The obligation to submit an application for a business licence and to amend that licence exists for registration purposes and does not prove that there was significant State interference within the meaning of Article 2(7)(c) of the

basic regulation. Furthermore, the applicant explained to the Commission that the fact that its entire production was sold for export was its own commercial decision (see paragraphs 22 and 23 above).

76 The Commission also breached, in particular, the principle of equal treatment by granting MET to another sampled company, Foshan City Nanhai Golden Step Industrial Co., Ltd ('Golden Step'), when there is nothing to justify that difference in treatment.

77 The applicant recalls that it had supplied the Commission on 13 July 2006, that is to say, before expiry of the prescribed deadline for comments on the final disclosure document, with the same evidence as that supplied by Golden Step, namely a copy of its business licence and its amended articles of association showing that it was no longer subject to an export obligation (see paragraph 46 above). The Commission's refusal to examine that evidence constitutes a breach of Article 20(5) of the basic regulation and also of the principles of sound administration and equal treatment, since Golden Step also produced evidence after expiry of the deadline set for submitting comments on the general disclosure document (see paragraph 38 above). Furthermore, the basic regulation does not specify any deadline for the production of evidence relating to changes in circumstances. In addition, the Commission failed to observe the three-month time-limit provided for in Article 2(7)(c) of the basic regulation for deciding on the applicant's MET claim.

78 The assessment set out at recital 77 to the contested regulation, that the failure to examine the information in question was attributable to the fact that it was impossible to carry out a verification in accordance with Article 16(1) of the basic regulation (see paragraph 52 above), is incorrect. First, more than three months elapsed between 13 July (the date on which the additional evidence was produced) and 5 October 2006 (the date of adoption of the contested regulation); second, no verification was carried out in relation to the evidence of the same type produced by Golden Step; third, the applicant was not informed until 7 July 2006 that the Commission was prepared to

accept additional evidence; and, fourth, it was specifically in response to the findings made in the course of a verification visit that the applicant produced the evidence in question. It is, moreover, apparent from the case-law that the Commission has a broad discretion when deciding to take into account evidence submitted after expiry of the deadlines.

79 The argument that, even if the applicant ought to have qualified for MET, the time available to the Commission was insufficient for the purposes of calculating normal value cannot be upheld. That consideration cannot justify, in the light of Article 2(7)(c) of the basic regulation, the refusal to grant MET. Furthermore, that data on the applicant's production costs had already been supplied in the context of the anti-dumping questionnaire and verified during the Commission's on-site visit. In addition, as observed at paragraph 78 above, three months elapsed between the submission of the last information on the destination of the applicant's production and the adoption of the contested regulation.

80 The applicant disputes the Council's argument that rejection of the second plea would entail rejection of the first. Even if it should be held that the applicant did not co-operate with respect to the calculation of the export price, normal value could have been calculated on the basis of the information in its own accounts, allowing for an individual dumping margin to be established. In addition, the applicant indisputably provided all the information requested of it, so that Article 18(6) is not applicable. That provision has the effect of precluding an operator which has withheld relevant information from objecting to the fact that its lack of cooperation had unfavourable consequences for it. Accordingly, there is no provision or practice that can deprive the applicant of MET if it satisfies the conditions for a grant of that status.

81 It follows that the Commission's decision not to grant the applicant MET is vitiated by a manifest error of assessment and thus constitutes a breach of Article 2(7)(c) of the basic regulation.

82 The Council, supported by the Commission, disputes the applicant's arguments.

Findings of the Court

83 It is apparent from recital 125 to the contested regulation that '[f]or sampled companies that did not meet the MET … criteria one weighted average dumping margin was calculated', that 'this weighted average dumping margin applies to cooperating non-sampled companies', and that 'as cooperation was high the same dumping margin was applied to all other Chinese exporting producers as well'. In addition, the Council indicated in recital 146 to the contested regulation that 'the level of cooperation was high and consequently, consistent with standard practice, it was considered appropriate to set the dumping margin for any non-cooperating exporting producers at the level of the weighted average dumping margin established for cooperating exporting producers in the sample in the countries concerned'. It is therefore apparent from a joint reading of those provisions – the legality of which has not been challenged before the Court – that, if the applicant had obtained MET but had been considered not to have cooperated, the institutions would, in any event, have attributed to it the weighted average dumping margin established for cooperating exporting producers in the sample, because it had not cooperated. It follows that, even if the institutions wrongly refused to grant MET to the applicant, that error could not have a decisive effect on the outcome if the Court were to confirm the institutions' assessment that the applicant did not cooperate with the investigation. Accordingly, if the Court were to reject the second plea in law, challenging the institutions' assessment in that regard, any error committed by the institutions in relation to the granting of MET could not have decisive influence on the dumping margin applied to the applicant and therefore would not be sufficient to warrant annulment of the contested regulation (see, to that effect, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49).

84 It is therefore appropriate to examine the second plea in law first.

Second plea: breach of Article 18 of the basic regulation

Arguments of the parties

85 The applicant maintains that the Commission incorrectly applied Article 18(1) of the basic regulation, read in conjunction with paragraph 3 of Annex II to the 1994 anti-dumping code (see paragraphs 12 and 13 above). As the applicant explained in the letter of 6 March 2006 (see paragraph 26 above), the reasoning which the Commission followed in its fax of 24 February 2006 (see paragraph 25 above) did not justify the application of that provision. In those circumstances, the Commission also breached Article 18(3) and (4) of the basic regulation.

86 As regards the latter provisions, the applicant submits that by informing it more than four months after its on-site verification visit that the transaction-by-transaction list of its sales on the Community market provided during that visit was not reliable, the Commission failed to comply with the requirements arising under those provisions.

87 The initial response to the anti-dumping questionnaire, lodged by the applicant on 12 September 2005, showed that exports intended for the European market during the investigation period came to [*confidential*] [1] pairs. That was the correct figure accepted by the Commission during the verification visit. The difference between that figure and the figure of [*confidential*] pairs exported that was mentioned in the document submitted by the applicant on 19 September 2005 is the consequence, first, of the inclusion in the latter figure of [*confidential*] pairs not intended for the Community market; second, of the fact that the applicant was not aware of the final destination of its entire production, since its exports were made through intermediate

1 — Confidential data omitted.

independent trading companies; and, third, of the inclusion in that list of sales of footwear not covered by the definition of the product concerned.

