JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

4 March 2010 *

In Case T-401/06,

Brosmann Footwear (HK) Ltd, established in Kowloon (China),

Seasonable Footwear (Zhongshan) Ltd, established in Zhongshan (China),

Lung Pao Footwear (Guangzhou) Ltd, established in Guangzhou (China),

Risen Footwear (HK) Co., Ltd, established in Kowloon,

represented by L. Ruessmann and A. Willems, lawyers,

applicants,

* Language of the case: English.

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

defendant,

supported by

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

and by

Confédération européenne de l'industrie de la chaussure (CEC), established in Brussels (Belgium), represented initially by P. Vlaemminck, G. Zonnekeyn and S. Verhulst, and subsequently by P. Vlaemminck and A. Hubert, 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 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), in so far as it concerns the applicants,

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

'(b) 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.

(c) A claim under [Article 2(7)](b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions …

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation …'

3 As regards the determination of injury, Article 3(2), (3), (6) and (7) 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 …

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

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

4 As regards the conditions for the initiation of an anti-dumping investigation, Article 5(2), (3) and (4) of the basic regulation provides:

'2. A complaint under paragraph 1 shall include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury …

3. The Commission shall, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

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

5 Article 6(8) and (9) of the basic regulation provides:

'8. Except in the circumstances provided for in Article 18, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.

9. For proceedings initiated pursuant to Article 5(9), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 15 months of initiation, in accordance with the findings made pursuant to Article 8 for undertakings or the findings made pursuant to Article 9 for definitive action.'

6 According to 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.'

7 As regards sampling, 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 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.'

8 Under Article 18(3) and (4) of the basic regulation:

'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 therefor 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.'

9 Article 20(1) and (2) 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.'

Background to the dispute and the contested regulation

10 The applicants, Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co., Ltd, are footwear-producing and exporting companies established in China.

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

12 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').

13 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.

14 The applicants contacted the Commission and on 25 and 26 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').

15 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').

16 According to recital 9 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 trends relevant for the assessment of injury covered the period from 1 January 2001 to 31 March 2005 ('the period considered').

17 In 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 Federative Republic of Brazil, took place at the premises of three Brazilian companies (recital 8 to the provisional regulation).

18 As regards the product concerned, it follows from recitals 10, 11, 40 and 41 to the provisional regulation that that regulation 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 ('STAF') from the definition of the product concerned and that it included children's footwear. According to recital 38 to the provisional regulation, all remaining types of footwear with

uppers of leather, although they cover a wide range of styles and types, have essentially the same basic characteristics, and their uses and consumer perception remain the same. Thus, all those various styles and types are, according to recital 39 to that regulation, in direct competition and to a very large extent interchangeable.

19 The Commission therefore concluded, at recital 52 to the provisional regulation, that 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 were alike to those exported from the countries concerned to the Community.

20 In ascertaining whether there had been dumping, the Commission applied sampling. Of the Chinese exporting producers which came forward in order to be included in the sample, 154 exported to the Community during the investigation period, according to recital 55 to the provisional regulation. According to the same recital, those companies were initially considered to be cooperating companies and were taken into account in the selection of the sample.

21 It follows from recital 57 to the provisional regulation that the Commission finally selected a sample consisting of 13 Chinese exporting producers representing more than 20% of the Chinese export volume to the Community. According to recital 59 to that regulation, the criteria taken into account in the selection of the sample were, first, the size of the exporting producer in terms of export sales to the Community and, second, the size of the exporting producer in terms of domestic sales. With respect to the latter criterion, the Commission stated at recital 60 to the provisional regulation that domestic sales figures would make the sample more representative by providing information on prices and costs associated with producing and selling the product concerned on the domestic markets. According to recital 61 to the provisional regulation, the Chinese companies selected for the sample represented 25% of export quantities to the Community and 42% of Chinese domestic market sales by producers which had cooperated in the investigation. According to the same recital, the exclusion of STAF from the definition of the product concerned did not significantly influence the representativeness of the sample.

22 According to recital 62 to the provisional regulation, exporting producers which were not finally retained in the sample were informed that any anti-dumping duty on their exports would be calculated in accordance with the provisions of Article 9(6) of the basic regulation. As regards the requests presented by those exporting producers which sought an individual dumping margin pursuant to Article 9(6) and Article 17(3) of the basic regulation, the Commission considered, at recital 64 to the basic regulation, that individual examination of those exporting producers would be unduly burdensome and prevent it from completing the investigation in good time. In those circumstances, the dumping margin of those producers was determined on the basis of the weighted average of the dumping margins of the companies in the sample (recitals 135 and 143 to the provisional regulation).

23 One of the 13 companies initially included in the sample did not respond to the anti-dumping questionnaire which the Commission sent it (recital 63 to the provisional regulation).

24 As regards the definition of the Community industry, the Commission observed, at recital 150 to the provisional regulation, that the complainants accounted for 42% of the total Community production of the product concerned. According to recitals 65 and 151 to the provisional regulation, the Commission selected a sample of 10 Community producers on the basis of their production volume and location. The producers in the sample represented approximately 10% of the production of the complainants. Thus, the 814 Community producers on whose behalf the complaint was lodged were deemed to constitute the Community industry within the meaning of Article 5(4) of the basic regulation (recital 152 to the provisional regulation).

25 As regards the identities of the Community producers taking part in the sample, the Commission observed that certain Community producers supply customers in the Community that also source their products in China and Vietnam and thus benefit directly from the imports in question. Those producers are therefore in 'a sensitive position', since some of their customers may not be satisfied with their having lodged or supported a complaint against alleged injurious dumping. Those producers therefore considered that there was 'a risk of retaliation' by some of their customers, including

the possible termination of their business relationship. The Commission therefore granted the request for confidential treatment of the identities of the companies selected to participate in the sample (recital 8 to the provisional regulation).

26 As regards the level which the provisional anti-dumping measures ought to reach in order to eliminate injury, the Commission stated, at recital 284 to the provisional regulation, that a profit margin of 2% of turnover could be expected for the Community industry in the absence of injurious dumping. That profit margin, according to the same recital, corresponds to the highest level of profit achieved by the Community industry during the period under examination and namely during 2002, when the market shares from the countries concerned were relatively limited by comparison with the level attained during the investigation period.

27 By letters of 7 and 12 April 2006, the Commission sent the applicants, pursuant to Article 14(2) and Article 20(1) of the basic regulation, respectively, 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 applicants to submit any comments which they might have on those documents by 8 May 2006.

28 By letters of 8 May 2006, two of the applicants, Brosmann Footwear (HK) Ltd ('Brosmann') and Lung Pao Footwear (Guangzhou) Ltd ('Lung Pao') sent the Commission their comments on the provisional regulation and the general disclosure document.

29 On 2 June 2006, a meeting took place between Lung Pao and the Commission at the Commission's headquarters.

30 By fax of 8 July 2006, the Commission sent the applicants, pursuant to Article 20(2) to (4) of the basic regulation, a final disclosure document setting out the essential facts and considerations forming the basis of the proposal to impose definitive anti-dumping duties. The Commission invited the applicants to submit their comments on the final disclosure document by 17 July 2006.

31 By letter of 28 July 2006, the Commission sent the applicants an additional final disclosure document.

32 By letters of 17 July and 2 August 2006, three of the applicants, Brosmann, Seasonable Footwear (Zhongshan), Lung Pao and Novi Footwear (Far East) Pte Ltd sent the Commission their comments on the final disclosure document and the additional final disclosure document. By letter of 7 August 2006, the other applicant, Risen Footwear (HK) Co. sent the Commission its comments on the additional final disclosure document.

33 On 5 October 2006, the Council of the European Union 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 imposed a definitive anti-dumping duty on imports of footwear with uppers of leather or composition leather, excluding sports footwear, STAF, slippers and other indoor footwear and footwear with a protective toecap, originating in China and falling within a number of 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 was established, for footwear produced by the applicants, at 16.5%. Pursuant to Article 3, the contested regulation was to remain in force for a period of two years.

34 As regards the product concerned, the Council confirmed the Commission's assessment (see paragraph 18 above), according to which STAF should be excluded from the definition of the product concerned, whereas children's footwear should be included (recitals 19 and 25 to the contested regulation). On the other hand, the Council rejected the requests to exclude from the definition of the product concerned six types of footwear, including patented technology footwear. With respect to that category of footwear, the Council observed that patented technology does not by itself substantially change the characteristics of being footwear for ordinary usage. Accordingly, that footwear remains in competition with the Community production of the product concerned (recital 37 to the contested regulation).

35 As regards the representativeness of the sample of the Chinese producers, the Council stated, at recital 44 to the contested regulation, that the undertakings taking part accounted for more than 12% of exports to the Community by the cooperating producers. Since Article 17 of the basic regulation lays down no threshold with respect to the level of representativeness, the sample taken is representative for the purposes of that provision.

36 The Council also stated, at recital 46 to the contested regulation, that the methodology applied was intended to ensure the highest possible representativeness of the samples and to include within the largest representative volume of exports that could reasonably be investigated some companies with representative domestic sales.

