Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 19 November 2015 [1]

Joined Cases C-186/14 P and C-193/14 P

ArcelorMittal Tubular Products Ostrava a.s. and Others
v
Hubei Xinyegang Steel Co. Ltd
and
Council of the European Union
v

Hubei Xinyegang Steel Co. Ltd

(Appeal — Dumping — Regulation (EC) No 384/96 — Article 3(5), (7) and (9) — Article 6(1) — Imports of certain seamless pipes and tubes, in iron or steel, from China — Definitive anti-dumping duty — Determination of a threat of injury — Taking into account of post-investigation period data — Extent of judicial review)

I – **Introduction**

1. By their respective appeals, ArcelorMittal Tubular Products Ostrava a.s. and Others ('ArcelorMittal and Others') and the Council of the European Union seek to have set aside the judgment of the General Court in *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35, 'the judgment under appeal'), whereby the General Court upheld the applicant's application for annulment of Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China [2] ('the regulation at issue').

2. These appeals, which were joined by decision of the President of the Court of 28 July 2014, provide the Court with the opportunity to clarify, for the first time, the scope of the concept of 'threat of injury' within the meaning of Article 3 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, [3] as amended by Council Regulation (EC) No 2117/2005 of 21 December 2005 [4] ('the basic regulation'). They also raise the question of the General Court's observance of the limits of its review of the economic assessments made by the institutions in the context of the measures on protection against dumping.

1 — Original language: French.
2 — OJ 2009 L 262, p. 19.
3 — OJ 1996 L 56, p. 1.
4 — OJ 2005 L 340, p. 17.

II – **Legal framework**

3. Article 3 of the basic regulation provides:

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

…

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

…

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.

…

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.In making a determination regarding the existence of a threat of material injury, consideration should be given to such factors as:

(a) a significant rate of increase of dumped imports into the Community market indicating the likelihood of substantially increased imports;

(b) sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;

(c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports;

and

(d) inventories of the product being investigated.

No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.'

4. Article 6(1) of the basic regulation provides:

'Following the initiation of the proceedings, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of no less than six months immediately prior to the initiation of the proceeding. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.'

III – **Background to the disputes**

5. On 9 July 2008, following a complaint lodged by the Defence Committee of the Seamless Steel Tube Industry of the European Union, the Commission published a notice of initiation of an anti-dumping proceeding concerning imports of seamless pipes and tubes, of iron or steel, originating in the People's Republic of China. [5]

6. The Commission decided to limit its examination to a sample, in accordance with Article 17 of the basic regulation. In that context, it selected four Chinese exporting producers representing 70% of the volume of total exports of the product concerned to the European Union. Those exporting producers included Hubei Xinyegang Steel Co. Ltd ('Hubei').

7. On 7 April 2009, the Commission adopted Regulation (EC) No 289/2009 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China [6] ('the provisional regulation').

8. At recital 13 in the preamble to the provisional regulation, the Commission stated that the investigation of dumping and injury covered the period from 1 July 2007 to 30 June 2008 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2005 to the end of the investigation period ('the period considered').

9. In the words of its assessment, as summarised at recital 135 to the provisional regulation, the Commission considered, first, that, 'although the Community industry had not suffered material injury during the period considered [it] was at the end of the [investigation period] in a vulnerable state'; second, that 'all the conditions for the injury to fully appear after the [investigation period] [were] present'; and, third, that 'the condition of threat of injury [was] also fulfilled'.

10. On 24 September 2009, the Council adopted the regulation at issue.

11. At recitals 35 to 81 to that regulation, the Council confirmed the Commission's findings set out in the provisional regulation relating to the absence of injury and the existence of a threat of injury for the EU industry. In that regard, the Council took into account data relating to a period after the investigation period, namely the period between July 2008 and March 2009.

5 — OJ 2008 C 174, p. 7.

6 — OJ 2009 L 94, p. 48.

IV – **The proceedings before the General Court and the judgment under appeal**

12. By application lodged at the Registry of the General Court on 30 December 2009, Hubei sought the annulment of the regulation at issue. The Commission and ArcelorMittal and Others intervened in support of the form of order sought by the Council.

13. In support of its action, Hubei raised three pleas in law. Among those pleas, the third alleged infringement of Articles 3(9), 9(4) and 10(2) of the basic regulation, on the ground that the regulation at issue was based on manifest errors of assessment as to the existence of a threat of material injury.

14. The General Court examined only the third plea raised by Hubei, and upheld it. The General Court considered that the Council had made a manifest error of assessment in confirming the Commission's finding that the EU industry was in a vulnerable state at the end of the investigation period and also that it had infringed Article 3(9) of the basic regulation in holding that in this case there was a threat of injury.

15. As regards the institutions' findings as to the state of vulnerability of the EU industry, the General Court found, at paragraph 61 of the judgment under appeal, that besides the decrease of the EU industry's market share, the economic factors taken into account by the institutions were all positive and, on the whole, painted a picture of an industry in a situation of strength, not of fragility and vulnerability. According to the General Court, the institutions' conclusion that the EU industry was in a vulnerable situation was not supported by the relevant economic data.

16. Furthermore, at paragraphs 63 to 65 of the judgment under appeal, the General Court rejected the other evidence put forward by the institutions to support their finding that the EU industry was in a vulnerable situation at the end of the investigation period. In particular, the General Court observed that contraction in demand must not be attributed to the dumped imports and held that the relevant evidence in the present case did not support the assertion that the increase in importations from China had certainly limited the EU industry's inclination to invest and expand production capacity to follow the expansion in the market.

17. As regards the threat of injury, following the examination carried out at paragraphs 70 to 90 of the judgment under appeal, the General Court held, at paragraph 91 of that judgment, that as regards the four factors laid down in Article 3(9) of the basic regulation, one factor (inventories of the product being investigated) was regarded as irrelevant by the institutions; two factors (volume of imports and price of imports) showed inconsistencies between the Commission's estimates, confirmed by the Council in the regulation at issue, and the relevant post-investigation period data; and one factor (capacity of the exporter and risk of redirection of exports) was incomplete in respect of the relevant evidence to be taken into account.

18. Also at paragraph 91 of the judgment under appeal, the General Court stated that those inconsistencies and lacunae must be viewed in the context of the requirements laid down in Article 3(9) of the basic regulation that the threat of injury must be based 'on facts and not merely on allegation, conjecture or remote possibility' and that the change in circumstances which would create a situation in which the dumping would cause injury must be 'clearly foreseen and imminent'.

19. The General Court therefore concluded, at paragraph 93 of the judgment under appeal, that, since the regulation at issue was based on the finding of a threat of injury and the Council had erred in that regard, that regulation must be annulled to the extent that it imposed anti-dumping duties on exports of products produced by Hubei and collected provisional duties imposed on those exports.

V – **Forms of order sought and procedure before the Court**

20. In Case C-186/14 P, ArcelorMittal and Others claim that the Court should:

— set aside the judgment under appeal;

— reject the first part of the third plea raised by the applicant at first instance;

— refer the case back to the General Court, for the remainder; and

— order Hubei to pay the costs incurred by ArcelorMittal and Others at first instance and in the present appeal.