88 Following a number of checks seeking to determine, in all likelihood, the final destination of the relevant exports and to exclude sales of products other those of the product concerned, the applicant submitted a final list on 21 October 2005, that is to say, before the expiry of the deadline set for submission of corrected materials following the verification visit.

89 As regards the conduct of that visit, on day one the Commission's agents selected a sample of 21 transactions (12 of which related to the product concerned) and on the following day they examined the documents relating to those transactions. Furthermore, they chose 13 transactions concerning exports to the Community market in order to determine the export prices on the basis of the related documents. The verified export prices proved to be correct. It is therefore incorrect for the Council to maintain that the Commission's agents were unable to select and verify a sample of transactions during the visit. In addition, it follows from the foregoing that no verification was necessary after the final list of 21 October 2005 had been submitted (see paragraphs 21 and 88 above), since that document merely removes the sales not intended for the Community market and those of footwear not covered by the definition of the product concerned, that is to say irrelevant material, and adds nothing. The verification was therefore not flawed.

90 In any event, contrary to the Council's contention, the applicant did not breach any provision of the basic regulation by submitting the final list on 21 October 2005. Even on the assumption that the facts raised by the Council could result in the application of Article 18(1) of the basic regulation (quod non), there was no reason why the Commission should not have used the export prices (the only relevant material) verified during the on-site verification visit and not disputed, since the Council's objections relate only to the volumes of footwear exported. Those prices constitute facts available to the Commission within the meaning of Article 18(1) of the basic regulation.

91 In addition, the Commission did not respond to the comments which the applicant made in its letter of 6 March 2006, nor did it state its position on the explanations given during the verification visit, which would have made it possible to clarify all the discrepancies, to validate all the information on prices and to understand the particularities of the applicant's distribution chain. Thus, the Commission did not examine that list carefully and impartially.

92 The applicant was not informed during the verification visit that the Commission would not accept further corrections, although it supplied the Commission with explanations concerning the difficulties in compiling the final list. On the contrary, it is clear from the Commission's conduct that it had not precluded examining the corrected lists, as it also did with respect to other data.

93 As regards the data relating to the c.i.f. Community frontier prices (see paragraphs 25 and 26 above), the applicant submits that it explained during the investigation that its sales were invoiced f.o.b. and not c.i.f. Community frontier. The applicant was therefore not in a position to provide data relating to costs incurred between the products leaving the factory and their arrival at the Community frontier, which include the substantial profits of the independent trading companies, the amount of which is not known by the applicant. It is because the applicant was unable to obtain the c.i.f. frontier values that it invited the Commission to apply the reliable data provided by the independent trading companies relating to costs borne between the f.o.b. sale and arrival at the Community frontier. It follows that the applicant acted 'to the best of its ability' to provide the information available to it, which the Commission could have supplemented in order to arrive at a 'reasonably accurate finding'.

94 The Council, supported by the Commission, disputes the applicant's arguments.

Findings of the Court

95 It must be pointed out that the parties disagree as to the facts in relation to the present plea. In particular, while the applicant claims that the Commission's agents were able to obtain a sample of export sales of the product concerned to the Community market, to examine the documentation relating to that sample and to verify the export price, the Council largely contests that claim. The Council contends that the Commission's agents were not able to carry out any examination of the documents relating to the exports of the product concerned to the Community market during the on-site verification visit, and therefore unable to verify the export price.

96 In that regard, it must be observed that the Council does not dispute that the Commission's agents actually selected, on the first day of the on-site verification visit, a sample of export sales of the product concerned to the Community market. The reason for that, according to the Council, is that, at that stage, the Commission's agents had not yet established which of the two sets of figures provided by the applicant on 12 and 19 September 2005 respectively were correct. Therefore, if it had been proven that the list of 19 September 2005 – on the basis of which the verification had been carried out – was correct, the Commission's agents would have proceeded, the following day, to verify the selected sample, as the applicant would have gathered, in the meantime, all the documents relating to the sample transactions.

97 It must however be noted, as the Council has noted, that there is no point in verifying a sample of transactions for the purposes of calculating the export price on the basis of all the transactions on the transaction-by-transaction list of sales on the Community market, when it has been established that that list also includes export sales which should not be included. If it is established that such a list contains a substantial number of unidentified sales, whether they are products which are not covered by the definition of the product concerned or products which are not exported to the Community market, the verification of a sample of sales, even if it proves convincing, does not remedy the problem that it is not possible to use all the transactions on the list because that list is unreliable.

98 In the present case, first, it is not in dispute between the parties that, during the verification visit, the Commission's agents agreed with the applicant's representatives on the total volume of exports of the product concerned to the Community market ([*confidential*] pairs). The parties also agree on the fact that that volume came from the applicant's sales ledger. Therefore, it must be held that the information provided to the Commission on 19 September 2005 ([*confidential*] pairs; see paragraph 87 above) referred to a volume of exports overstated by approximately 60% in relation to the actual exports of the product concerned to the Community market, and that it was not possible to identify the irrelevant exports during the verification visit. In addition, it should be borne in mind that the applicant had already put forward, on 12 September 2005, a third figure of [*confidential*] pairs. Thus, despite the fact that the applicant was in possession of data relating to the total volume of its exports to the Community market, the lists which it supplied during the administrative procedure contained inconsistent information, which, moreover, did not provide the details necessary to explain the contradictions found. Lastly, the explanations offered by the applicant during the administrative procedure did not provide a convincing explanation for the discrepancies found.

99 Second, in reply to a written question from the Court, the Commission indicated that, if the transaction-by-transaction list of sales on the Community market, which the applicant submitted before or during the verification visit, had not contained those discrepancies, it would have calculated the export price on the basis of all of the transactions on that list. That list would have been presumed to be reliable if it had tallied with the total volume of exports of the product concerned indicated in the applicant's sales ledger and the verification of a sample of transactions had also successfully taken place.