37 As regards the sample of Community producers, the Council, at recitals 53 to 59 to the contested regulation, rejected all the complaints questioning the representativeness of that sample and, accordingly, confirmed the findings of the Commission in the provisional regulation (see paragraph 24 above).

38 The Council dealt with the questions connected with the claims of a number of companies to be granted MET, on which the Commission had not ruled, at recitals 60 to 65 to the contested regulation.

39 According to those recitals, the fact that the Commission did not respond individually to each MET claim submitted to it does not constitute a breach of the basic regulation. It is, on the contrary, consistent with Article 17 of that regulation. The sampling methodology provided for in that article also applies where a high number of companies concerned request MET or IT. In the present case, the exceptionally high number of claims by the companies concerned left the administration with no alternative other than to examine only those from the companies which were part of the sample in order to balance necessities resulting from an as individualised as possible case assessment within the margin of mandatory deadlines. That entailed the application to all non-sampled companies of the weighted average margin resulting from the undertakings in the sample. It follows that the complaints formulated during the administrative procedure, according to which the dumping calculation is not representative, must also be rejected.

40 Those considerations also apply to claims for IT.

41 As regards the definition of the Community industry, the Council emphasised, at recital 157 to the contested regulation, that none of the complainants had been found not to cooperate with the investigation. Full injury questionnaires were sent only to the sampled Community producers, which followed from the very nature of sampling (recital 158 to the contested regulation).

42 As for the level at which the definitive anti-dumping duties would have to be set in order to eliminate injury, the Council referred at recital 292 to the contested regulation to evidence provided by the Community industry after the imposition of the

provisional duties, which showed that the profit margin of 2% fixed by the provisional regulation (see paragraph 26 above) must be reconsidered. On that basis, the Council increased that margin to 6% of the turnover of the Community industry, noting that it had in fact achieved that margin for footwear not subject to materially injurious dumping.

Procedure and forms of order sought by the parties

43 By application lodged at the Registry of the Court on 28 December 2006, the applicants brought the present action.

44 By document lodged at the Court Registry on 26 March 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 27 August 2007, the Commission informed the Court that it was waiving the right to lodge a statement in intervention, but that it would take part in the hearing.

45 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.

46 By documents lodged at the Court Registry on 21 May 2007 and 30 May 2008, the applicants requested that certain documents and information in their pleadings be excluded from the file communicated to CEC pursuant to Article 116(2) of the Rules of Procedure of the Court. To that end, the applicants produced a non-confidential version of the documents concerned.

47 By order of 2 August 2007, the President of the Second Chamber of the Court granted the applications to intervene lodged by the Commission and CEC.

48 By letter lodged at the Court Registry on 27 August 2007, CEC stated that it had no objection to the applicants' request for confidential treatment.

49 CEC lodged its statement in intervention on 19 September 2007.

50 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.

51 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure.

52 The parties presented oral argument and replied to the questions put by the Court at the hearing on 11 February 2009.

53 The applicants claim that the Court should:

— annul the contested regulation in so far as it imposes anti-dumping duties on footwear which they export;

— order the Council to pay the costs.

54 The Council contends that the Court should:

— dismiss the action as inadmissible or unfounded;

— order the applicants to pay the costs.

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

56 CEC contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs of its intervention.

Law

57 In support of their action, the applicants raise eight pleas in law, alleging, respectively:

— breach of Article 2(7)(b) and Article 9(5) of the basic regulation and breach of the principles of equal treatment and protection of legitimate expectations,

— breach of Article 2(7)(c) and Article 18 of the basic regulation and breach of the rights of the defence,

— manifest error of assessment and breach of Article 5(4) of the basic regulation,

— manifest error of assessment and breach of Article 1(4) and Articles 2 and 3 of the basic regulation,

— manifest error of assessment and breach of Article 17 of the basic regulation and of Article 253 EC,

— manifest error of assessment and breach of Article 3(2) of the basic regulation and of Article 253 EC,

— manifest error of assessment and breach of Article 3(2) of the basic regulation, and

— manifest error of assessment and breach of Article 9(4) of the basic regulation.

58 Since the first two pleas concern errors allegedly made by the Commission in so far as it refused to grant the applicants MET or IT without examining their MET/IT claims, they will be examined together.

The first two pleas: breach of Article 2(7)(b) and (c), Article 9(5) and Article 18 of the basic regulation, breach of the principles of equal treatment and protection of legitimate expectations and breach of the rights of the defence

Arguments of the parties

59 In their first plea, the applicants claim that, by examining only the MET/IT claims submitted by companies included in the sample of exporting producers, the Commission and the Council breached Article 2(7) and Article 9(5) of the basic regulation.

60 It follows from Article 2(7)(b) of the basic regulation that, in the case of imports from China, the institutions are to determine the normal value in accordance with paragraphs 1 to 6 of that provision, provided that the producers concerned have made a

'proper' claim. Likewise, it follows from the second subparagraph of Article 9(5) of the basic regulation that where MET is not granted, normal value is to be compared with the export prices charged by the exporter concerned (IT), provided that the exporter submits a properly substantiated claim showing that the conditions set out in that provision are satisfied.

61 As their wording confirms, Article 2(7)(b) and Article 9(5) of the basic regulation can be applied only on an individual basis, since they entail a consideration of the individual characteristics of each exporter concerned.

62 The sampling provisions deal with a limited number of aspects concerning the calculation of dumping margins, in accordance with Article 2(11) of the basic regulation, or the calculation of injury, and do not concern the economic conditions in which each company operates, to which sampling cannot apply. Article 2(7)(b) and Article 9(5) of the basic regulation would be rendered meaningless if, through the application of sampling, the institutions were relieved of the obligations deriving from those provisions, which, moreover, are drafted in mandatory terms and leave no discretion. Thus, the relevant question is not whether the institutions correctly applied Article 17 of the basic regulation for the purpose of the dumping margin calculation, but whether they are permitted to make use of that provision to ignore the MET/IT claims submitted by non-sampled operators and, accordingly, treat companies whose claims should be granted in the same way as those whose claims should not be granted.

63 Where sampling is used, the institutions must therefore apply to non-sampled companies whose MET/IT claims have been granted the weighted average dumping margin established for sampled companies which have been granted MET or IT, as appropriate. The case-law of the Court must be interpreted as meaning that it precludes the automatic refusal of MET or IT to companies which 'merit' it.

64 Furthermore, the practice previously followed by the institutions in two other cases confirms that each MET/IT claim must be examined individually. In addition, the institutions cannot rely on administrative constraints to justify the failure to comply with their obligation to examine each MET/IT claim, since a small number of additional members of staff would have been sufficient to examine those claims.

65 What is more, the institutions' approach is tantamount to a breach of the principle of equal treatment in so far as it treats the companies which cooperated, provided the required sampling information, submitted MET/IT claims and 'merited' being granted MET or IT in the same way as those which did not provide that information or did not submit such a claim or did not 'merit' MET or IT. Neither Article 17(3) of the basic regulation, which concerns only the calculation of a dumping margin and not the examination of MET/IT claims, nor administrative constraints can objectively justify that unequal treatment. In the present case, all the non-sampled producers which 'merit' MET ought to have been granted the same dumping margin (9.7%) as Foshan City Nanhai Golden Step Industrial Co., Ltd, the only sampled company to have been granted MET.

66 The failure to examine the MET/IT claims thus also constitutes a breach of the principle of protection of legitimate expectations, since the institutions' previous practice, and the invitation issued to exporters, by the notice of initiation, to submit MET/IT claims within a specific deadline, created the legitimate expectation on the part of the applicants that the institutions would examine each individual claim with a view to granting operators the dumping margin required by the considerations set out at paragraph 63 above. To interpret the notice of initiation otherwise would mean accepting that the Commission could ask all exporters to dedicate their resources to providing information in support of their MET/IT claims before the sample had been established, with no intention of examining them. Besides, the wording of the notice of initiation is the same as that of the notices published in the context of two other procedures, where the Commission had also examined the MET/IT claims submitted by non-sampled operators.

67 In the second plea, the applicants rely, first of all, on Article 2(7)(c) of the basic regulation, which requires that the question whether a producer satisfies the MET criteria be settled within three months of the initiation of the investigation. This is a binding procedural deadline that the Commission must comply with. By failing to adopt a decision in that regard within that deadline, the Commission breached that provision.

68 Next, the applicants claim that there has been a breach of Article 18(3) and (4) of the basic regulation, which provides that the institutions must not disregard information provided by the parties concerned even if it is not ideal in all respects and must inform the parties whose information is rejected and give them the opportunity to provide further explanations. Those provisions, which are applicable when the Commission is required to make determinations on MET/IT claims, mean that the Commission was required to inform the applicants in that regard and to state the reasons for its decision. However, the Commission did not respond to the applicants' submissions in that regard until in the final disclosure document, where it referred to the unprecedented number of MET/IT claims received. Since the Commission was aware of the number of MET/IT claims before the end of July 2005, there was nothing to prevent it from informing the applicants immediately after the expiry of the three-month deadline provided for in Article 2(7)(c) of the basic regulation, or, at the latest, in the provisional regulation, that their requests would not be examined. Accordingly, the institutions rejected, without justification, the information provided by the applicants and therefore breached Article 18(3) and (4) of the basic regulation.