21. In Case C-193/14 P, the Council claims that the Court should:

— set aside the judgment under appeal;

— reject the first part of the third plea raised by the applicant at first instance;

— refer the case back to the General Court for an examination of the other pleas raised at first instance;

— order Hubei to pay the costs borne by the Council at first instance and on appeal.

22. Hubei contends that the Court should:

— dismiss the appeals in their entirety; and

— order the appellants to pay the costs.

23. By decision of the President of the Court of 28 July 2014, the two cases were joined for the purposes of the oral procedure and the judgment.

24. In application of Article 172 of the Rules of Procedure of the Court, the Commission lodged a response in which it supported the form of order sought by ArcelorMittal and Others and the Council and asked the Court to order Hubei to pay the costs.

25. The Italian Republic, which by decision of the President of the Court of 21 August 2014 was granted leave to intervene in support of the form of order sought by the Council in Case C-193/14 P, also asks the Court to set aside the judgment under appeal, reject the first part of the third plea put forward by the applicant at first instance and refer the case back to the General Court.

VI – **Analysis of the pleas**

26. ArcelorMittal and Others submit three pleas in support of their claim for annulment. Those pleas allege, respectively, misinterpretation of Article 3(7) of the basic regulation; incorrect application of Article 3(9) and infringement of Article 6(1) of that regulation; and error on the part of the General Court in that it concluded that the EU institutions' analysis regarding the threat of injury was vitiated by a manifest error of assessment.

27. In support of its appeal, the Council raises four pleas for annulment, alleging, first, infringement of Article 3(5) of the basic regulation and distortion of the clear sense of the evidence; second, misinterpretation of Article 3(7) of the basic regulation; third, misinterpretation of Article 3(9) of the basic regulation; and, fourth, an error of law on the part of the General Court in that it substituted its own assessment of the economic factors for that of the EU institutions.

28. In so far as virtually all of the pleas in the two appeals are analogous or, at least, overlap to a large extent, I propose to examine them together, in the following order:

— the first plea raised by the Council and the first part of the third plea raised by ArcelorMittal and Others, alleging, in essence, infringement of Article 3(5) of the basic regulation and distortion of the clear sense of the evidence as regards the General Court's findings relating to the vulnerable state of the EU industry;

— the Council's second plea and ArcelorMittal and Others' first plea, both alleging misinterpretation of Article 3(7) of the basic regulation;

— the Council's third plea and ArcelorMittal and Others' second plea and the second part of their third plea, alleging misinterpretation of Article 3(9) of the basic regulation and errors in relation to the examination of the factors relating to the threat of injury;

— the Council's fourth plea, alleging an error of law on the part of the General Court in that it substituted its own assessment of the economic factors for that of the EU institutions.

A – *The Council's first plea and the first part of ArcelorMittal and Others' third plea, alleging infringement of Article 3(5) of the basic regulation and distortion of the clear sense of the evidence as regards the General Court's findings relating to the vulnerable state of the EU industry*

1. Summary of the arguments of the parties

29. The Council submits that, although Article 3 of the basic regulation does not mention the concept of 'vulnerability', that concept may none the less, as in the present case, be a key element for a finding of threat of injury. Thus, the examination of the vulnerability of the situation of the EU industry is the first step during which the institutions examined the situation of the EU industry, relying on the factors set out in Article 3(5) of the basic regulation. Those factors include the impact of dumped imports, which the General Court failed to examine.

30. Furthermore, the Council maintains that, in its assessment of the economic factors, such as the level of stocks, sales volume, the market share of the EU industry, employment levels, sales prices, returns on investments and the profitability of the EU industry, the General Court arrived at incomplete, and indeed incorrect, conclusions, by omitting certain facts and disregarding trends or the negative aspects of positive factors during the last two years of the investigation period, which amounts to a manifest distortion of the clear sense of the evidence. In addition, the General Court failed to take account of either the size of the dumping margin or the institutions' analysis relating to the recovery of the EU industry following previous dumping practices.

31. ArcelorMittal and Others claim that the General Court ascribed to the concept of 'vulnerability' an independent meaning and importance that it does not have. They observe that the only relevant question is whether the finding relating to the vulnerability of the EU industry was manifestly erroneous, and not whether the institutions were correct to characterise the situation as 'vulnerable'. In fact, the basic regulation does not mention the terms 'vulnerable' or 'vulnerability', let alone require that the EU industry must be in a 'vulnerable' state at the end of the investigation period as a condition for finding a threat of injury.

32. ArcelorMittal and Others also maintain that the General Court's findings at paragraphs 64 and 65 of the judgment under appeal, concerning, respectively, the EU industry's inclination to invest in and expand production capacity and its failure to recover following dumping practices prior to those addressed by the regulation at issue are incorrect.

33. The Commission submits that the General Court's approach evidences a disregard of the case-law concerning the wide discretion of the institutions in complex anti-dumping issues and reflects the General Court's apparent desire to substitute its own assessment for that of the Council. It supports the arguments of ArcelorMittal and Others concerning the concept of 'vulnerability' and adds that that is merely a descriptive concept of the state of the EU industry.

34. Hubei contends, in essence, that those pleas for annulment are inadmissible in so far as they challenge the General Court's assessment of the facts and that they are in any event unfounded. In that regard, it submits that, in accordance with the case-law, the General Court ascertained whether the evidence was such as to support the conclusions which the institutions drew from it and correctly concluded that it was not. In addition, Hubei maintains that the assertion that the General Court did not specifically address the dumping margin is also unfounded, since that is not a relevant economic indicator for assessing whether the EU industry is in a vulnerable state or whether there is a threat of injury.

2. Assessment

35. The criticisms made by the appellants in the present pleas are directed against the paragraphs of the judgment under appeal relating to the assessment of the EU industry at the end of the investigation period, in the light of the factors listed in Article 3(5) of the basic regulation.

36. Following the analysis carried out at paragraphs 58 to 65 of the judgment under appeal, the General Court concluded, at paragraph 66 of that judgment, that the Council had made a manifest error of assessment in confirming the Commission's conclusion (in the provisional regulation) that the EU industry was in a vulnerable situation at the end of the investigation period. According to the General Court, the economic data on which the institutions had relied did not support that conclusion, but, on the contrary, as a whole, painted a picture of an industry in a situation of strength, not of fragility or vulnerability. [7]

37. Before I examine the appellants' complaints, I would point out that the appellants do not dispute the General Court's assertion, at paragraph 58 of the judgment under appeal, that, in essence, the situation of the EU industry at the end of the investigation period, although contained in the part (of the basic regulation and of the provisional regulation and the regulation at issue) concerning the injury, 'is not irrelevant to the analysis of the threat of injury', provided for in Article 3(9) of the basic regulation.

7 — See paragraphs 61 and 66 of the judgment under appeal.