100 Third, it must be pointed out that the case-file contains no evidence that the Commission's agents actually verified the information relating to the sample of sales during the verification visit. The evidence on which the applicant relies consists of the Commission's agents' handwritten notes in the margin of some transactions on the applicant's transaction-by-transaction list of its sales on the Community market and thus proves, at the very most, that those agents chose those sales for the sample, but not that they verified the documents relating to each of them.

101 Fourth, it is not apparent from the case-file that the Commission, either during the on-site verification visit or later, indicated that it was willing to receive and verify a transaction-by-transaction list of sales on the Community market that corresponded to the correct total volume of exports of the product concerned to the Community market. In that regard, it should be noted that the communication relied on by the applicant in support of its assertions consists of an email dated 13 October 2005 sent by its legal adviser to a member of its staff. That email states, first, that a Commission agent agreed to extend the period granted for the submission of certain data relating to the calculation of the normal value (production costs) until 21 October 2005 and, second, that that same agent wanted to know whether the applicant's transaction-by-transaction list of its sales on the Community market, which was available to the Commission, was definitive.

102 Apart from the fact that that email does not come from the Commission but from the applicant, it does not indicate that the Commission set a time-limit of 21 October 2005 for the submission of a corrected version of the transaction-by-transaction list of sales on the Community market. Moreover, the fact that the Commission accepted corrected data relating to normal value submitted after the verification visit, such as production costs, does not imply that that institution was prepared, generally, to accept corrected data supplied after the verification visit in relation to any other aspect. As is clear from the handwritten notes made during the verification visit on the production costs chart submitted by the applicant in its response to the anti-dumping questionnaire, the Commission's agents requested the applicant to make a single, very specific, correction, that is to say, to add a specific amount to the costs incurred by Sun Sang Kong Yuen (Hong Kong).

103 Fifth, it must be pointed out that Article 18 of the basic regulation constitutes the implementation, into Community law, of the content of paragraph 6.8 of, and Annex II to, the 1994 anti-dumping code and must be interpreted in the light thereof in so far as possible (see, to that effect, Case T-45/06 *Reliance Industries* v *Council and Commission* [2008] ECR II-2399, paragraph 91). In that regard, it should be noted that recourse to the facts available is justified where an undertaking refuses to cooperate

or where it supplies false or misleading information, the second sentence of Article 18(1) of the basic regulation not requiring that conduct be intentional.

104 The degree of effort displayed by an interested party in submitting certain information does not necessarily reflect the substantive quality of the information submitted, and in any case is not the only determinant thereof. Thus, where the requested information is not ultimately obtained, the Commission is entitled to resort to the facts available in respect of the requested information (see, in relation to paragraph 6.8 of the 1994 anti-dumping code, the report of the panel established under the WTO entitled 'Egypt – Definitive anti-dumping measures on steel rebar from Turkey' and adopted on 1 October 2002, point 7.242).

105 That assessment is backed up by Article 18(3) of the basic regulation, according to which, where the information submitted is not ideal in all respects it should nevertheless not be disregarded, provided that it is not such as to cause undue difficulty in arriving at a reasonably accurate finding and the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability. The fact of having acted to the best of its ability constitutes, therefore, one of the conditions which must be met before the Commission is bound to take deficient information into account. As is apparent from paragraph 98 above, despite the fact that the applicant was in possession of data relating to the total volume of its exports to the Community market, the information which it sent to the Commission during the administrative procedure regarding its export sales was inconsistent, so that it cannot be considered to have acted to the best of its ability.

106 In those circumstances, the Commission was not obliged to take into account, for the purposes of calculating the export price, the transaction-by-transaction list of sales on the Community market submitted by the applicant before the verification visit, since use of all the information contained therein would necessarily have led to an incorrect result (see paragraphs 97 to 99 above).

107 As regards the list submitted on 21 October 2005, it should be observed that, even if the institutions are entitled to take into account information submitted to them after the time-limit which they have set (see, to that effect, Case T-413/03 *Shandong Reipu Biochemicals* v *Council* [2006] ECR II-2243, paragraph 67), the Commission was entitled to refuse to take account of that list, since it could not be verified without a second visit.

108 In that regard, it should be added that the Commission did not exceed its discretion by finding that the calculation of the export price could not be properly calculated on the basis of the information available at the time of the verification visit (see paragraphs 97 to 99 above). By implication, the Commission considered that the list supplied after that visit could not be used for calculating the export price, since it had not verified the sample transactions on-site. In those circumstances, the fact that the sample transactions also appear in the list submitted on 21 October 2005 is irrelevant.

109 In the light of the significant discrepancies found concerning the transaction-by-transaction lists of sales on the Community market submitted by the applicant during the administrative procedure, it must be concluded that the applicant did not cooperate as regards the calculation of its export price for the purposes of Article 18 of the basic regulation. Therefore, the second plea in law must be rejected.

110 In those circumstances, it must be held that the error alleged by the applicant in its first plea in law cannot render the contested regulation unlawful, since, even if the applicant had been granted MET, the institutions would, in any event, have attributed to it the weighted average dumping margin for the sample. It follows that the first plea in law must be rejected.

111 In the light of the rejection of the second plea in law, it is not necessary to rule on the Council's request that certain parts of the applicant's replies to the written questions from the Court be removed from the case-file (see paragraph 67 above).

Third plea: breach of Article 3 of the basic regulation

Arguments of the parties

112 As regards the calculation of the export price, the applicant takes the view that the Council did not take account, in the contested regulation, of the fact that the applicant sold its goods to independent trading companies which acted as intermediaries between Chinese producers and the distributors established on the Community market.

113 In the applicant's submission, independent trading companies, such as Pagoda, which is an intermediate trader for the applicant's sales on the Community market, bear a significant part of production and marketing costs, particularly in relation to marketing, the organisation of exports and research and development. Those costs, and also the independent trading companies' profit margins, ought to have been taken into account for the purpose of determining the c.i.f. Community frontier price and, accordingly, of calculating the price undercutting and the injury resulting from the applicant's exports.