69 In addition, while it is true that the notice of initiation informed operators wishing to obtain an individual dumping margin, in accordance with Article 17(3) of the basic regulation, that their claims were not certain to be granted, the fact remains that that notice did not state that the Commission reserved the right not to respond to MET/IT claims, contrary to previous practice.

70 The Commission thus breached the applicants' rights of defence in that it did not state in the general disclosure document that their MET/IT claims would not be examined, whereas the sampled exporters received a communication relating to their requests. The applicants received a response only in the final disclosure document.

71 The Council, supported by the Commission and CEC, disputes the applicants' arguments.

Findings of the Court

72 First, it must be pointed out that, according to the wording of Article 17(1) and (3) of the basic regulation, the use of sampling as a technique in order to deal with a large number of complainants, exporters, importers, types of product or transactions constitutes a limitation of the investigation. That assessment is borne out by Article 9(6) of the basic regulation under which producers who are not part of the sample are not included in the investigation.

73 However, the basic regulation provides that where there is such a limitation the institutions must comply with two obligations. First, the sample must be representative within the meaning of Article 17(1) and (2) of the basic regulation. Secondly, Article 9(6) of the basic regulation provides that the dumping margin established for producers who are not included in the sample is not to exceed the weighted average margin of dumping established for the parties in the sample.

74 Secondly, Article 9(6), read in conjunction with Article 17(3) of the basic regulation, to which it refers, gives each producer who is not included in the sample the

possibility of requesting the calculation of an individual dumping margin, provided that he submits all the necessary information within the time-limits provided for and that that process is not unduly burdensome to the Commission or prevents the investigation from being completed in good time.

75 Thirdly, Article 2(7)(b) of the basic regulation provides that normal value is to be determined in accordance with paragraphs 1 to 6 of that provision, if it is shown, on the basis of claims by one or more producers subject to the investigation, that the conditions set out in Article 2(7)(c) are fulfilled.

76 Therefore, as the Council submits, producers who are not included in the sample may request that an individual dumping margin be calculated – which presupposes the acceptance of an MET/IT claim where countries concerned by Article 2(7)(b) of the basic regulation are involved – only on the basis of Article 17(3) of that regulation. However, Article 17(3) gives the Commission the power to assess whether, having regard to the number of MET/IT claims, examining them would be unduly burdensome and would prevent completion of the investigation in good time.

77 It follows from the above considerations, first, that, where sampling is used, the basic regulation does not give traders who are not included in the sample an unconditional right to the calculation of an individual dumping margin. The acceptance of such a claim depends on the Commission's decision as to the application of Article 17(3) of the basic regulation.

78 Secondly, as the grant of MET or IT serves, pursuant to Article 2(7)(b) of the basic regulation, only to establish the method for calculating normal value with a view to the calculation of individual dumping margins, the Commission is not required to examine MET/IT claims from traders who are not included in the sample, where it has concluded, in applying Article 17(3) of the basic regulation, that the calculation

of such margins would be unduly burdensome and would prevent it from completing the investigation in good time.

79 Lastly, in the present case, it is not disputed that the calculation of individual dumping margins in respect of all non-sampled traders who made claims to that effect would have been unduly burdensome to the institutions and would have prevented completion of the investigation in good time.

80 Consequently, the applicants' argument that Article 2(7)(b) and (c) of the basic regulation obliged the Commission to examine MET/IT claims from non-sampled traders, including those to whom an individual dumping margin is not applied, must be rejected. In that regard, it must be added that the case-law relied on by the applicants, according to which the Commission decides whether to grant MET or IT on the basis of an examination of each claim submitted to it, does not imply that that institution has to examine each claim even where it does not intend to calculate individual dumping margins pursuant to Article 17(3) of the basic regulation.

81 The same is true of the applicants' argument alleging a breach of the principle of equal treatment in respect of the companies included in the sample and those who are not (see paragraph 65 above). Those two groups of companies are in different situations since the Commission must necessarily calculate an individual margin of dumping for the former, and that presupposes the examination and acceptance of an MET/IT claim, whereas it is not obliged to establish an individual margin for the latter. Consequently, observance of the principle of equal treatment, which prohibits treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment, does not require that those two groups of companies be treated identically.

82 As regards the argument alleging a breach of the principle of equal treatment in respect of the companies which were not included in the sample, it cannot, contrary to

what the applicants maintain, in the present case be held that that principle required the Commission to decide on all the MET/IT claims which were submitted to it, with the result that the producers or exporters not included in the sample, but to whom MET or IT is granted, may have applied to them the average dumping margin of the sampled companies to which MET or IT has been granted.

83 As has been pointed out in paragraphs 76 to 80 above, if the number of MET/IT claims is so large that examining them would prevent the institutions from completing the investigation in good time, the institutions are not required, under Article 17(3) of the basic regulation, to decide on all of those claims, even for the sole purpose of distinguishing, among the non-sampled companies, between those which may or may not be entitled to MET or IT, with a view to applying to them the average dumping margin of the sampled companies to which MET or IT has been granted, but without calculating an individual dumping margin.

84 In the present case, 141 MET/IT claims from Chinese exporting producers were submitted to the Commission, and thus, even if it had been possible to examine them solely on a documentary basis without the necessity of verifying that data by on-site verification visits at the producers or exporters concerned, the Commission was right to find that the number of claims was manifestly too high to enable them to be examined without compromising the completion of the investigation in good time.

85 Consequently, the Court finds that in view of the particularly high number of MET/IT claims which were submitted to it in the present case, the Commission did not exceed the discretion granted to it by Article 17(3) of the basic regulation by not deciding on all the MET/IT claims submitted by the non-sampled companies, the difference in treatment pleaded by the applicants being inherent in the sampling provided for in Article 17 of the basic regulation.

86 Therefore, although the Commission was entitled to act in the way described by the applicants in paragraph 63 above, neither the basic regulation nor the principle of equal treatment obliged it to do so.

87 The same considerations are valid as regards the examination of IT claims from companies which were not included in the sample.

88 As regards the alleged breach of the principle of protection of legitimate expectations, it is settled case-law that that principle extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. Moreover, a person may not plead infringement of the principle unless he has been given precise assurances by the administration (Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147).

89 It is apparent from the fourth indent of point 5.1(a)(i) of the notice of initiation, and in particular from footnote No 1 to that point, that the Commission informed the traders concerned that it might apply sampling in accordance with Article 17 of the basic regulation and that, in such a case, individual margins could be claimed pursuant to Article 17(3) of the basic regulation for companies not included in the sample. That information was repeated in point 5.1(b) of the notice of initiation. Therefore, the fact that the operators concerned were invited to submit an MET/IT claim is not tantamount to a precise, unconditional and consistent assurance that it would be examined.

90 In that connection, it must also be accepted that the absence of a reaction from the Commission for a significant length of time cannot constitute an assurance which causes the applicants to entertain legitimate expectations. That absence of reaction does not affect the meaning of the clear terms used in the notice of initiation.

91 As regards the head of claim alleging a departure from a practice which the institutions followed in earlier investigations, it must be pointed out that the Commission did not exceed the discretion granted to it by Article 17(3) of the basic regulation in taking the view that examining all the MET/IT claims from the non-sampled Chinese exporting producers would have prevented it from completing the investigation within the time-limits provided for by the basic regulation (see paragraph 84 above). It is settled case-law that where the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that the means initially chosen will continue to be employed, since those means may be altered by the institutions in the exercise of their powers (Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 34, and Case C-171/87 *Canon* v *Council* [1992] ECR I-1237, paragraph 41).

92 As the Commission did not, having regard to the above, err in not examining the applicants' MET/IT claims, the applicants may not rely on the expiry of the three month period laid down in Article 2(7)(c) of the basic regulation (see paragraphs 3 and 67 above) since that period relates to cases in which the Commission is required to examine those claims.

93 As regards the argument relating to breach of Article 18(3) and (4) of the basic regulation, clearly, as noted by the Council, that provision does not require the institutions to examine MET/IT claims from companies which are not included in the sample. Therefore, since, according to the above considerations, the Commission was entitled not to examine and, therefore, not to decide on MET/IT claims from producers which were not included in the sample, Article 18 of the basic regulation cannot be interpreted in the manner suggested by the applicants.

94 Lastly, as regards the alleged breach of the applicants' rights of the defence, it should be noted that, according to settled case-law, pursuant to the principle of respect for the rights of the defence 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 can 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 assessment of the existence of dumping and the resultant injury (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 17; Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraph 99; Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 55; and Case T 88/98 *Kundun and Tata* v *Council* [2002] ECR II-4897, paragraph 132).

95 In the present case, it must be pointed out that, as is apparent from recitals 62, 64, 135 and 143 to the provisional regulation, the Commission stated that any anti-dumping duty relating to the producers which were not included in the sample had been calculated in accordance with the provisions of Article 9(6) of the basic regulation and that the dumping margin of those producers had been determined on the basis of the weighted average of the dumping margins of the companies in the sample.