38. Although that assertion is not criticised, it highlights and provides a better understanding of the relationship between the different relevant paragraphs of Article 3 of the basic regulation, entitled 'Determination of injury'.

39. Article 3(1) of the basic regulation defines the term 'injury' as meaning, unless otherwise specified, in particular, material *injury* to the EU industry or *threat of material injury* to that industry.

40. Article 3(2) of the basic regulation covers the determination of the *existence* of injury. Such determination is to involve an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the EU market for like products and also the consequent impact of those imports on the EU industry.

41. Article 3(5) of the basic regulation, which was applied by the institutions in the context of the regulation at issue, provides that the examination of the impact of the dumped imports on the EU industry is to include an evaluation of 'all relevant economic factors and indices having a bearing on the state of the [EU] industry'. That article states that the list of those factors is not exhaustive.

42. Article 3(9) of that regulation covers the 'determination of a threat of material injury'. It is specified that that determination is to be based on facts and not merely on allegation or remote possibility and that the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. Article 3(9) also lists four factors which, among others, must be considered in order to make a determination of 'the existence of a threat of material injury'. Article 3(9) states that no one of those factors can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken material injury will occur.

43. It will be noted, therefore, that while Article 3(2) of the basic regulation requires that a 'determination of [the *existence of*] injury' [8] is to involve an objective examination of the impact of the dumped imports on the Community industry, an examination which, in the words of Article 3(5) of the basic regulation, is to include an evaluation of all relevant factors and indices having a bearing on the state of the EU industry, that examination is not expressly required by the basic regulation in the case of the analysis of a *threat* of injury, within the meaning of Article 3(9) of that regulation.

44. However, Article 3(9) of the basic regulation sets out a non-exhaustive list of the factors to be taken into consideration in making a determination regarding the existence of a threat of injury, which therefore does not preclude the factors relating to the state of the EU industry referred to in Article 3(5) of that regulation.

45. As the institutions considered in the present case, examination of the relevant factors which have an impact on the situation of the EU industry in the context of a threat of injury also appears to be necessary.

46. Admittedly, that examination does not help to demonstrate the existence of injury, since, in the context of the analysis of a threat of injury, such injury has, by definition, not (yet) materialised.

47. However, it makes it possible to present the situation of the EU industry in the light of which the institutions can evaluate, as required by Article 3(9) of the basic regulation, whether, where further dumped imports are imminent, the threat of material injury to the EU industry would be transformed into material injury if protective action were not taken.

8 — Emphasis added.

48. In other words, in order for the institutions to be able to determine whether there is a threat of material injury to the EU industry, when, by definition, that industry is not suffering present material injury in spite of the effects of the imports dumped during the investigation period, it is necessary to know the present situation of that industry. It is only by knowing the current state of that industry that the institutions will be able to determine whether the imminent increase in future dumped imports will be capable of causing material injury to the EU industry unless protective action is taken. [9]

49. In the present case, it is common ground that, following their analysis, the institutions inferred from the examination of the (non-exhaustive) factors and indices listed in Article 3(5) of the basic regulation that, although the EU industry had not suffered material injury during the investigation period, it was none the less in a 'vulnerable state' at the end of that period, namely on 30 June 2008.

50. That state of vulnerability, as indicated by the General Court at paragraph 58 of the judgment under appeal, was taken into consideration in the provisional regulation and the regulation at issue in the context of the analysis of the threat of injury.

51. That finding was disputed by Hubei before the General Court on the ground that it contradicted the relevant economic data, as the General Court observed at paragraph 57 of the judgment under appeal.

52. It is true, as ArcelorMittal and Others submit, that the basic regulation does not lay down the vulnerable state of the EU industry as a condition that can lead to a finding of a threat of injury. However, it is incorrect to give the impression that the General Court required the institutions to demonstrate that the EU industry satisfied such a condition. None of the paragraphs in the judgment under appeal suggests that that is so.

53. The fact that the vulnerability of the EU industry found by the institutions may appear to be a factual description of the situation of the EU industry, as the Commission maintains, does not mean that it is immune to review by the Court; in particular, review of a manifest error of assessment covers both facts and evidence.

54. I am not persuaded, moreover, that, in the light of the evidence in the file, that concept had only the function of a factual description in the present case.

9 — See, by analogy, concerning the interpretation of Articles 3.4 and 3.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), the wording of which was reproduced in Article 3(5) and (9), respectively, of the basic regulation, the Report of the Panel on 'Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States', WT/DS132/R, 28 January 2000, paragraphs 7.140 and 7.141, adopted by the Dispute Settlement Body on 24 February 2000. The Panel's assessment was upheld by the Report of the Panel on 'Mexico — Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States', WT/DS132/RW, 22 June 2001, paragraphs 6.24 and 6.28 and also by the Report of the Appellate Body, WT/DS132/AB/RW, 22 October 2001, paragraphs 114 to 118.

55. Indeed, as the Council expressly acknowledges in its appeal, the state of vulnerability of the EU industry was regarded by the institutions as a 'key' element in the analysis of the threat of injury in the present case. That emerges very clearly, in particular, from recital 126 to the provisional regulation, mentioned by the General Court at paragraph 58 of the judgment under appeal, and also from recital 135 to that regulation, which states that the vulnerable state is one of the three criteria that enabled the Commission to conclude that there was a causal link between the imminent threat of dumped Chinese imports and the future injury that the EU industry was foreseen to suffer. [10]

56. It is no doubt easier, moreover, to demonstrate the existence of a threat of imminent material injury when the EU industry is already in an economically fragile situation or a state of vulnerability because of dumped imports than if the factors set out in Article 3(5) of the basic regulation paint a picture of that industry as being in a state of expansion or, at least, in a situation of strength. [11]

57. In those circumstances, I consider that, on a plea at first instance alleging that the institutions' finding as regards the vulnerability of the EU industry contradicted the relevant economic data, the General Court was perfectly entitled to examine the complaint raised before it by Hubei.

58. It is also appropriate to reject the Council's general criticism that the General Court infringed Article 3(5) of the basic regulation, on the ground that it did not examine the factor of the impact of the dumped imports on the situation of the EU industry. In fact, that impact is not as such one of the factors set out in Article 3(5) of the basic regulation. It is the result (either positive or negative) of the examination of the factors referred to in Article 3(5) of the basic regulation. To my mind, therefore, the Council misinterprets that provision.

59. More central to the present pleas in the appeals is the question of the extent of the review carried out by the General Court of the finding reached by the institutions concerning the situation of vulnerability of the EU industry, following their assessment of the factors and indices set out in Article 3(5) of the basic regulation, and also the General Court's alleged distortion of the clear sense of the evidence in that context.