114 In spite of the fact that the Commission was aware of the role played by the independent trading companies and had detailed figures concerning their profit margins, it failed to fulfil its obligation to carry out an objective examination of all the relevant material for the purpose of determining injury, in accordance with Article 3 of the basic regulation and Article 3 of the 1994 anti-dumping code. By failing to take into consideration all the costs incurred between the applicant's f.o.b. price and the price on arrival at the Community frontier, and by not taking into account the profit margins of the independent trading companies, such as Pagoda, the Commission therefore miscalculated the undercutting margin in the applicant's case. A correct calculation would have resulted in a lower or even zero anti-dumping duty.

115 It follows that, if the applicant had been granted MET, the taking into account of the abovementioned factors could have led to an injury margin lower than its dumping margin.

116 The Council disputes, first, the admissibility of this plea, claiming that it does not satisfy the requirements of Article 44 of the Rules of Procedure of the Court, in that it does not clearly set out the facts on which it is based. The plea is not supported by any coherent argument and the assertions which it contains do not contradict the facts established by the institutions or demonstrate any error on their part.

117 Next, the Council claims that the applicant failed to mention that the reason why no export price was established for the applicant was to be found in the absence of a reliable transaction-by-transaction list of its sales on the Community market. Its export price could not therefore be used in order to calculate the undercutting/underselling margins for Chinese imports. Those margins were established by reference to the export prices of the fully cooperating sampled undertakings. Accordingly, even on the assumption that the institutions ought to have increased the applicant's export prices by the margin of the intermediate trading companies, that conclusion would not alter the final result.

Findings of the Court

118 The Council's plea of inadmissibility, summarised in paragraph 116 above, must be rejected. The applicant has clearly pointed out that the failure to take account of the trading companies, such as Pagoda, and therefore of their profit margins, for the purposes of calculating the injury margin, constituted an infringement of Article 3(2) of the basic regulation, in so far as that provision requires an objective assessment

of undercutting. In addition, by stating explicitly that the independent trading companies take their profit margins before the goods enter the Community territory, the applicant has set out the reason for which it was of the view that the institutions ought to have taken those profits into account in the context of calculating the applicant's export price if they wanted to calculate that undercutting objectively. The applicant therefore set out its complaints in a sufficiently precise way to enable the Council to understand the omissions for which it was being criticised and the importance of those omissions in the calculation of injury and to allow the Court to assess the merits of the claims in question.

119 As regard the merits of the plea, it is clear from paragraphs 112 to 115 above that the applicant complains that, when calculating undercutting, the Council did not take account of the profits of the trading companies, and in particular of Pagoda, in determining the c.i.f. Community frontier price of its exports when calculating undercutting.

120 In that regard, it must be noted that, as is clear from the examination of the second plea (see paragraphs 95 to 110 above), the institutions did not exceed their discretion by considering that the transaction-by-transaction list of sales on the Community market supplied by the applicant could not be used for the purposes of calculating the export price of the products which it manufactured. Therefore, even if the institutions ought to have taken into account the involvement of the Pagoda trading company in the calculation of the applicant's c.i.f. Community frontier price, when calculating the undercutting margin, that could have no effect on the calculation of that margin. Since the export price of the applicants' products was not used for the purposes of calculating the undercutting margin, taking into account Pagoda's profit margins in the context of the transit of those goods to the Community market cannot affect the undercutting margin established on the basis of the export prices of other fully cooperating sampled undertakings.

121 It follows that the third plea in law must be rejected.

Fourth plea: breach of Article 20 of the basic regulation, breach of the rights of the defence and failure to state reasons

Arguments of the parties

122 The applicant claims that the institutions did not adequately inform it of the new factual analysis regarding the injury suffered by the Community industry or give it the opportunity to comment on that new approach taken with respect to the type of definitive duties (see paragraphs 41 to 48 above). Furthermore, the Commission failed to provide an adequate explanation of its reasons for changing its analysis and using different data from those used in its initial proposal.

123 Whereas the Commission considered in the final disclosure document that imports of 140 million pairs of footwear per annum did not cause injury to the Community industry, it significantly reduced that figure to 41.5 million pairs in the additional final disclosure document without explaining its reasons for changing that figure, which had the 'perverse effect' of reversing, by means of a manipulation made on the basis of the reference years, the value of the duties imposed between China and Vietnam. As regards their economic rationale, the quotas established by a delayed duty system are intended to deal with import volume pressures which are not, however, deemed to comprise unfair practices, whereas anti-dumping measures are designed to deal with unfair dumping practices. In view of those differences, the period of five days within which the Commission allowed the applicant to submit its comments on the new proposal is inadequate, and the applicant complained of this during the administrative procedure.

124 The contested regulation, recital 301 to which followed the Commission's proposal, does not contain sufficient reasoning with respect to that discrepancy and fails to explain why the institutions followed the new methodology. By contrast, recital 301 to the contested regulation merely reproduces the wording of point 280 of the additional

final disclosure document, which does not contain any further information. Furthermore, the additional final disclosure document does not contain any figures or calculations to support the methodology, described at recital 301 to the contested regulation, and does not serve to explain the use of different years, values and volumes different from those used in the first proposal. In addition, the institutions breached Article 20 of the basic regulation, which requires the disclosure of details underlying the essential facts and considerations on the basis of which the Commission intends to propose the adoption of the definitive measures. The factual assessment underlying the Commission's new approach was not explained or justified.

125 In addition, the Commission breached the applicant's rights of defence inasmuch as it did not allow it to make its views known effectively on a number of significant matters, such as the reasonableness of the new proposal, the correctness and relevance of the facts and circumstances alleged, the calculations carried out and the evidence put forward by the Commission to support its determinations on dumping and the injury suffered by the Community industry. The two systems are characterised by fundamental differences in the factual analysis on which they are based. Those differences gave rise to radically different consequences for Chinese and Vietnamese producers without any explanation from the Commission as to how it arrived at that outcome or any opportunities being given to the parties concerned to exercise their rights of defence.