96 In the provisional regulation the Commission therefore explained its position as regards the methodology for calculating the dumping margin in respect of the traders who were not included in the sample, which consisted of applying the average dumping margin of the companies constituting the sample. That methodology implied that MET/IT claims from those traders would not be examined as such an examination was of no use in the procedure in question.

97 It follows that, as from the stage of the communication of the provisional regulation and the general disclosure document, the applicants had the opportunity to state their views on the methodology the Commission used to calculate their dumping margin, with the result that their rights of defence have not been breached.

98 It follows that the first two pleas must be rejected.

The third plea: manifest error of assessment and breach of Article 5(4) of the basic regulation failing evidence from the Commission of support for the complaint by the Community industry

Arguments of the parties

99 The applicants submit that the Community institutions erred in defining the Community industry supporting the complaint which gave rise to the anti-dumping duty proceeding in question. The Community administration has in the past adopted the theory that only the Community producers which cooperate in the procedure by participating in the sampling exercise or by supplying useful information could be considered to have supported the complaint.

100 In the present case there were only 10 requests to be included in the sample from Community producers, submitted by the operators finally included within the sample. Therefore, of the 814 complaining companies, only 10 submitted any meaningful information and could therefore be described as companies which cooperated in the investigation. Consequently, only those companies should be taken into account for the purpose of the definition of the Community industry. However, those companies represent only 4.2% of Community production and the 25% threshold required by Article 5(4) of the contested regulation was therefore not reached.

101 The information supplied by the Council in the defence on the method employed to verify the degree of support for the complaint by the Community industry was not communicated to the applicants during the administrative procedure. The fact that the contested regulation does not explain the way in which the institutions measured the degree of the Community industry's support for the complaint constitutes a failure to state reasons. The absence of that information also constitutes a breach of the applicants' rights of defence. Furthermore, by collecting the data relating to the Community industry's support for the complaint before initiating the investigation

by publishing the notice of initiation, the Commission breached Article 6(1) and Article 17 of the basic regulation. In any event, even on the assumption that the investigation could validly have commenced before publication of the notice of initiation, that would mean that the contested regulation was adopted after the expiry of the 15-month deadline for completion of the investigation laid down in Article 6(9) of the basic regulation. Last, the applicants observe that, by examining whether the complaint was supported by the Community industry before initiating the investigation, the Commission did not properly verify whether the Community producers supporting the complaint represented 25% of total production of the like product by the Community industry, in accordance with Article 5(4) of the basic regulation. Supporting a complaint for the purposes of Article 5(4) of the basic regulation presupposes that the person declaring support is aware of the obligations involved in participating in the sample of Community producers, such as replying to an injury questionnaire and agreeing to an on-site verification visit. A simple declaration made before the commencement of the investigation cannot demonstrate support within the meaning of Article 5(4) of the basic regulation.

102 The Council, supported by the Commission and CEC, disputes the applicants' arguments.

Findings of the Court

103 As is apparent from Article 5(1) and (4) of the basic regulation, except where Article 5(6) applies, an anti-dumping investigation is initiated properly if a complaint has been made by or on behalf of the Community industry. A complaint is to be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers representing, as regards the like product, more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. Furthermore, the producers expressly supporting the complaint must also represent at least 25% of total production of the like product produced by the Community industry.

104 As regards the term 'support', it must be pointed out that, according to Article 5(2) of the basic regulation, a complaint must include evidence of dumping, injury and a causal link between the two. A complaint must contain in that regard a certain amount of information which may reasonably be available to the complainant.

105 Support for a complaint made by or on behalf of the Community industry thus means that the complainant or complainants and the persons on behalf of which the complaint was made must, first, supply the evidence which the Commission requests with a view to verifying that the necessary conditions for the imposition of an anti-dumping duty have been satisfied and, secondly, accept the imposition of any checks which the Commission may make in order to examine whether the information supplied is accurate. Given the absence of any coercive means of investigation, the replies of the parties to the questionnaire referred to in Article 6(2) of the basic regulation, and the subsequent on-the-spot verification which the Commission may carry out under Article 16 of that regulation, are essential to the operation of the anti-dumping procedure (Case T-413/03 *Shandong Reipu Biochemicals* v *Council* [2006] ECR II-2243, paragraph 65).

106 Consequently, in verifying that support for the complaint complies with the thresholds in Article 5(4) of the basic regulation, the Commission is entitled to disregard a producer which is not prepared to provide information in support of a complaint made by it or on its behalf or to permit verification of the justification for such a complaint. Therefore, where a Community producer states that it does not accept verification of the data which it provides in support of a complaint made by it or on its behalf, it must, first, be regarded as a non-cooperative producer for the purpose of Article 18(1) of the basic regulation and, secondly, be excluded from the group of producers expressing their support for the complaint in terms of Article 4(1) and Article 5(4) of the basic regulation.

107 That approach complies with Article 6(8) of the basic regulation, which states that except in cases of non-cooperation, the information which is supplied by interested parties and upon which findings are based is to be examined for accuracy in as far as possible.

108 Therefore, as the Council states at recital 156 to the contested regulation, the complainant Community producers which failed to cooperate during the investigation are to be excluded from the definition of the Community industry. Thus, where sampling is used, the Commission, in the majority of cases, as stated by the Council in the defence, sends out a questionnaire to each known producer requesting data relating to its production and sales and asking whether it would be prepared to complete the injury questionnaire and permit on-site verification if selected for the sample. Only those producers who respond affirmatively to these last two questions are to be considered as cooperating in the investigation and may therefore be included in the sample. By contrast, a producer which states that it is not willing to participate in the sample cannot be regarded as cooperating in the investigation since it is not, by definition, prepared to complete an injury questionnaire or permit its answers to be verified. Those measures relate only to companies which are included in the sample.

109 The Council maintains that, in the present case, given the exceptionally large number of Community producers, the Commission applied a different but equally valid procedure. Therefore, instead of sending sampling questionnaires to each producer, the Commission, first, used the data relating to Community production in the complaint and, secondly, gathered information regarding support for the complaint from each of the 814 producers represented by CEC.

110 What is more, at the hearing, the Council and the Commission stated that the document attached as an Annex to the defence, called 'Anti-dumping complaint concerning imports of … originating in …', was not that which was actually sent to Community producers and that the Council had submitted that document in error. The Commission submitted another document which was sent to Community producers in order to verify their support for the complaint. Unlike the document submitted as an Annex to the defence, the title of that document (Possible initiation of an anti-dumping investigation concerning imports of footwear with uppers of leather originating in the People's Republic of China and Vietnam) specifically refers to the investigation in question and so it may be concluded that it was in fact the document which the

Commission sent to the Community producers. By that document, the Commission asked each Community producer who received it to state, inter alia, whether it supported the complaint, was against it or was neutral, whether it produced and sold the product concerned on the Community market and in what quantities, whether it was related to any Chinese or Vietnamese producer or exporter of the product concerned and whether it had sold the product concerned imported from the target non-member countries.

111 In the preamble to that document it was stated that any figures would be treated as confidential and might be subject to verification by the Commission. In those circumstances, each Community producer which received that document was aware that all the information communicated to the Commission, including that which may have been submitted in the injury questionnaire, might also be verified by the Commission. Furthermore, that document stated that the legal basis on which that information was being requested was Article 5(4) of the basic regulation. According to the list of Annexes on the last page of the document in question, Articles 4 and 5 of the basic regulation were attached as an Annex to that document. In that regard, the reference to Article 5 of the basic regulation and the inclusion of that article in the Annexes to the document in question informed Community producers that the complaint had to contain a series of items of evidence of dumping, injury and a causal link between the two and, inter alia, information on prices.

112 In those circumstances, it must be held that the statement by Community producers that they supported the complaint was sufficient to prove that there was support for the complaint in terms of Article 5(4) of the basic regulation.

113 The head of claim relating to breach of Articles 6(1) and 17 of the basic regulation, on the grounds that the Commission took account of information relating to Community

production, the complainants' *locus standi* and injury supplied before the initiation of the investigation, clearly cannot be upheld.

114 First, it must be borne in mind that Article 5(2) of the basic regulation provides that the complaint, which is by definition made before the initiation of the investigation, must contain a series of items of evidence of dumping, injury and a causal link between the two. Furthermore, Article 5(3) of the basic regulation provides that the Commission must, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation. Therefore, as the Council states, there is nothing to prevent the Commission from taking account, in the investigation, of information which was by its very nature gathered before the initiation of that investigation.

115 Secondly, it must be pointed out that the Commission must verify the *locus standi* of complainants before it initiates the investigation.

116 Lastly, as regards the head of claim relating to breach of Article 6(9) of the basic regulation on the ground that the contested regulation was adopted after the expiry of the 15-month deadline laid down in that provision, it must be borne in mind that, according to that provision, the initiation of the investigation constitutes the starting point of the 15-month period laid down for the imposition of definitive duties.