60. As regards the extent of the judicial review, it should first of all be pointed out that the General Court explicitly recalled the limits which it must observe when it is required to review the legality of measures adopted to protect trade. That follows unambiguously from paragraph 53 of the judgment under appeal, which properly refers to the case-law of this Court in which it has been held that the institutions enjoy a broad discretion in that field by reason of the complexity of the economic, political and legal situations which they have to examine, which means that the judicial review of the appraisal of complex economic matters must be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there have been manifest errors in the assessment of those facts or a misuse of powers. [12]

10 — The final paragraph of recital 126 to the provisional regulation, on the 'Conclusion on threat of injury', states that '[i]t is provisionally concluded that in the absence of measures the Chinese dumped imports would imminently cause material injury to the vulnerable [EU] industry, in particular, in terms of reduced sales, market share, production and profitability'. Recital 135 to that regulation states that '[i]n conclusion, considering that, although the [EU] industry had not suffered material injury during the period considered but was at the end of the [investigation period] in a vulnerable state (see recital 89), that all the conditions for the injury to fully appear after the [investigation period] are present (see recital 112 …), and the condition of threat of injury are also fulfilled as explained at recital 126 …, it is concluded that there is a causal link between the imminent threat of dumped Chinese imports and the injury that is foreseen to be suffered by the [EU] industry'.

11 — See, to that effect, by analogy, Panel Report, 'Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey', WT/DS211/R, 8 August 2002, paragraph 7.91. See also Dascalescu, F.D., 'Threat of Injury in Anti-dumping Investigations: Some Comments on the Current Practice at EU and WTO Level', *Journal of World Trade*, No 4, 2011, p. 884.

12 — See judgments in *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraph 40), and *Hoesch Metals and Alloys* (C-373/08, EU:C:2010:68, paragraph 61), cited by the General Court, and also, more recently, judgments in *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 63), and *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154, paragraph 29).

61. It will be recalled, moreover, that the Court has already applied that case-law in the context of the determination of the existence of injury caused to the EU industry, which presupposes the assessment of complex economic situations, in particular as regards the factors that cause injury to that industry in the context of an anti-dumping investigation. [13] The same must apply, to my mind, and as the General Court has acknowledged, in the determination of a threat of injury.

62. It follows that, in the exercise of their restricted review of such complex economic situations, the Courts of the European Union cannot substitute their own economic assessment for that of the EU institutions. [14]

63. However, as the Court has repeatedly held in the context of competition law and State aid, fields which, as in the field of measures to protect trade, give rise to complex economic assessments, the broad discretion enjoyed by the institutions does not mean that the Courts of the European Union must refrain from reviewing the EU institutions' interpretation of information of an economic nature. [15]

64. According to that case-law, the Courts of the European Union must, in particular, not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. [16]

65. At paragraph 53 of the judgment under appeal, the General Court applied that case-law by analogy in the context of the examination of the economic data relating to the analysis of the threat of injury. It also applied that case-law when it verified the institutions' conclusion relating to the state of vulnerability of the EU industry at the end of the investigation period. Following that examination, the General Court held, at paragraph 66 of the judgment under appeal, that the institutions' conclusion was 'not supported by the relevant data in the present case'.

66. This Court has not thus far expressly applied in the field of measures to protect trade the wording of its case-law developed in the fields of competition law and State aid cited at paragraphs 63 and 64 above.

67. However, it clearly applied that wording in its judgment in *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78). [17] When called on to determine whether the General Court had exceeded the limits of its judicial review when it had considered that the relevant evidence in the file on which the institutions had based their conclusion that the functions of a selling company linked with two Ukrainian exporters whose products were dumped were comparable to those of an agent working on a commission basis was not sufficiently

13 — See, in particular, judgments in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council* (C-10/12 P, EU:C:2013:865, paragraph 22), and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 34).

14 — See, in particular, in the sphere of State aid, judgments in *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 57), and *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 66) and also, in the sphere of the application of the competition rules, judgments in *Commission* v *Alrosa* (C-441/07 P, EU:C:2010:377, paragraph 67), and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 46).

15 — See, in particular, as regards the application of the competition rules, judgments in *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39); *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraph 145); and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 46) and also, as regards the application of the rules on State aid, judgments in *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 56), and *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 64).

16 — See, in particular, judgments in *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 65), and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 46 and the case-law cited).

17 — See also my Opinion in these joined cases (C-191/09 P and C-200/09 P, EU:C:2011:245, points 101 to 117).

convincing, the Court held that the review of that evidence by the General Court did not constitute a new assessment of the facts replacing that made by the institutions. The General Court had therefore not encroached on the broad discretion of the institutions, but had been restricted to ascertaining whether that evidence 'was able to support the conclusions reached by the institutions'. [18]

68. It follows, to my mind, that the General Court was correct to hold that it was entitled to ascertain whether the relevant economic data, namely the factors set out in Article 3(5) of the basic regulation relating to the situation of the EU industry, substantiated the institutions' conclusion that the industry was in a vulnerable state at the end of the investigation period.

69. Does that mean that, in the exercise of its power of review, the General Court, by rejecting as invalid the conclusion reached by the institutions, substituted its own assessment of the relevant economic data for that of the institutions?

70. In order to answer that question, it is necessary, first of all, to ascertain whether, as the Council claims in the first plea of its appeal, the summary of the relevant economic data on which the institutions relied, set out by the General Court at paragraph 59 of the judgment under appeal, is incomplete, selective and inaccurate to the extent that it ultimately distorts the clear sense of the evidence on which the institutions relied.

71. As we are aware, the distortion of the clear sense of the evidence by the General Court — a point of law which is amenable to review by the Court in an appeal — must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence. [19] Otherwise it would amount to inviting the Court to reappraise the facts established by the General Court in the exercise of its absolute discretion, which, under Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, falls outside the jurisdiction of the Court of Justice in an appeal, as an appeal is limited to points of law. [20]

72. A plea alleging distortion of the clear sense of the evidence must therefore be limited to the assumption of a manifest inaccuracy on the part of the General Court in the establishment of the facts, which must itself be obvious from the file, whether a manifestly inaccurate finding of the content of the evidence taken into account, or again, in my view, the omission or selection of evidence giving rise to a manifestly misleading and incorrect impression of the truth.

73. In this instance, at paragraph 59 of the judgment under appeal, the General Court listed 13 factors, mentioned in Article 3(5) of the basic regulation and examined by the Commission in the provisional regulation and confirmed in the regulation at issue, designed to demonstrate the development of the situation of the EU industry during the investigation period and therefore up to the end of that period.

74. The Council puts forward complaints of various types with the aim of showing that the General Court distorted the clear sense of the evidence relating to 10 of those 13 factors [21] and also incorrectly failed to take two additional factors into consideration.

18 — Judgment in *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 68). See also my Opinion in these joined cases (C-191/09 P and C-200/09 P, EU:C:2011:245, point 111).

19 — See, in particular, judgment in *Trubowest Handel and Makarov* v *Council and Commission* (C-419/08 P, EU:C:2010:147, paragraphs 31 and 32 and the case-law cited).

20 — See, in particular, judgment in *Council* v *Alumina* (C-393/13 P, EU:C:2014:2245, paragraph 16 and the case-law cited).