126 The Council's attempt to minimise the differences between the two proposals by stating that the system adopted took into account the fact that only imports above certain volume thresholds were injurious entails the imposition of anti-dumping duties on imports which cause no injury, which constitutes a breach of Article 1(1) of the basic regulation. The fact that the applicant was able to make some comments with respect to that system, within a period shorter than the minimum period of 10 days laid down in Article 20(5) of the basic regulation cannot, moreover, be held against the applicant, nor can it compensate for the inadequacy of information provided by the Commission. The question whether the time given by the Commission was adequate for the purposes of complying with the applicant's rights of defence has to be assessed in

the light of the extent of the change in methodology adopted by the Commission, and the lack of data on, or explanation of, the new legal and factual assessment. In that regard, the applicant states that, where the institutions offer no adequate explanation of the methodology and the factual assessment which they are using, the fact that the applicant was able to make some comments is of limited value and does not imply that the requirements of Article 20 of the basic regulation and the general principles of Community or WTO law have been fulfilled. In addition, the Commission itself adopted a very restrictive timetable, which precluded any extension to the deadline allowed for submitting comments on the additional final disclosure document. Furthermore, the discussions which took place over many months concerned the delayed duty system and not the system eventually adopted.

127 The applicant submits that as a result of the shortcomings of the additional final disclosure document and of the insufficient period granted, it did not have the opportunity to explain to the Commission the reasons why the approach adopted was inappropriate and unreasonable or to put forward its view on the methodology or the figures underlying the proposal contained in that document.

128 Lastly, the applicant adds that, if it had been given an opportunity properly to submit comments, it would have submitted, first, that the proposed system was tantamount to an infringement of Article 1(1) of the basic regulation in so far as it resulted in the imposition of anti-dumping duties on imports which do not cause injury, secondly, that an individual injury margin should have been calculated for it and, thirdly, that the Commission's final proposal was unreasonable and disproportionate inasmuch as the revised factual assessment, which was not explained or justified, had the 'perverse effect' of reversing the respective burden of the anti-dumping measures as between China and Vietnam.

129 The Council, supported by the Commission and the CEC, disputes the applicant's arguments.

Findings of the Court

130 By its fourth plea the applicant claims, first, that the institutions breached Article 20 of the basic regulation on the grounds that the Commission did not communicate the information on which it based the calculations made in the additional final disclosure document and did not allow the applicant a sufficient period of time consistent with Article 20(5) to submit full comments on its new approach.

131 Secondly, the applicant maintains that the institutions did not set out in the final disclosure document, the additional final disclosure document, or the contested regulation the grounds for the methodology which was applied in order to take into account the existence of a volume of imports which caused no injury and which reduced the injury margin instead of exempting the non-injurious imports from the imposition of anti-dumping duties. Those circumstances constitute a breach of the applicant's rights of defence and a failure to state reasons.

132 It should be noted, at the outset, that Article 20 of the basic regulation sets out the means by which the parties concerned, including exporters, exercise their right to be heard, which constitutes one of the fundamental rights recognised by the Community legal order and includes the right to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive anti-dumping duties (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 15, and Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 55).

133 In those circumstances, the applicant's arguments regarding a breach of Article 20 of the basic regulation must be interpreted as referring to a breach of its rights of defence, as enshrined in the Community legal order including in that provision (see, to that effect, Case T-88/98 *Kundan and Tata* v *Council* [2002] ECR II-4897, paragraph 131).

134 In the regard, it must be borne in mind that the undertakings affected by an investigation preceding the adoption of an anti-dumping regulation must be placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (*Al-Jubail Fertilizer* v *Council*, paragraph 132 above, paragraph 17; Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraph 99; *Champion Stationery and Others* v *Council*, paragraph 132 above, paragraph 55; and *Kundan and Tata* v *Council*, paragraph 133 above, paragraph 132).

135 It should also be noted that the incomplete nature of the final disclosure does not render a regulation imposing definitive anti-dumping duties unlawful unless, on account of that omission, the interested parties were not in a position to properly defend their interests. That would be the case where the omission concerns facts or considerations different than those used in relation to the provisional measures, to which particular attention must be paid in final disclosure, pursuant to Article 20(2) of the basic regulation. That would also be the case, for the same reasons, where the omission concerns facts or considerations different than those which form the basis of a decision taken by the Commission or the Council, subsequent to final disclosure being made, as is apparent from the last sentence of Article 20(4) of the basic regulation.

136 In the present case, as it was pointed out in paragraphs 42 to 44 above, the Commission first recommended, in the final disclosure document, a delayed duty system based on the fact that only imports over 140 million pairs of footwear per annum caused injury within the meaning of Article 3 of the basic regulation. That assessment was based on the existence of a quantitative quota regime until 1 January 2005, which prevented such injury, and on a calculation of the quantity of imports from China in 2005. According to that proposal, a definitive anti-dumping duty should be applied to imports from China of over 140 million pairs of footwear per annum. That duty was equal to the underselling margin, in this instance 23%.

137 Nevertheless, as has been explained in paragraphs 47 and 48 above, the Commission, in the additional final disclosure document, amended its proposal relating to the type of duties necessary to eliminate the injury. That new approach was also based on the existence of a volume of imports which did not cause injury within the meaning of Article 3 of the basic regulation. However, according to the additional final disclosure document, both the method for calculating that volume of non-injurious imports and that volume's impact on the type of definitive duties proposed were different than those set out in the final disclosure document.

138 In particular, in the additional final disclosure document, the Commission, first, noted that the underselling margin for imports from China amounted to 23%. Second, it established that the volume of imports coming from China during the investigation period amounted to 38% of the imports coming from the two countries targeted. That percentage, applied to all of the imports from China and Vietnam in 2003 (109 million pairs of footwear), was equivalent to approximately 41.5 million pairs of footwear, a volume which was considered not to cause injury to Community industry. Third, the Commission found that that volume represented 28.26% of the imports coming from China in 2005. Lastly, fourth, it reduced the original injury margin (23%) by 28.26%, which gave a 'weighted' injury margin of 16.5%.