117 It must, however, be stated that, as is apparent from paragraphs 114 to 116 above, although the 15-month period laid down in the basic regulation for the imposition of definitive duties must be calculated as from the time when the Commission initiates the investigation, it is initiated only after the Commission has verified that the necessary conditions have been satisfied both as regards the content of the complaint and the *locus standi* of the complainants.

118 The applicants' heads of claim in that regard must therefore be rejected, as the contested regulation was adopted within the 15-month period provided for by the basic regulation.

119 As regards the heads of claim relating to breach of the applicants' rights of defence, it must be pointed out that, in a note in the file dated 6 July 2005, the Commission stated that Community production had been estimated at around 425 million pairs of shoes in 2004 and at around 92 million pairs of shoes in the first quarter of 2005. Furthermore, it is apparent from that note that the production of the companies on whose behalf the complaint was made amounted to around 190 million pairs of shoes in 2004 and around 44 million pairs of shoes in the first quarter of 2005, with the result that those companies represented more than 44% of the Community industry in 2004 and more than 47% of that industry in the first quarter of 2005. Furthermore, 36 other producers also supported the complaint, which further increased the representativeness to a level of more than 45% in 2004 and more than 48% in the first quarter of 2005. Those figures come from the complaint, the Community producers and the associations of which they are part. Lastly, the note in question states that no opposition to the complaint was expressed and contains, attached as an Annex, figures relating to the total production of six Member States (unnamed) in 2004 and in the first quarter of 2005.

120 In those circumstances, it must be held that, contrary to what the applicants maintain, the Commission set out the basis for its assessment relating to the *locus standi* of the companies on whose behalf the complaint was made. Consequently, the institutions respected the applicants' rights of defence.

121 On the same grounds, it must be pointed out that the institutions complied sufficiently with their duty to state the reasons on which their decisions are based.

122 It follows that the third plea must be rejected.

The fourth plea: manifest error of assessment and breach of Article 1(4) and Articles 2 and 3 of the basic regulation

Arguments of the parties

123 The applicants take issue with the institutions, first of all, for having defined the product concerned too broadly by including products which are substantially different as regards their characteristics, appearance, consumer perception, style, use and channels of distribution.

124 Next, the applicants observe that by including patented technology footwear (see paragraph 34 above) in the investigation, the institutions defined the product concerned too broadly in that regard also, which led them to make incorrect findings. The physical and technical characteristics of that footwear are different from those of other footwear as they incorporate 'patented shock absorption', patented 'cushioning' mid-sole and 'patented super flex'. In addition, the production process of that footwear is different as it requires separate production lines and specialised machinery. Furthermore, as regards the end use of such footwear, the applicants maintain that that footwear is aimed at a 'niche market' in the health shoe segment and is targeted at women with health problems. Patented technology footwear is therefore sold in specialist shops. Last, the applicants observe that this type of footwear is not produced in the Community.

125 The 'incorrect classification' used by the institutions therefore led to comparisons between footwear made from leathers of quite different qualities. Those comparisons are senseless.

126 In that regard, examples and background information are to be found in three documents submitted by the Footwear Association of Importers and Retail Chains during the administrative procedure.

127 Accordingly, the institutions have breached Article 1(4) of the basic regulation, according to which 'like product' means a product which is alike in all respects to the produce under consideration. Such a breach calls into question the validity of the findings of the entire investigation.

128 The Council, supported by the Commission and CEC, disputes the applicants' arguments.

Findings of the Court

129 It must be pointed out that, in the present plea, the applicants put forward two heads of claim. The first concerns the definition of the product concerned at recitals 38 and 39 to the provisional regulation (see paragraph 18 above) and confirmed at recital 39 to the contested regulation. The second relates to the inclusion in the investigation of patented technology footwear.

130 As regards the first head of claim, the applicants make the general claim that the product concerned, as defined in the provisional regulation and in the contested regulation, includes products which are substantially different as regards their characteristics, appearance, consumer perception, style, use and channels of distribution.

By way of illustration, the applicants refer to city trotters on the one hand and hiking boots on the other, which differ substantially as regards their characteristics and use and, therefore, as regards consumer perception.

131 In that regard, it must be pointed out that the purpose of the definition of the product concerned in an anti-dumping investigation is to aid in drawing up the list of products which will, if necessary, be subject to the imposition of anti-dumping duties. For the purposes of that process, the institutions may take account of a number of factors, such as the physical, technical and chemical characteristics of the products, their use, interchangeability, consumer perception, distribution channels, manufacturing process, costs of production, quality etc.

132 Therefore, a claim that a particular product should be excluded from the definition of the product concerned must be based on arguments which show either that the institutions erred in their assessment with regard to the factors they held to be relevant, or that the application of other more relevant factors necessitated the exclusion of that product from the definition of the product concerned.

133 In the present case, the institutions based their decision on the fundamental characteristics of the products, their main use and consumer perception. The applicants merely state in a general manner that the product concerned includes different types of footwear and mention, as an example, city trotters and hiking boots. As was pointed out in the preceding paragraph, those claims can be effective only if they relate to one or more types of specific product which should be excluded from the definition of the product concerned. It follows that the applicants' arguments can relate, at the very most, to the exclusion of hiking boots from the definition of the product concerned. Nevertheless, what is important, in the present case, is that the footwear with uppers of leather which is the subject of the present procedure has the same fundamental

physical characteristics and the same use and that there is competition between footwear of different categories, in particular those of neighbouring categories. Therefore, the institutions did not make an error of assessment by including hiking boots in the definition of the product concerned.

134 As regards the arguments made in the observations submitted by the Footwear Association of Importers and Retail Chains during the administrative procedure, which provide 'background information' as regards the present plea (see paragraph 126 above), it must be pointed out that, apart from general claims relating to the definition of the product concerned, those arguments concern the criteria used in order to regroup under product control numbers the various types of footwear covered by the definition of the product concerned. Therefore, those arguments do not relate to the question whether certain types of footwear with uppers of leather have to be part of the product concerned, but relate to the question of the criteria according to which the products covered by the product concerned should have been categorised. Consequently, those arguments are ineffective in the context of the analysis of the present plea. On the same grounds the arguments submitted in the reply, which seek to dispute the institutions' assessment as to the categorisation of the types of footwear covered by the product concerned (see paragraph 125 above), must also be rejected as ineffective.

135 The arguments relating to the existence of separate production lines for the manufacture of patented technology footwear, the absence of Community production of that type of footwear and the existence of a patent are not conclusive. The manufacturing process does not, in itself, influence consumer perception nor, therefore, the interchangeability of a number of types of footwear, if the physical characteristics and the intended use of the products are the same. The same is true of the absence of Community production of patented technology footwear since the decisive question is whether that type of footwear is, on account of its physical characteristics, its intended use and, therefore the perception which consumers have of it, in competition with footwear of Community production. In that context, clearly the fact that a type

of footwear enjoys the protection of a patent is not indicative as regards its competitive position with respect to products of Community origin.

136 As regards the second head of claim concerning the inclusion of patented technology footwear in the definition of the product concerned, it must be pointed out that the arguments that that footwear is intended for people with orthopaedic problems and is sold exclusively in specialist shops could be capable of calling in question the institutions' assessment as to the inclusion of that type of footwear in the definition of the product concerned. If it were shown that the use of that type of footwear was part of medical treatment intended for people who have orthopaedic problems and that those products were distributed only in specialist shops, then clearly they would not have the same physical characteristics or the same intended use as shoes which do not have such qualities. Consumer perception would thus necessarily be different in that regard.

137 However, the applicants have adduced no evidence capable of substantiating their description of the characteristics and use of that type of footwear. Neither the letter from Brosmann of 8 May 2006 (see paragraph 28 above) nor the observations made by fax of 29 November 2005 by Wortmann KG Internationale Schuhproduktion, the holder of the patents in question, contain evidence in support of the claims made therein. It should be added that, as is apparent from point 3.2.1.3 of the letter of 8 May 2006 and from point 3.4 of the fax of 29 November 2005, in referring to specialist shops the applicants seem to be referring to shops other than discount shops and department stores. That approach does not exclude the possibility that specialist shops, in the sense that they sell only footwear, also sell patented technology footwear. That assessment strengthens the Council's argument that, despite the features of the footwear in question, it is entirely probable that consumer choice is dependent on personal preferences rather than on considerations of a medical nature.

138 It follows that the fourth plea must be rejected.

The fifth plea: manifest error of assessment and breach of Article 17 of the basic regulation and of Article 253 EC

Arguments of the parties

139 The applicants claim that the sample of Chinese exporting producers is unrepresentative, on two grounds. First, the sample consists essentially of producers mainly manufacturing STAF, which had however been excluded from the definition of the product concerned (see paragraphs 18 and 34 above). Second, the applicants point to a number of 'defects' with respect to the criteria applied for the purposes of selecting the sample in question and, by way of example, state that several cooperating companies which were not in the sample had significantly higher production, exports and sales than the companies in the sample.