21 — The Council does not take issue with the 7th, 8th and 12th factors, as summarised by the General Court at paragraph 59 of the judgment under appeal. Those factors are, in order, 'productivity increased by 7% (recital 78 [to] the provisional regulation)'; 'the average wage per employee increased by 16% (recital 79 [to] the provisional regulation)'; and 'the net cash flow from operating activities increased by 73% to EUR 634 million during the investigation period, and the Commission stated, moreover, that "[t]here was no indication that the [EU] industry [had] encountered difficulties in raising capital" (recital 84 [to] the provisional regulation)'.

75. Although in several respects those allegations tend, de facto, to confer on the Court the power to reappraise the facts, which it cannot do in an appeal, to my mind they must be rejected in any event as unfounded, on the following grounds.

76. As regards the *first* and *second* factors, the General Court noted that, respectively, 'the [EU] industry's production increased by 7% (recital 67 [to] the provisional regulation)' and that 'the production capacity utilisation increased by 9% to 90% during the investigation period, and showed elevated rates in 2006 and 2007 (recital 69 [to] the provisional regulation)'.

77. That finding is clear from recital 69 to the provisional regulation, according to which production capacity utilisation increased between 2005 (the beginning of the period concerned) and the investigation period from 83% to 90%, that is to say, by approximately 9%, or, in other words, by seven percentage points.

78. The Council does not criticise that finding but takes issue with the General Court for having confused two economic indicators, namely production capacities and production capacity utilisation, and criticises it for not having taken account of the fact that the increase of seven percentage points was limited.

79. However, it is clear on a simple reading of paragraph 59 of the judgment under appeal that the General Court definitely did not confuse the two factors. Furthermore, the fact that the increase of seven percentage points was limited has no impact on the finding that an increase of approximately 9% (or seven percentage points) of production capacity occurred during the period concerned and reached 90% during the investigation period. The Council has therefore not demonstrated a distortion of the clear sense of that evidence.

80. At paragraph 59 of the judgment under appeal, the General Court summarised the *third* factor as follows: 'the level of stocks increased by 12%; however, the Commission noted that "the relevance of this indicator in the injury analysis is limited" since the vast majority of the production is made in response to orders (recital 72 [to] the provisional regulation)'.

81. The Council takes issue with the General Court for having failed to state that that indicator showed a downward trend since 2006, which in its submission means that the General Court's findings are, 'at the very least, incomplete if not simply incorrect'.

82. However, such incompleteness, on the assumption that it is established, does not mean that the General Court's findings concerning stocks is manifestly inaccurate. In reality, the General Court did take the decrease indicated by the Council into account, since the increase of 12% is the result of the difference, referred to at recital 72 to the provisional regulation, between 2006 (an increase of 16%) and the ensuing period up to the end of the investigation period (a cumulative decrease of 4%). The Council has therefore not adduced evidence that the General Court vitiated the judgment under appeal by distorting the clear sense of the evidence relating to the third factor.

83. The *fourth* factor relates to the volume of sales. The General Court noted in that regard that 'the sales volume by the [EU] industry increased by 14% (recital 73 [to] the provisional regulation)'.

84. The Council takes issue with the General Court for having failed to address the EU institutions' explanation that that increase was not in line with the overall growth of 24% in the market and that the EU industry was therefore losing market share. The General Court ignored the negative aspect of a positive indicator. In addition, the volume of sales in fact fell by 3% between 2007 and the end of the investigation period.

85. Those accusations also strike me as unfounded. The General Court merely referred to the increase of 14% mentioned at recital 73 to the provisional regulation between 2005 and the end of the investigation period. While it did not make clear that the positive effect of the significant rise in consumption was reflected only in part in the increase of 14%, that does not alter the accuracy of the finding. In addition, the 3% drop between 2007 and the end of the investigation period alleged by the Council was neither expressly indicated nor specifically highlighted at recital 73 to the provisional regulation and does not in any way alter the finding that the volume of sales increased by 14% between 2005 and the investigation period (2007-2008).

86. As regards the *fifth* factor, the General Court observed that 'the [EU] industry's market share decreased by 5.2 percentage points (recital 75 [to] the provisional regulation)'.

87. Although it does not deny the accuracy of that figure, the Council takes issue with the General Court for having failed to consider the circumstances in which that decline took place, that is to say, the context of an expanding market which had seen a strong increase in imports from China.

88. It is true that a reference by the General Court to the circumstances mentioned by the Council would no doubt have reinforced the negative nature of that factor. The fact none the less remains that the General Court acknowledged, at paragraph 61 of the judgment under appeal, that the factor in question was not positive. Furthermore, as is apparent from paragraphs 64 and 65 of the judgment under appeal, the General Court took into account evidence taken from the provisional regulation relating to the context in which the EU industry's market share had fallen. I therefore see no manifest factual inaccuracy on the part of the General Court in relation to the evidence concerning this factor.

89. The *sixth* factor was summarised by the General Court as follows: 'the level of employment remained stable (recital 77 [to] the contested regulation)'.

90. In the Council's submission, that assertion is not accurate, since the level of employment fluctuated during the period concerned and even fell by 6% between 2007 and the end of the investigation period, as is apparent from recital 77 to the provisional regulation, confirmed in the regulation at issue.

91. With respect to recital 77 to the provisional regulation, the Council's assertion does not demonstrate any manifestly incorrect finding of fact on the part of the General Court. It follows from that recital that, although employment certainly fell between 2007 and the end of the investigation period, '[o]verall, employment of the sampled producers remained stable between 2005 and the [investigation period] at around 9 100 persons. This indicates that the sampled producers improved efficiency since, at the same time, production volumes increased by 7%'.

92. As already stated,[22] the Council does not address any criticism alleging distortion of the clear sense of the evidence in connection with the *seventh* (productivity increased by 7%) and *eighth* (the average wage per employee increased by 16%) factors, as summarised by the General Court at paragraph 59 of the judgment under appeal. That must be noted.

93. As regards the *ninth* factor, the General Court observed that 'the sales prices of the [EU] industry increased by 21% (recital 80 [to] the provisional regulation)'.

94. The Council takes issue with the General Court for having mentioned an increase that does not reflect the entire period concerned and for having failed to take the reasons for that increase and its relative nature into account.

22 — See point 74 of and footnote 21 to this Opinion.

95. It follows, in particular, from recital 80 to the provisional regulation that '[t]he sales prices of the sampled producers increased substantially by 21% between 2005 and 2007, and remained stable during the [investigation period]'. The indices of increase, set out in the table at recital 80, for 2007 and the investigation period are the same (an index of 121), by comparison with 2005 (an index of 100), which means that the General Court could reasonably infer from that recital that the sales prices had in fact increased by 21%. I do not therefore think that the Council's assertions of distortion of the clear sense of the evidence with respect to the General Court's summary of that factor can be upheld.

96. As concerns the *10th* factor, the General Court summarised recital 82 to the provisional regulation as follows: 'the profitability of the [EU] industry's sales to independent customers, as a percentage of net sales, increased by 27%, or by 3.3 percentage points, to 15.4% during the investigation period, the rate of profit for 2005 and, in particular, 2006 and 2007 were also very high'.