139 It follows from the foregoing that the differences between the method set out in the final disclosure document and the method set out in the additional final disclosure document are as follows: first, instead of establishing the annual volume of non-injurious imports at the level of imports from China in 2005, the Commission established that annual volume by multiplying the 109 million pairs of footwear in 2003 by 38%. That is the percentage of the total imports – coming from the two countries targeted during the investigation period – which the imports originating in China represent. Second, instead of exempting that annual volume – categorised as non-injurious in paragraphs 278 to 280 of the additional final disclosure documents – from an anti-dumping duty, the Commission chose to take that volume into account by reducing

the injury elimination level and imposing anti-dumping duties on all imported pairs, from the first pair imported.

140 In that regard, it must be held that the fact that the Commission amended its analysis following comments made by the interested parties on the final disclosure document does not, in itself, constitute a breach of the rights of the defence. As is clear from the last sentence of Article 20(4) of the basic regulation, the final disclosure document does not prejudice any subsequent decision which may be taken by the Commission or the Council. That provision limits itself to imposing the duty on the Commission to communicate, as soon as possible, the facts and considerations which are different to those underpinning its initial approach contained in the final disclosure document. It is on the basis of that explanation that the interested parties are in a position to understand the reasons which led the institutions to adopt a different position.

141 Therefore, in order to determine whether the Commission respected the rights granted to the applicant under the last sentence of Article 20(4) of the basic regulation, it is still necessary to ascertain whether the Commission sent to it the facts and considerations relied on for the purposes of the new analysis on the injury and on the type of measures required to eliminate that injury, to the extent that those facts and considerations differ from those relied on in the final disclosure document (see paragraph 135 above).

142 In that regard, first, the Commission explained in the additional final disclosure document that its new proposal meant that it did not have to distinguish between the different categories of importers.

143 As regards, next, the factors on the basis of which the Commission adjusted the injury margin from 23 to 16.5%, the applicant is wrong to claim that it did not have access to that information. The method described in paragraph 138 above, concerning the adjustment of the injury margin taking account of a volume of non-injurious imports, appears in the additional final disclosure document. It is true that that document does

not give details on the exact volume of imports coming from China in 2005, which would allow for the figure of 28.26% to be verified as corresponding to the reality. None the less, given that, according to the Commission, 41.5 million pairs of footwear represent 28.26% of the total imports coming from China in 2005, it can be inferred therefrom that those imports amounted to 146.85 million pairs of footwear. Indeed, that calculation was made by the applicant itself in its email of 2 August 2006 (see paragraph 49 above).

144 It follows from the foregoing that the Commission communicated to the applicant the reasoning which it followed in calculating the injury margin taking account of a volume of non-injurious imports. It also set out all the detailed figures which it considered to be relevant thereto, such that the applicant's rights of defence were not breached in that regard.

145 It must also be pointed out – as the Council has pointed out – that the applicant's plea, as developed in the application, alleges a breach of its rights of defence and not a breach of Article 1(1) of the basic regulation. It follows that the issue as to whether the system adopted under the contested regulation, inasmuch as it imposes anti-dumping duties on imports below the annual threshold which were considered not to cause injury, is compatible with Article 1(1) of the basic regulation has not been submitted as such for review by the Court.

146 As regards the period granted, the parties agree that it expired on 2 August 2006.

147 By granting the applicant a period of time less than 10 days to comment on the additional final disclosure document, the Commission breached Article 20(5) of the basic regulation (see, to that effect, *Champion Stationery and Others* v *Council*, paragraph 132 above, paragraph 80). Nevertheless, that fact cannot, in itself, lead to annulment of the contested regulation. It is also necessary to establish whether

the fact of having a period of time shorter than the lawful period was actually capable of affecting the applicant's rights of defence in the procedure in question (see, to that effect, Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraph 331).

148 In that regard, it should be noted that the applicant reiterated the Commission's calculations in its email of 2 August 2006 and that it submitted an alternative calculation which would have led to a different and, in the applicant's opinion, equitable outcome. Therefore, the applicant understood the Commission's reasoning and was in a position to suggest an alternative approach to it, without requesting an extension of the period granted. In those circumstances, it must be held that it could effectively make known its views.

149 It follows the applicant's rights of defence were not infringed.

150 For the same reasons, the applicant's line of argument alleging a failure to state reasons for the method applied to calculate the injury elimination level must be rejected. The statement of reasons for the contested regulation must be appraised having regard, in particular, to the information disclosed to the applicant and to its observations submitted during the administrative procedure (Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, paragraph 107).

151 In the present case, as has been pointed out in paragraph 56 above, recitals 296 to 301 to the contested regulation contain the appraisals which led the Council to adopt the system finally implemented. Consequently, in the light of the fact that the Commission communicated to the applicant the reasoning which it followed to calculate the injury margin taking account of a volume of non-injurious imports, and that the Commission also set out for the applicant all the detailed figures which it considered to be relevant thereto (see paragraphs 166 to 168 below), it must be found that the contested regulation is sufficiently reasoned.

152 Accordingly, the fourth plea in law must be rejected.

Fifth plea: error of law and manifest error of assessment concerning the injury sustained by the Community industry

Arguments of the parties

153 The applicant contends that the injury determination is not based on a sufficient period of normal imports and is not therefore supported by reliable and objective data. Since the investigation period lasted from 1 April 2004 to 31 March 2005, the Commission's conviction that the increase in imports after the lapse of the quota regime had a particularly decisive injurious effect for the Community industry was based solely on a three-month period, namely the first quarter of 2005. The clear indications of significant injury in 2004 to which the Commission refers at paragraph 277 of the new section H in the additional final disclosure document do not mean that significant injury was actually caused in 2004. The lack of significant injury in 2004 is borne out by the fact that imports increased only slightly in that year by comparison with 2003 and is confirmed by paragraph 285 of the final disclosure document.