140 While it is true that, at recital 43 to the contested regulation, the Council stated that the exclusion of STAF did not 'influence significantly' the representativeness of the sample, the fact none the less remains that the institutions did not give reasons for that assessment, although those products represent a substantial percentage of the imports initially targeted. That observation is all the more relevant because, according to recitals 180 and 181 to the contested regulation, the exclusion of STAF had had significant repercussions for the dumping margin. Generally, a sample composed solely of producers of a product excluded from the scope of the investigation should, by definition, be considered unrepresentative.

141 In the applicants' submission, the fact that the governments of exporting countries were involved in the choice of some of the companies in the sample, as stated in the penultimate sentence of recital 61 to the contested regulation, is not directly relevant to establishing the representativeness of the sample, *a fortiori* because the definition

of the product concerned was changed after those governments had been consulted. It follows from the explanations given in the defence that the criteria for selection for inclusion in the sample were that the owners of the undertakings must be of Chinese nationality and the undertakings must be members of the China Chamber of Commerce for Import and Export of Light Industrial Products and Arts-Crafts ('the CCCLA'). The sample was therefore not selected in such a way as to ensure that it would be representative.

142 In addition, the sample included only one undertaking which was granted MET and no company granted IT, thus further indicating that the sample was not representative.

143 At recital 44 to the contested regulation the Council stated that sampled exporters represented 12% of Chinese exporters after exclusion of STAF from the definition of the product concerned, which renders the sample unrepresentative. In that context, since Brosmann itself represented 10% of Community imports, the assertion that the sample included the highest representative volume of exports possible is inaccurate. Nor does the Council provide any support for its claim that the sampled producers represented 14% of all Chinese exports, including those of non-cooperating producers.

144 That shows that there was a failure to state the reasons for the contested regulation and a manifest error of assessment resulting from the breach of Article 17 of the basic regulation.

145 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

146 It must be borne in mind that, under Article 17(1) of the basic regulation, sampling is the limitation of the investigation to a reasonable number of parties, products or transactions by using samples which are statistically valid, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

147 That provision gives the Commission the power to choose, from among the companies which have volunteered to participate in the sample and have provided the necessary information for that purpose, those which will be included. In the light of the discretion which Article 17(1) of the basic regulation thus grants to the Commission, review by the Community judicature of the choice made in that regard relates to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of those facts or a misuse of power.

148 In the present case, it is apparent from recital 60 to the provisional regulation and from recitals 44 to 46 to the contested regulation that, in choosing the sample of Chinese exporting producers the institutions were guided by the intention of ensuring both that the sample was representative and that it included, within the largest representative volume of exports that could reasonably be investigated within the time available, some companies with representative Chinese domestic sales.

149 It is therefore necessary to examine whether, in the light of the circumstances complained of by the applicants, the choices made by the institutions indicate a manifest error of assessment having regard to those two objectives.

150 As regards the claim that the companies included in the sample are producers of STAF, it must be pointed out that the applicants have not submitted evidence capable of substantiating that claim. Accordingly, the head of claim alleging a manifest error of assessment must be rejected.

151 The head of claim alleging that there was a failure to state reasons must also be rejected on the ground that the institutions set out the effect of the exclusion of STAF from the definition of the product concerned.

152 As regards the percentage of exports included in the sample, it must be pointed out that the applicants and the Council agree on the fact that the sales of the 13 companies initially chosen to participate in the sample represented 25% of the exports and 42% of the domestic sales of all the Chinese producers of the product concerned which had cooperated. The parties also agree on the fact that, following the exclusion of data from one Chinese producer which had not replied to the Commission's questionnaire and from five other companies which had not cooperated, the representativeness of the sample fell to 16.5% of the exports of all the Chinese producers which had cooperated, a percentage which was reduced to 12.5% after the exclusion of STAF from the definition of the product concerned.

153 As regards the head of claim alleging a failure to state reasons, the Council stated, in paragraph 44 of the contested regulation, in what respect that percentage was sufficient to ensure that the sample was representative. Consequently, the Council stated sufficiently the reasons on which its assessment of the representative nature of the sample was based.

154 As regards the heads of claim alleging a manifest error of assessment, first, it is clear that, at the time when the sample was selected, it was not possible to envisage the number of traders which would subsequently refuse to cooperate, all the more so because those traders had stated the contrary in the documents they had previously submitted to the Commission. The same is true of the companies which were granted MET or IT as the examination of MET/IT claims is carried out after the sample has been selected.

155 Secondly, even if it had been possible to include other companies in the sample after having found that a certain number of participants did not intend to cooperate, the fact that the traders which remained in the sample represented 12.5% of Chinese exports to the Community is nevertheless sufficient to establish that the sample is representative.

156 In those circumstances, it must be held that the Commission was not required to include other companies in the sample and did not therefore make a manifest error of assessment by not doing so. Consequently, the fifth plea must be rejected.

The sixth plea: manifest error of assessment and breach of Article 3(2) of the basic regulation and of Article 253 EC

Arguments of the parties

157 The applicants take issue with the Community institutions for having relied on 'unrepresentative and unreliable data' to evaluate the injury suffered by the Community industry. More particularly, the applicants claim that as the sample of Community producers consists of only 10 companies, it represents only 0.1% of producers and 4.2% of Community production. In addition, the producers selected did not submit information that would enable the representativeness of the sample to be evaluated and were not invited to do so. That arbitrary approach constitutes a breach of Article 17 of the basic regulation. The collection of macroeconomic information about the injury at the pre-initiation stage means that those data were not properly verified, that a non-confidential version of the data was not made available to the interested parties and that the Commission discriminated against the Chinese producers by comparison with the Community producers, since the Chinese producers did not have the opportunity to submit their MET/IT requests before the initiation of the procedure so that the Commission would have more time to examine them.

158 Since the names of the sampled Community producers were not disclosed, the applicants obtained no information about their activities and were unable to carry out an independent verification of the representativeness of the sample. It follows that their rights of defence were breached in a manner contrary to the case-law in that regard.

159 As regards the reliability of the data used by the institutions, the applicants observe that during the administrative procedure they supplied the Commission with information from public sources which showed that some of the largest Italian producers, probably forming part of the sample of Community producers or being among the complainants (which the Council does not deny), had submitted false or distorted information to the Commission. The inaccurate data related to employment, investments, turnover, sales and place of establishment, since some companies had relocated their production facilities to non-member countries. That information justified closer scrutiny by the Commission. Since, in the applicants' submission, two Italian companies which submitted false or distorted information represented some 10.4% of sales and 7.5% of Community production, the impact of the circumstances referred to above on the evaluation of injury would be sufficiently serious to have a significant effect on the results of the investigation, whether they were part of the sample or not. According to recital 175 to the provisional regulation, the macroeconomic indicators were assessed at the level of the entire Community industry, whereas the microeconomic indicators were assessed at the level of sampled producers. Therefore, on the assumption that none of those companies participated in the sample of Community producers, the fact would remain that the Commission used data supplied by them in order to draw macroeconomic consequences concerning the injury to the Community industry.

160 However, the institutions did not take account of that information when calculating the injury suffered by the Community industry, which constitutes a manifest error of assessment giving rise to a breach of Article 3(2) of the basic regulation (see paragraph 3 above). In any event, the failure to provide any explanation in that regard in the contested regulation constitutes a breach of the obligation to state reasons with respect to a crucial point in the investigation.

161 The Council, supported by the Commission and CEC, disputes the applicants' arguments.

Findings of the Court

162 The present plea contains two parts. In the first, the applicants complain that the institutions did not examine whether the traders retained in the sample of Community producers were representative of the Community industry. In that connection, they also maintain that they were deprived of any information which would have enabled them to verify the representativeness of those traders. In the second part, the applicants submit that the institutions relied on unreliable data in order to assess the macroeconomic and microeconomic factors relating to the injury suffered by the Community industry.

163 As regards the first part, it must be borne in mind that, according to recital 65 to the provisional regulation, the Commission selected a sample of 10 Community producers on the basis of their production volume and location (see paragraph 24 above). According to the same recital, those criteria sought not only to reflect the size and importance of the various producing companies, but also the geographical spread of the Community industry. The producers in the sample were therefore located, according to recital 8 to the provisional regulation, in five different Member States.

164 In that regard, it must be held that the complaint form and the sampling questionnaires sent to the 814 producers on whose behalf the complaint had been made (see paragraph 108 above) contained information on the Community industry's production and domestic sales and on the production of each producer which made the complaint in respect of 2003 and 2004. In those circumstances, it must be held that the Commission was in a position to assess the size, production capacity and, obviously, the location of each company which made the complaint. The Commission therefore had the necessary information to select the sample of Community producers on the

basis of those criteria which, in the Commission's opinion, were the most relevant. As the applicants have not disputed the relevance of those criteria, it must be held that their arguments as regards the selection of the sample must be rejected in that regard.

165 As regards the argument alleging breach of the rights of the defence, the applicants have not disputed the Council's claim that they had access to data relating to the production of each company in the sample and to the non-confidential version of the answers that those companies had provided to the injury questionnaire. The name of each company included in the sample is irrelevant for the purposes of assessing their representativeness. Nevertheless, that assessment is valid only if the data provided by the companies concerned are accurate. Consequently, the applicants should have requested access to the evidence from which the Commission concluded that the information submitted by the Community traders included in the sample was correct. That access could have been granted without disclosure of the companies' names. It appears that the applicants did not request access to that evidence and thus their arguments as regards breach of their rights of defence cannot be upheld.