97. Without calling into question the accuracy of the data used by the General Court, the Council maintained that that Court failed to take account of the fact that profits were negative between 2007 and the end of the investigation period and also during the post-investigation period.

98. As regards the post-investigation period, the Council's criticism is to my mind inoperative. The appraisals of the institutions examined by the General Court and summarised at paragraph 59 of the judgment under appeal related to the situation of the EU industry, described by the institutions as 'vulnerable' during the period concerned and up to the end of the investigation period.

99. As concerns the failure to take into account the fall in profits between 2007 and the end of the investigation period, it should be observed that that fall in profits is not explicitly mentioned in the explanations provided by the Commission at recital 82 to the provisional regulation, although it is true that it might be apparent from the table of gross figures set out in that recital. On the other hand, those explanations emphasised that profitability decreased from 17.9% in 2007 to 15.4% during the investigation period and that between 2005 and the investigation period 'profitability [had] increased by 3 percentage points'. In those circumstances, it does not appear to me that the alleged omission led the General Court to distort the clear sense of the evidence.

100. As regards the *11th* factor, the General Court observed that 'the return on investments, that is to say, the profit expressed as a percentage of the net book value of investments, increased by 10%, or by 4.6 percentage points, to 51.7% during the investigation period, after having reached 85.1% in 2006, and 79.2% in 2007 (recital 82 [to] the provisional regulation)'.

101. In the Council's submission, the General Court merely mentions the data indicating a positive trend, although the increase between 2005 and the end of the investigation period conceals a drop of more than 70% in the return on investments.

102. It should be stated, first of all, that the return on investments examined in the provisional regulation does not emerge solely from recital 82 to that regulation, which contains a single table setting out the economic data relating to the profitability of sales and the return on investments, but also from the explanations provided by the Commission at recital 83 to the provisional regulation. Independently of that approximation, I consider that the General Court made a faithful summary of the data from the table and the explanations supplied in those two recitals to the provisional regulation relating to the return on investments.

103. First, recital 83 states that the return on investments (profit in percent of the net book value of investments) had 'increased from a level of 47% in 2005 to 85% in 2006', that it had 'decreased to 79% in 2007 and further decreased to 52% in the [investigation period]. Overall, the return on investments increased by 4.6 percentage points over the period considered'. Second, while it is true that the index, set out in the table at recital 82 to the provisional regulation, shows a reduction of 71 points between

2006 (an index of 181) and the investigation period (an index of 110), the fact none the less remains that what was particularly emphasised in the provisional regulation was that the return on investments had increased by 4.6 percentage points over the period considered, which corresponds precisely to the difference between 2005 (an index of 100) and the investigation period (an index of 110), or the 10 index points also mentioned by the General Court at paragraph 59 of the judgment under appeal.

104. The General Court therefore did not to my mind distort the clear sense of the evidence relating to the factor linked with the return on investments.

105. As stated earlier,[23] the General Court's summary of the *12th* factor (the net cash flow from operating activities) does not give rise to any complaint by the Council of distortion of the clear sense of the evidence. That should therefore be duly noted.

106. Last, the General Court set out the *13th* factor as follows: 'the [EU] industry's annual investments increased by 185% to EUR 284 million during the investigation period (recital 85 [to] the provisional regulation)'.

107. The Council states that that positive indicator, the accuracy of which it does not question, ought to have been placed in context by the General Court in the light of the 'facts' set out at recital 86 to the provisional regulation, whereas there is no indication that they were taken into consideration.

108. In that regard, I am not certain that the Council's criticism is genuinely based on a distortion of the clear sense of the evidence. Recital 86 to the provisional regulation contains no facts or economic data, but sets out assessments made by the Commission as to the low level of investments before the period concerned and the fact that investments during that period had not been made with the purpose of increasing production capacity. In any event, it should be noted at this stage that the General Court did indeed examine those assessments at paragraphs 64 and 65 of the judgment under appeal.

109. Accordingly, the summary set out at paragraph 59 of the judgment under appeal which the General Court drew up of the 13 pieces of evidence taken into consideration by the institutions is not vitiated by any distortion of the clear sense of that evidence.

110. As for the Council's complaint that the General Court disregarded two additional factors on which the institutions relied, namely the magnitude of the dumping margin and the recovery of the EU industry following earlier dumping practices, set out at recital 87 to the provisional regulation, I consider that it is inoperative. Irrespective of the fact that that recital does not contain any precise economic data, but sets out rather assessments of the facts, the latter were examined by the General Court at paragraphs 64 and 65 of the judgment under appeal. The Council cannot therefore claim that those assessments of fact were omitted from the judgment under appeal.

111. As concerns, specifically, the General Court's examination of those assessments, ArcelorMittal and Others submit that the General Court carried out an incomplete and incorrect reading of recital 87 to the provisional regulation.

112. However, those criticisms tend to entrust the Court with the task of making a fresh appraisal of the facts, without identifying a manifestly inaccurate appraisal of the facts by the General Court, which falls outside the jurisdiction of the Court in an appeal.[24]

23 — See point 74 of and footnote 21 to this Opinion.

24 — See, in particular, as regards the limits of the Court's review in an appeal, judgment in *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 65 and the case-law cited).

113. In the light of those considerations, the complaint that the General Court substituted its own assessment of the economic data for that of the institutions is not supported by any more precise criticism. Ultimately, the General Court seems to me to have confined itself to ascertaining whether the evidence used by the institutions was such as to support the conclusions which they had drawn from it.

114. In that regard, it should be added that the appellants do not call into question the passage at paragraph 61 of the judgment under appeal, where it is stated that the General Court took into account the finding, pointed out by the Council, that the EU industry's market share had decreased by some percentage points during the period considered, being of the view that that finding did not support the conclusion that that industry was in a vulnerable situation at the end of the investigation period, in so far as it must be considered in the light of the fact that the EU industry had a significant market share during the investigation period, namely 63.6%, and that its sales had grown strongly in volume during the period considered.

115. For all of those reasons, I propose that the Council's first plea and the first part of ArcelorMittal and Others' third plea should be rejected.

B – *The Council's second plea and ArcelorMittal and Others' first plea, alleging misinterpretation of Article 3(7) of the basic regulation*

1. Summary of the arguments of the parties

116. The Council and ArcelorMittal and Others take issue with the General Court for having held, at paragraphs 63 and 69 of the judgment under appeal, that the deterioration of the economic context found by the EU institutions was based on an error of law, in so far as, according to Article 3(7) of the basic regulation, factors such as the contraction in demand must not be attributed to the dumped imports.