154 The first quarter of 2005 was the initial period of an open market which for more than 12 years had been subject to strict quotas. As the Commission observed in the final disclosure document, that period following the lapse of the quota regime was artificially distorted by expectations linked with that event. The contested regulation is therefore based on data relating to a short period which could not provide reliable material owing to the lifting of the quotas. It follows that the Council has breached Article 3(2) of the basic regulation. In addition, there is no proof that the Commission examined injury factors for the whole of the period considered.

155 Lastly, the applicant observes that the quota regime was not intended to remedy the consequences of the dumped imports.

156 The Council, supported by the Commission and the CEC, disputes the applicant's arguments.

Findings of the Court

157 First, it must be observed that the adoption of anti-dumping duties is not a penalty for earlier behaviour but a protective and preventive measure against unfair competition resulting from dumping practices. In order to be able to determine the anti-dumping duties appropriate for protecting the Community industry against dumping, it is therefore necessary to carry out the investigation on the basis of information which is as recent as possible (*Industrie des poudres sphériques* v *Council*, paragraph 134 above, paragraphs 91 and 92, and Case T-138/02 *Nanjing Metalink* v *Council* [2006] ECR II-4347, paragraph 60).

158 Therefore, where the institutions find that the imports of a product which has until then been subject to quantitative restrictions increase after those restrictions have lapsed, they may take that increase into account for the purposes of their assessment of the injury suffered by the Community industry.

159 Secondly, as the Council observes, the Commission's assessment in paragraph 283 of the final disclosure document that the volume of imported products increased after the lapse of the quota regime does not establish that the institutions based their decision solely on that quantitative aspect in finding that there was injury.

160 Lastly, as is clear from recitals 162, 168 to 170, 187 to 206 and 216 to 240 to the contested regulation, the institutions took into account a number of factors, concerning the injury and the causal connection, relating not only to the last quarter of the investigation period, but also to the period considered.

161 It follows that the fifth plea in law must be rejected.

Sixth plea: breach of Article 2(10) of the basic regulation and manifest error of assessment concerning the comparison between export price and normal value

Arguments of the parties

162 The applicant claims that, by not making a fair comparison between export price and normal value, the Council breached Article 2(10) of the basic regulation. The methodology employed by the Commission in comparing the different styles of footwear led to distorted results.

163 In particular, the applicant claims that the Commission grouped under a single product control number several types of footwear with substantially different production costs and ex-factory prices. Accordingly, the comparison between export prices and prices paid on the domestic market resulted in 'greatly distorted dumping margins'.

164 During the investigation, the Commission provided examples of a single product control number incorporating very different styles of footwear, such as 'dress shoes' and

'moccasins'. Those types of footwear clearly differ as to the leather used, production processes and quality, leading to different prices. A slight improvement in the system employed would have satisfied the requirements of a fair comparison without compromising the effectiveness of the method. The Commission received detailed evidence during the administrative procedure showing that several types of footwear at very different prices were grouped under the same product control number. In those circumstances, it is for the Commission to improve its system and not for the applicant to propose a different system.

165 As regards the Council's argument to that effect, set out at recital 143 to the contested regulation, which states that what mattered was that the product control number system was consistently applied, the applicant responds that the consistent application of a faulty method does not remedy the incorrect nature of that method consisting in the comparison of products that are not comparable from the perspective of the consumer. In addition, no appropriate control procedures were applied.

166 The argument relating to the adjustments alleged to have been made is ineffective, since the adjustments in question do not remedy the consequences of the shortcomings mentioned above.

167 In the alternative, the applicant claims that the Council's conclusions set out at recital 143 to the contested regulation are vitiated by a failure to state reasons, in that the price variations found were justified only hypothetically and were not supported by any specific evidence.

168 Furthermore, the evidence on which those conclusions are based was not communicated to the applicant, which constitutes a breach of its rights of defence.

169 The applicant further maintains that the Commission also applied the product control number system in order to evaluate price undercutting and the anti-dumping duties that would remove injury. Accordingly, the Commission's approach is manifestly incorrect, in so far as it leads, for example, to a comparison between the c.i.f. price of a Chinese 'moccasin' type shoe and the ex-factory price of an Italian 'dress shoe'. That method precludes the possibility of an 'objective reasoned assessment' of the facts relevant to the determination of injury.

170 The Council, supported by the Commission and CEC, contends that the applicant's arguments are in part inadmissible and in part unfounded. As regards the admissibility of the applicant's arguments, it submits that a plea based on a general reference to the annexes to the application is inadmissible. That is so in respect of the arguments relating to the submissions to the Commission during the administrative procedure.

Findings of the Court

171 Concerning the plea of inadmissibility raised by the Council, it should be observed that the applicant set out its complaints in a sufficiently precise manner to enable the Council to understand the objections raised against the contested regulation and their significance in the context of calculating the dumping and injury margins, and to enable the Court to assess the merits of the claims in question. In addition, the referral to the annexes, as made in the present case, seeks to prove that the claims made in the application are well founded, which is the primary function of annexes.

172 Where the product concerned contains a wide range of goods which have considerable differences with regard to their characteristics and their prices, it may prove necessary to group them under categories which are more or less homogenous. The purpose of that grouping, as the parties have indicated, is to allow for a fair comparison

between comparable products and thereby to avoid an incorrect calculation of the dumping and injury margins owing to unsuitable comparisons.

173 In the present case, the Commission requested Chinese, Brazilian and Community traders to establish product control numbers on the basis of the characteristics set out in the following table:

Field description	Explanation	
Style of footwear	Indicate the style of footwear. Choose between:	
	— Urban footwear (city trotters)	A
	— Sandals	B
	— Thongs	C
	— Clogs	D
	— Other: family footwear, moccasins, wovens, etc.	E
Type of consumer	Indicate the type of consumer. Choose between:	
	— Men	A
	— Women	B
	— Unisex	C
	— Children	D
Type of footwear	Indicate the type of product concerned. Choose between:	
	— Not covering the ankle	A
	— Covering the ankle but not the calf	B
	— Covering the ankle and the calf	C

Material of outer sole	Indicate the material of the outer sole. Choose between:	
	— Leather or combination of leather and other material	1
	— Rubber, crepe or cork	2
	— PU (polyurethane) – PVC (polyvinyl chloride)	3
	— Wood	4
	— Other	5
Lining of the footwear	Indicate whether the footwear has a lining. Choose between:	
	— With lining	1
	— Without lining	2

174 Thus, unisex urban footwear which does not cover the ankle, with a rubber outer sole and lining is given the product control number ACA21.