166 As regards the second part of the present plea, the plea of inadmissibility raised by the Council on the ground that the applicants merely refer to their Annexes must be rejected at the outset. The applicants have not merely referred to Annexes A 33 and A 34 to the application but have given a synopsis of the main points in those annexes by setting out specific heads of claim challenging the institutions' assessment. The Rules of Procedure do not prohibit the submission, in support of those heads of claim, of more detailed documents which were submitted to the Commission during the administrative procedure.

167 As regards the merits of the applicants' arguments, it must be pointed out, first, that the information which they provided to the Commission in the memoranda of 17 July and 2 August 2006 relate, in essence, to information gathered from the press on the misconduct of Community footwear producers, such as fraud at national level in order to be able to profit from subsidies, or infringements of employment law.

168 In that regard it must be pointed out that the fact that a company has committed fraud at national level does not necessarily imply that it is not cooperating in a Commission anti-dumping investigation and that it is providing incorrect information in that connection. It must be stated that, even if the companies mentioned by the applicants have committed fraud at national level, that does not in itself lead to the conclusion that the data which they provided in an anti-dumping investigation are not reliable in circumstances where the data are unconnected with those frauds. As regards the information provided by the applicants in the course of the administrative procedure, concerning the degrading treatment of workers and the recruitment of children, it must be pointed out immediately that it seems inconceivable that those facts might be connected with the data which the companies concerned may have provided in the investigation in question.

169 The applicants also maintain that the Italian producer La Nuova Adelchi provided inaccurate data concerning its turnover and sales. In that regard, they relied, in the memoranda of 17 July and 2 August 2006, on the fact that the sole manager of La Nuova Adelchi had been convicted at first instance by the Italian authorities of false accounting. In support of that claim, they relied, in the memoranda of 17 July and 2 August 2006, on the judgment in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565. However, it is apparent from paragraph 29 of that judgment that the facts in question relate to 1992 and 1993 and therefore to a period a number of years prior to the investigation period. Any irregularities relating to the accounts of 1992 and 1993 cannot call in question the reliability of the data provided in the present investigation.

170 As regards the other matters that the applicants allege in respect of certain Community footwear producers, it is appropriate to note the following. According to recitals 175 to 185 to the provisional regulation, the Commission examined the existence of the injury suffered by the Community industry at the macroeconomic level on the basis of data relating to production, sales, market share, employment, growth, the magnitude of dumping margins and recovery from the effects of past dumping. Those data related to the entire Community industry (see paragraph 24 above). Following that examination, the Commission concluded that there had been a decrease in production, market share, employment and therefore in growth for the period from 2001

to the end of the investigation period. As regards the microeconomic indicators relating to the sampled producers, the Commission found, at recitals 186 to 196 to the provisional regulation, that the production and sales volumes, sales prices, cash flow, profitability, return on investments, the ability to raise capital for the purpose of investments and employment had been subject to a significant decrease from 2001 to the end of the investigation period.

171 So far as concerns the definitive findings regarding the macroeconomic injury indicators, the Council confirmed, at recitals 186 to 198 to the contested regulation, the Commission's findings concerning the decrease in production, sales, market share, employment, productivity, growth and recovery from the effects of dumping. As regards the microeconomic indicators, the Council also confirmed, at recitals 199 to 206 to the contested regulation, the Commission's assessments as regards the decrease in sales prices, cash flow, profitability, return on investments and the ability to raise capital for the purpose of investments.

172 On the basis of those considerations the Council pointed out, at recital 214 to the contested regulation, that the injury had mainly materialised, at the macroeconomic level, in terms of a decrease of sales volume and market shares, circumstances which had an influence on the production level and employment. As regards the microeconomic level the Council stated, at recital 200 to the contested regulation, that the sampled companies had achieved marginal profits in the course of the investigation period and could not further lower their prices without incurring losses.

173 In those circumstances, the applicants' claims relating to the allegedly distorted data provided by two Italian companies can be considered to be relevant only if those data are capable of calling in question the factors taken into account by the Council to determine that there was injury.

174 In that regard, first, the applicants refer to notional redundancies used by two Italian companies as a ground for re-hiring the ex-employees with the benefit of State aid for the recruitment of unemployed persons. The applicants submit that the number of notional redundancies in question amounts to 3 100. Even if all of those redundancies were made not because the companies in question were in a difficult position but because they intended to collect State aid in a fraudulent manner, the fact remains that the Council referred, in recital 192 to the contested regulation, to a loss of more than 27 000 jobs since 2001. Therefore, even if it were accepted that 3 100 of those redundancies were notional, the Council's finding as regards a significant decrease in the level of employment at the macroeconomic level remains valid. It must also be pointed out that, at the microeconomic level, the Council did not base its finding as to injury on data relating to employment.

175 Secondly, the applicants refer to the relocation of Community production to non-member countries along with fraudulent measures designed to state that the products were Italian in origin. However, even if the institutions were taken in by that practice in the sense that their figures relating to the production of the Community industry included quantities produced abroad, that would in point of fact mean that the decrease in Community production is even greater than that stated in the provisional regulation and the contested regulation. The circumstances complained of by the applicants, if proved, are not therefore capable of calling in question the Council's assessment as regards the injury stemming from the level of Community production.

176 Thirdly, the applicants rely on fraud allegedly committed by one of the two Italian companies, consisting in the collection of State aid for the purpose of buying new machines which were, however, installed in Albania in particular. However, even if it were to be accepted that that claim had been proved, that fact could only have an adverse impact on the actual level of investments within the Community market, thus bearing out the Council's findings in that regard.

177 The applicants' claims are not therefore capable of calling in question the Council's assessments at the macroeconomic level.

178 From a microeconomic point of view, it must, in any event, be pointed out that even though the two Italian companies in question participated in the sample and included among their sales in the Community market also their sales of footwear manufactured in non-member countries, which could affect the calculation of the average price per pair of EUR 18.2 mentioned at recital 199 to the contested regulation, nonetheless, for the reasons set out at recital 200 to the contested regulation, the criterion of the average sales price is not in itself a determinative factor.

179 As is stated at recital 200 to the contested regulation, footwear is produced on order and new orders are normally accepted only if the corresponding price level allows for, at least, a break even. Therefore, even if the average sales price of the Community industry were not to have been determined with the greatest precision and if, in actual fact, it were higher, that would not suffice to call in question the findings relating to cash flow, profitability, return on investments, the ability to raise capital and investments, all of which show a significant deterioration in the position of the Community industry.

180 As regards the head of claim alleging an inadequate statement of reasons, it must be pointed out the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact and law dealt with in the regulations, provided that they fall within the general scheme of the body of measures of which they form part. In that regard, it is sufficient for the reasoning of the institutions in the regulations to appear clearly and unequivocally (Case T-2/95 *Industrie des poudres sphériques* v *Council* [1998] ECR II-3939, paragraphs 357 and 358).

181 Furthermore, it must be pointed out that the institutions are not obliged to adopt a position on all the arguments relied on by the parties concerned, but that it is sufficient to set out the facts and the legal considerations having decisive importance in the context of the decision (see, to that effect, the judgment of the Court of Justice of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission*, not published in the ECR, paragraph 30).

182 It is apparent from the above that the Council stated clearly, in the contested regulation, the reasons why it considered that the Community industry had suffered significant material injury, at the microeconomic as well as at the macroeconomic level, as a result of imports from China. It follows that the reasons for the contested regulation were stated sufficiently in that regard.

183 Accordingly, the sixth plea must be rejected.

The seventh plea: manifest error of assessment and breach of Article 3(2) of the basic regulation

Arguments of the parties

184 The applicants maintain that it is necessary to ascertain whether there is a direct causal link between the dumped imports and the injury sustained by the Community industry in 2004. That is not so, in light of other injurious factors such as, essentially, the poor export performance of the Community industry, the increase in imports from non-member countries other than China or Vietnam and the lifting of the quantitative quota regime from 1 January 2005 (see paragraph 11 above).

185 In the present case, the mediocre economic situation of the Community industry is attributable to the deterioration of its export results, which confirms the lack of competitiveness of Community production. That explains why Community producers cannot raise their prices significantly or increase the profitability of the sector beyond the level achieved in 2004, the relevant year for the determination of the level of anti-dumping duties that will eliminate injury. It also explains the decline in sales by Community producers on the Community market and the relocation of production

to non-member countries. Furthermore, as previous anti-dumping investigations show, the levels of profitability attained by the Community industry in 2004 and during the investigation period are not significantly below the levels attained over the last 15 years.

186 It follows that the primary cause of the injury sustained by the Community industry is the uncompetitive prices of the Community products concerned. Therefore, even if the argument that the export performance of the Community industry did not cause any material injury were to be true up to a point, it fails to take into account the fact that the significant injury caused is not the consequence of the dumped imports in issue.