117. In that regard, the appellants maintain that the General Court misinterpreted Article 3(7) and that it was wrong to rely on the judgment in *Commission* v *NTN and Koyo Seiko* (C-245/95 P, EU:C:1998:46). Although in *Commission* v *NTN and Koyo Seiko* the EU institutions relied on the existence of an economic recession for the purposes of examining injury to the EU industry, in the present case they did not rely on such a recession to support the finding of a threat of injury. Nor did they attribute the effects of an economic recession to dumped imports, as the Italian Republic also maintains in its statement in intervention. On the contrary, the institutions found that exceptionally high demand had disguised the true injurious effect of the dumped imports and that those effects would be revealed if demand returned to normal levels.

118. In the appellants' submission, the fall in demand was foreseeable, since consumption could not remain at that exceptionally and historically anomalous level for a long period. However, the General Court did not address that finding.

119. The Commission claims that the fundamental legal error made by the General Court in the judgment under appeal consists in having wrongly merged the analysis of the threat of injury with the analysis of causality, although those two concepts are clearly distinguished in the basic regulation.

120. In effect, the Commission maintains that, in the analysis of the threat of injury, contraction in demand must be regarded as an objective fact or a framework of reference in which the existence of the injury or the threat of injury is assessed. The Commission observes, in that regard, that contraction in demand is not one of the injury factors referred to in Article 3(5) of the basic

regulation. It is logical to state that a contraction in consumption is likely to lead to a situation in which the EU industry will be worse off than if consumption remained stable or increased. In other words, the EU industry is likely to be exposed to a threat of injury when consumption is expected to fall in the very near future.

121. On the other hand, in the context of the examination of causation, a contracting demand for the product concerned plays an opposite role. Under the basic regulation, the analysis of causation is carried out in two successive steps. First of all, a 'positive attribution analysis' is made between increasing dumped imports and the injury or the threat of injury. Next, if causality is provisionally established, the analysis proceeds to the second step, that is to say, a 'negative attribution' analysis, whereby the investigating authority assesses whether one of the factors listed in Article 3(7) of the basic regulation (including contraction in demand) is in itself so important that it breaks the causal link that was provisionally established. In other words, that factor must be more important than the dumped imports as the cause of the injury or the threat of injury.

122. In the Commission's submission, the General Court used contraction in demand as a negative factor for the assessment of the threat of injury, whereas that factor can play a role only in the second step of the two-stage assessment of causality.

123. Hubei contends that the General Court was correct to hold that the expected contraction in Community demand could not be taken into account in the assessment of the threat of injury. The effects of such a contraction in demand, which cannot be confined to situations of economic recession, must not, according to Article 3(7) of the basic regulation, be attributed to dumped imports and cannot therefore serve to support the conclusion that there is a threat of injury, as is clear from the case-law of this Court.

124. At recital 48 to the regulation at issue, the Council claimed, in essence, that if the economic conditions deteriorated and the level of EU demand contracted, the threat of injury would then materialise. Consequently, it attributed at least a part of the alleged threat of injury to that expected contraction in demand. In Hubei's submission, that is precisely the type of external factor that cannot serve as the basis for an assessment of a threat of injury, as is clear from Article 3(7) of the basic regulation.

125. In any event, Hubei maintains that the General Court examined numerous other factors in order to find that the institutions had made a manifest error of assessment concerning the vulnerability of the EU industry and that there was a threat of injury. Accordingly, any error of law in relation to contraction in demand would not entail the annulment of the judgment under appeal.

2. Assessment

126. These pleas relate to the error of law that the General Court is alleged to have made at paragraphs 63 and 69 of the judgment under appeal.

127. Paragraph 63 of the judgment under appeal forms part of the General Court's reasoning concerning the situation of vulnerability of the EU industry at the end of the investigation period. In that paragraph the General Court rejected a number of arguments put forward by the institutions in relation to the effects of the deterioration of the economic context on that industry.

128. Thus, the General Court held that 'the finding, relied on by the institutions, that the [EU] industry would be exposed to the possible injurious effects deriving from the dumped imports if the economic trend were to reverse (recital 89 [to] the provisional regulation, confirmed by the Council at recital 47 [to] the contested regulation), would allow the determination, if necessary, of a situation of vulnerability in the future. That finding is therefore irrelevant for the purposes of concluding that the

[EU] industry was in a vulnerable situation at the end of the investigation period. That is also the case as regards the evidence put forward by the Council in its written pleadings before the Court, concerning the post-investigation period economic data, and the inferences which the Council draws from it in relation to the deterioration of the [EU] industry's situation'. The General Court also emphasised, referring in particular to the judgment in *Commission* v *NTN and Koyo Seiko* (C-245/95 P, EU:C:1998:46, paragraph 43), that 'the finding relied on by the institutions relating to the deterioration of the economic context has already been held, by [the Courts of the European Union], to be based on an error of law, since the basic regulation expressly provides, in the part relating to the analysis of the injury, that factors such as contraction in demand must not be attributed to the dumped imports …'

129. Paragraph 69 of the judgment under appeal comes within the context of the examination of a threat of injury found by the institutions in connection with the use of post-investigation period data. The General Court observes that those data 'confirm the institutions' forecast of the contraction of the [EU] market' and notes that '[i]n particular, the figures set out at recital 51 [to the regulation at issue] show that [EU] consumption decreased by 27.7% between the end of the investigation period, on 30 June 2008, and March 2009'. It emphasises, however, with reference to paragraph 63 of the judgment under appeal, that 'injury factors such as the contraction in demand must not be attributed to the dumped imports'.

130. It must be borne in mind — and the point is not disputed — that the first sentence of Article 3(7) of the basic regulation states that known factors other than the dumped imports which are injuring the EU industry are to be examined to ensure that injury caused by these other factors is not attributed to the dumped imports. Those other factors, a non-exhaustive list of which is set out in the second sentence of Article 3(7) of the basic regulation, include contraction in demand.

131. The institutions are therefore under an obligation to consider whether the injury on which they intend to base their conclusions does in fact derive from the dumped imports and to disregard any injury deriving from other factors,[25] such as contraction in demand or, more generally, recession in the industry.[26]

132. In the judgment in *Commission* v *NTN and Koyo Seiko* (C-245/95 P, EU:C:1998:46, paragraph 43), the Court upheld the General Court's finding, at paragraphs 98 and 99 of the judgment in *NTN Corporation and Koyo Seiko* v *Council* (T-163/94 and T-165/94, EU:T:1995:83), that the prohibition on attributing to the dumped imports the negative effects of other factors, such as contraction in demand, also applies in the context of the analysis of the threat of injury.

133. The General Court therefore did not err in law in referring to that principle at paragraphs 63 and 69 of the judgment under appeal.

134. However, the appellants maintain that the General Court was wrong to consider that the institutions had attributed to the dumped imports the injury deriving from the contraction in demand. The imminent contraction in demand was taken into account as a factor against which the threat of injury should be examined.

135. Even on the assumption that that is so, I consider that such a complaint is inoperative.

25 — See, in particular, to that effect, judgments in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council* (C-10/12 P, EU:C:2013:865, paragraph 23), and *TMK Europe* (C-143/14, EU:C:2015:236, paragraph 35).