175 As regards the determination of the dumping margin, it is clear from the table annexed to the final disclosure document, at page 303 of the case-file, that the Commission calculated a normal value for each product control number on the basis of the data compiled in Brazil. Further, it is clear from the table on page 302 of the case-file that the Commission compared, for each product control number, the normal value with the export price and calculated a dumping margin of 28.95%.

176 As regards the calculation of the injury caused by exports coming from China, it is apparent from the table on page 299 of the case-file that the Commission calculated an average price per pair of footwear for each product control number in order to compare them with the reference price which the Community industry would have

obtained with a 6% profit margin (see recital 292 to the contested regulation). The positive difference between the two prices constitutes the underselling and, therefore, the injury suffered by the Community industry, which was calculated at 23% (see paragraph 56 above).

177 In the present case, the applicant claims that the criteria used for the categories in question were so vague that they had the effect of grouping, under a single product control number, very different footwear as regards their characteristics and, therefore, as regards their price. That distorted the calculation of both the dumping and injury margins. In order to prove its claims, the applicant produced a table according to which several of the product control numbers included footwear for which the disparity in prices is such that the corresponding products are no longer comparable. Those details came from five Chinese traders, three of which were part of the sample. For example, the product control number AAB21 includes, according to the information provided by producer No 4, shoes with an ex-factory price of USD 26.30 and shoes with an ex-factory price of USD 112.09.

178 In that regard, it must be observed that the product control numbers are established on the basis of the individual characteristics of each sub-category of items coming within the definition of the product concerned and not on the basis of the price of each of those items. Thus, the fact that one product control number covers products within a wide range of prices does not establish, in itself, that the criteria chosen for implementing that system are not well founded.

179 As the Council points out, the applicant does not explain what the physical differences were between the footwear sold at the higher price and the footwear sold at the lower price, or how those differences could have been taken into account in a different system. Furthermore, as the Council stated in recital 143 to the contested regulation, price discrepancies can be caused by various factors, such as fashion trends and market psychology, which do not necessarily call into question the comparability of products under the same product control number. The applicant has not therefore proved

that the system based on the five characteristics, which the Commission conceived, was manifestly inappropriate.

180 As regards the applicant's argument alleging that the field relating to categories of footwear 'E' (Others) covers both 'dress shoes' and 'moccasins' (see paragraph 164 above), it must be noted – as the Council already has – that that field corresponds to only one of the five criteria used to establish the product control number system, and that the applicant has not established that the differences were so significant that they would have justified the creation of other categories of footwear to ensure a fair comparison.

181 Lastly, as regards the complaints alleging a failure to state reasons (see paragraph 167 above), it must be observed that, as there is no indication that the price discrepancies were due to physical differences that were not adequately taken into account by the product number control system, the institutions were not obliged to give a more detailed explanation of the possible reasons for those discrepancies.

182 Accordingly, the sixth plea in law must be rejected and the action dismissed in its entirety.

Costs

183 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with form of order sought by the Council.

184 In accordance with Article 87(4) of the Rules of Procedure, the Commission, CEC and the Italian producers shall bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd to pay its own costs and those incurred by the Council of the European Union;

3. Orders the European Commission, the Confédération européenne de l'industrie de la chaussure (CEC), BA.LA. di Lanciotti Vittorio & C. Sas and the 16 other interveners listed in the annex to bear their own costs.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 4 March 2010.

[Signatures]

Table of contents

Legal context ..... II - 814

Background to the dispute and the contested regulation ..... II - 824

Procedure and forms of order sought by the parties ..... II - 835

Law ..... II - 838

First plea: breach of Article 2(7)(c) of the basic regulation ..... II - 839

Arguments of the parties ..... II - 839

Findings of the Court ..... II - 842

Second plea: breach of Article 18 of the basic regulation ..... II - 843

Arguments of the parties ..... II - 843

Findings of the Court ..... II - 846

Third plea: breach of Article 3 of the basic regulation ..... II - 851

Arguments of the parties ..... II - 851

Findings of the Court ..... II - 852

Fourth plea: breach of Article 20 of the basic regulation, breach of the rights of the defence and failure to state reasons ..... II - 854

Arguments of the parties ..... II - 854

Findings of the Court ..... II - 857

Fifth plea: error of law and manifest error of assessment concerning the injury sustained by the Community industry ..... II - 863

Arguments of the parties ..... II - 863

Findings of the Court ..... II - 864

Sixth plea: breach of Article 2(10) of the basic regulation and manifest error of assessment concerning the comparison between export price and normal value ..... II - 865

Arguments of the parties ..... II - 865

Findings of the Court ..... II - 867

Costs ..... II - 871

Annex

Calzaturificio Elisabet Srl, established in Monte Urano (Italy),

Calzaturificio Iacovelli di Iacovelli Giuseppe & C. Snc, established in Monte Urano,

Calzaturificio Leopamy Srl, established in Monte Urano,

Calzaturificio Lunella Srl, established in Monte Urano,

Calzaturificio Mia Shoe Snc di Gattafoni Carlo & C., established in Monte Urano,

Calzaturificio Primitempi di Monaldi Geri, established in Monte Urano,

Calzaturificio R. G. di Rossi & Galie Srl, established in Monte Urano,

Calz. S. G. di Seghetta Giampiero e Sergio Snc, established in Monte Urano,

Carim Srl, established in Monte Urano,

Florens Shoes SpA, established in Monte Urano,

Gattafoni Shoe Snc di Gattafoni Giampaolo & C., established in Monte Urano,

Grif Srl, established in Monte Urano,

Missouri Srl, established in Monte Urano,

New Swing Srl, established in Monte Urano,

Podosan Medical Shoes di Cirilli Michela, established in Monte Urano,

Viviane Sas, established in Monte Urano.