187 The analysis in the contested regulation which seeks to call in question that conclusion is based on manifestly incorrect findings set out at recital 229 to that regulation. First, the finding that none of the non-member countries listed at recital 227 to the contested regulation significantly increased its market share during the period considered ignores the fact that two countries with appreciable market shares doubled those shares and two others increased their market shares by 50% and 30% respectively. Second, the market share of all the countries listed at recital 227 to the contested regulation is comparable to that of the countries targeted by the anti-dumping measures in question and, while that share does not correspond precisely with China's market share, it is higher than Vietnam's. Third, three non-member countries reduced their prices by at least 22% and a fourth reduced its prices by almost 20%. Fourth, the fall in the prices of products from China can be explained by the lapse of the quantitative quota regime imposed on imports of footwear from that country, which led to an increase in the quantities of low-priced footwear imported and therefore a shift in product mix.

188 The facts set out at recital 227 et seq. to the contested regulation lead rather to the conclusion that imports from non-member countries (other than China and Vietnam) made a significant contribution to the injury sustained by the Community industry. Furthermore, the Community institutions artificially understated the impact that the removal of the quota may have had on the Community industry, in particular as regards the fall in average unit prices, the increase in imports and the shift

in product mix. The applicants contend, in that regard, that the investigation period comprised only three months without quotas (from 1 January to 31 March 2005). That is too short a time to draw conclusions after such a major change requiring a significant period to allow the market to stabilise. The institutions therefore wrongly concluded that the lifting of the quota regime had not had a significantly distorting impact or that it had merely exacerbated the injurious effects of the dumped imports.

189 The Council, supported by the Commission, disputes the merits of the applicants' arguments.

Findings of the Court

190 It must be pointed out that, in determining injury, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves (Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, paragraph 16).

191 In the present case, the Council established that there was a causal link by examining, first, the effects of the dumped imports and, secondly, the effects of other factors such as the export performance of the Community industry, imports from other non-member countries, exchange rate fluctuations, the lifting of the quota regime, failure to modernise on the part of the producers which made the complaint and the relocation of production by the Community industry.

192 As regards the applicants' argument relating to the poor export performance of the Community industry, it must be pointed out, as did the Council at recital 224 to the contested regulation, that that factor does not affect indicators such as sales volume, market shares and depression of prices which were used as a basis for determining injury. Those indicators were established at the level of sales in the Community. Furthermore, according to recitals 187 and 189 to the contested regulation, the decrease in the Community industry's market share in the domestic market gave rise to an analogous decrease in production. It follows that the Council was right to find, at recital 224 to the contested regulation, that the vast majority of the production was intended to be sold on the Community market and therefore that export performance could not have caused significant injury to the Community industry.

193 As regards the arguments relating to imports from other non-member countries, it must be stated that the countries to which reference is made at recital 227 to the contested regulation held a market share of 33.8% between them during the investigation period as against 24.4% in 2001. In that connection, it must also be stated that two countries, Macao and Brazil, doubled their market shares in the course of the period under consideration (from January 2001 to April 2005) increasing them by 1.2% to 2.4% and 2.5% respectively, while India increased its market share from 3.6% in 2001 to 5.7% in the course of the investigation period.

194 What is more, according to the second table in recital 227 to the contested regulation, the prices of products imported from those countries, with the exception of Romania, decreased by 10% (India) to 25% (Brazil) and varied between EUR 8.7 (Indonesia with a market share of 2%) and EUR 14.9 (Romania with a market share of 6.9%).

195 Furthermore, it must be borne in mind that, according to recitals 162, 168 and 170 to the contested regulation, the market shares of imports from China and Vietnam increased from 9.3% in 2001 to 23.2% during the investigation period. In addition, according to recitals 170 and 199 to the contested regulation, footwear from China and Vietnam was imported, during the investigation period, at an average price of

EUR 8.5 per pair as against an average price of EUR 18.2 per pair for footwear produced in the Community and a weighted average price of EUR 12.21 per pair for imports from non-member countries. The calculation of the latter price is based on the average prices stated in the second table in recital 227 to the contested regulation, weighted according to the market shares to which reference is made in the first table in that recital.

196 It is apparent from those data that, even though the non-member countries collectively hold a significant share of the Community market, the overall market share of China and Vietnam corresponds to approximately 72% of the market share of the non-member countries listed at recital 227 to the contested regulation. In that respect it must be added that the average import price of footwear from the targeted countries is 30.4% lower than the average price at which footwear from the other non-member countries is imported. Accordingly, the effects of imports from other non-member countries are not capable of calling in question the causal link between the dumped imports and the injury suffered by the Community industry.

197 That finding is not invalidated by the fact that some non-member countries significantly increased their market shares in the course of the period under consideration, since the data in paragraphs 193 to 196 above duly takes into account that development.

198 As regards the impact which the lifting of the quotas might have had (see paragraph 188 above), it must be pointed out 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. It is therefore necessary, in order to be able to determine the anti-dumping duties appropriate for protecting the Community industry against dumping, to carry out the investigation on the basis of information which is as recent as possible (*Industrie des poudres sphériques* v *Council*, paragraphs 91 and 92, and Case T-138/02 *Nanjing Metalink* v *Council* [2006] ECR II-4347, paragraph 60).

199 Therefore, where the institutions find that 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.

200 Lastly, as is apparent 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 injury and the causal link, which related not only to the last quarter of the investigation period, but also to the period under consideration.

201 It follows that the seventh plea must be rejected.

The eighth plea: manifest error of assessment and breach of Article 9(4) of the basic regulation

Arguments of the parties

202 The applicants claim that the Council's assessment of the level which the definitive anti-dumping measures must attain in order to eliminate injury (see paragraph 42 above) is manifestly erroneous. That assessment is based on data relating to part of the product concerned which is not subject to 'materially injurious dumping' (instead of using the better data available for the years 2001 to 2003, during which there was no dumping) and makes a sub-division of a single like product on the basis of 'circular reasoning'. The identification of footwear not subject to 'materially injurious dumping' requires the determination of the time from which 'materially injurious dumping' takes place, which, in turn, requires a comparison of Community producers' profit margin with the profit margin that would have been attained in the absence of

dumped imports. That approach is particularly inappropriate, since the anti-dumping measures apply to all imports.

203 In addition, the Council has explained in the defence that the profit margin of 6% relates to products outside the scope of the investigation in question, which, by definition, means that that percentage cannot constitute a valid indication for the calculation of the profit margin that Community producers would have attained in the absence of dumped imports. In fact, the Community industry did not achieve a margin above 2% during the investigation period or in the recent past.

204 It follows that the fixing of the profit margin at 6% as the level that the Community industry could have expected to achieve in the absence of injurious dumping was the consequence of a manifest error of assessment constituting a breach of Article 9(4) of the basic regulation.

205 The Council refutes the applicants' arguments, stating that the concept of 'footwear not subject to materially injurious dumping' corresponds not to a subcategory of the product concerned but to footwear outside the scope of the definition of the product concerned. The institutions therefore did not use 'circular reasoning', nor did they give preference to unreliable data over better data relating to the product concerned.

206 As a subsidiary point, the Council contends that, even if the present plea were upheld, the only consequence would be that the contested regulation would be annulled in so far as in it the Council used an injury margin 4 percentage points higher than the margin which it ought to have established.

Findings of the Court

207 It must be pointed out first that, in the reply, the applicants have accepted the Council's explanation that the concept of 'footwear not subject to materially injurious dumping' was not a subcategory of the product concerned but referred to footwear outside the scope of the definition of the product concerned.

208 Secondly, it is necessary to reject the applicants' argument that the profit margin which the Community industry attained in respect of footwear which was not covered by the investigation (and was not subject to injurious dumping) cannot be considered to be a valid indication of the profit margin that Community producers would have attained on sales of the product concerned in the absence of dumped imports. Nothing requires the institutions to rely solely on data relating to the product concerned in order to assess the profit margin that the Community industry would have attained in the absence of injurious dumping. On the contrary, they may take into account related products, which are broadly similar to the product concerned. Even though those products are not included in the definition of the product concerned, the profit margin that the Community industry has attained for those products may be regarded as a valid indication of the profit margin that Community producers would have attained on sales of the product concerned in the absence of dumped imports. In the present case, the Council did not make a manifest error of assessment by taking into account the profit margin that the Community industry attained for footwear other than that covered by the investigation because that other footwear is sufficiently similar to the product concerned.

209 Lastly, it must be borne in mind that Article 3(3) of the basic regulation expressly provides that in order to determine the level of reference price undercutting in such circumstances account may be taken of any depression of the prices applied by the Community industry.

210 It follows that the eighth plea must also be rejected, together with the action in its entirety.

Costs

211 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 applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Council.

212 In accordance with Article 87(4) of the Rules of Procedure, the Commission and CEC must bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co., Ltd to bear their own costs as well as those incurred by the Council of the European Union;

3. Orders the European Commission and the Confédération européenne de l'industrie de la chaussure (CEC) to bear their own costs.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 4 March 2010.

[Signatures]

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