26 — See judgment in *Commission* v *NTN and Koyo Seiko* (C-245/95 P, EU:C:1998:46, paragraph 43), where the Court treated both expressions as having the same meaning.

136. As regards paragraph 63 of the judgment under appeal, the institutions' assessment relating to the state of vulnerability of the EU industry was held to be invalid by the General Court mainly on the basis of the factors set out at paragraph 59 of the judgment under appeal. The future or foreseeable contraction in demand for the post-investigation period could not in any event support the finding that the EU industry was in a state of vulnerability at the end of the investigation period, as, in essence, the General Court correctly held in the first and second sentences of paragraph 63 of the judgment under appeal.

137. As for paragraph 69 of the judgment under appeal, taking the future contraction in demand into account cannot, as such, allow the institutions to conclude that there is a threat of material injury within the meaning of Article 3(9) of the basic regulation caused by the dumped imports. In any event, it follows, in particular, from paragraphs 72, 83 and 87 of the judgment under appeal, which, as will be considered below, concern the examination of the factors on the basis of which the institutions found the existence of such a threat, that the General Court did not disregard the circumstance of the contraction in demand in the European Union after the investigation period which the institutions took into account.

138. Accordingly, I propose that the pleas alleging misinterpretation of Article 3(7) of the basic regulation should be rejected.

C – *The Council's third plea and ArcelorMittal and Others' second plea and the second part of their third plea, alleging misinterpretation of Articles 3(9) and 6(1) of the basic regulation and errors in the examination of the factors relating to the threat of injury*

1. Summary of the arguments of the parties

139. The Council maintains that the General Court was wrong to hold, at paragraph 92 of the judgment under appeal, that the institutions had made a manifest error of assessment in finding that there was a threat of injury in the present case.

140. Although the Council acknowledges that the analysis of a threat of injury must be based on facts and on the imminence of a change in circumstances, that analysis is necessarily prospective. The institutions might therefore be mistaken as to the future without erring in law in the exercise of their competence to evaluate complex economic situations. It is essential, in the Council's submission, that the competent authorities be allowed a wide discretion in the complex evaluation of future events in the context of the trade protection policy.

141. The Council observes that examination of the specific factors set out in Article 3(9) of the basic regulation revealed 'a mixed picture' as regards the existence of a threat of injury. In the light of the precise wording of that provision and the wide discretion which they have in matters of trade protection, the EU institutions are entitled to use that power in order to find the existence of a threat of injury.

142. The Council explains that it is precisely because of the 'mixed' nature of the situation at the end of the investigation period that, unusually, but with the aim of ensuring sound administration, the institutions continued in the present case to monitor the situation in the EU market during the period following the end of the investigation period, focusing their attention on the change in circumstances and the principal economic indicators.

143. The institutions were thus not mistaken as to the future. The Council emphasises that the data relating to the post-investigation period show that the market had begun to contract, which is a key element in the finding of the existence of a threat of injury at the time when the evaluation was made. EU consumption began to decrease significantly, and more quickly than forecast in the provisional regulation, since it fell by almost 30% between the end of the investigation period and March 2009. In addition, the post-investigation period data confirmed that the market share of dumped imports from China was increasing. The market share of dumped imports from China rose by almost 18%, which confirms the forecasts in the provisional regulation. Last, and by no means least, production of the EU industry, capacity usage of the sampled companies, sales in the EU market and profitability decreased significantly during the post-investigation period.

144. Accordingly, the Council maintains that the General Court erred in finding, at paragraph 91 of the judgment under appeal, that there were inconsistencies and lacunae in the overall assessment in the regulation at issue of the factors set out in Article 3(9) of the basic regulation.

145. ArcelorMittal and Others maintain that the General Court infringed both Article 3(9) of the basic regulation and Article 6(1) of that regulation in basing its reasoning on the inconsistencies between the post-investigation period data and the data gathered during the investigation period. Even in the context of the examination of a threat of injury, the use of such data after the investigation period is unreliable, since those data reflect the conduct of the producers concerned after the initiation of the anti-dumping proceedings. Such data should be used only if they show that the imposition of anti-dumping duties was manifestly inappropriate, which is not the case.

146. In those circumstances, ArcelorMittal and Others submit that it was not necessary to determine whether the Council was entitled to analyse the post-investigation period data. It is immaterial that those data confirm the forecasts made by the Commission in the provisional regulation on the basis of the investigation period data. Consequently, even if the Council had been wrong to conclude that the post-investigation period data confirmed the conclusions in the provisional regulation, that error could not entail the annulment of the regulation at issue.

147. Furthermore, ArcelorMittal and Others claim that the General Court made a number of errors of law when it examined the factors set out in Article 3(9) of the basic regulation, on the basis of which the EU institutions found that there was a threat of injury.

148. Those criticisms relate to the three factors taken into account by the institutions and examined by the General Court at paragraphs 72 to 90 of the judgment under appeal. They will be presented in greater detail in the context of the examination of each of the factors in question (see points 199, 219 and 238, respectively, of this Opinion).

149. Hubei claims, primarily, that these pleas are inadmissible. First, in that they take issue with the General Court for having examined the post-investigation period data, the appellants seek to introduce a new plea expanding the subject-matter of the dispute at first instance. Second, as regards ArcelorMittal and Others' criticisms of the General Court's examination of the factors set out in Article 3(9) of the basic regulation, they seek to challenge the assessments of the facts by the General Court, which is not amenable to review by the Court of Justice in an appeal.

150. In the alternative, Hubei maintains that those pleas are unfounded. It submits, first of all, that the analysis of the threat of injury does not require the institutions to evaluate future events. Article 3(9) of the basic regulation clearly states that the analysis is to be based on facts and 'not merely on allegation, conjecture or remote possibility'. In that regard, Hubei submits that the Council acknowledges that the institutions' analysis revealed, at most, a 'mixed picture' of the existence of a threat of injury, and it has not been established that the General Court manifestly distorted the clear sense of the evidence before it or that it erred in law.

151. Next, Hubei maintains that the General Court was perfectly entitled to review the post-investigation period data, since those data were relied on and used by the institutions, and otherwise the decisions taken by the institutions would not be subject to judicial review. As is the case here, those data are intrinsically linked to the overall assessment of a threat of injury and cannot be dissociated from that analysis, since they demonstrate that the imposition of an anti-dumping duty is manifestly inappropriate.

152. Furthermore, Hubei claims that the institutions cannot simply 'rubber stamp' the predictions made in a provisional regulation on the ground that they were correct at the time when the provisional regulation was adopted. They must ascertain whether those predictions are still accurate at the time of the adoption of the definitive regulation, in the light of the additional information made available and the arguments submitted during the remainder of their investigation.

153. Last, Hubei contends that the General Court did not err in law when it examined the factors set out in Article 3(9) of the basic regulation. In particular, Hubei observes that, in the light of the post-investigation period data, an increase of 0.7% in Chinese imports cannot be characterised as a 'substantial' increase for the purposes of that article.

2. Assessment

154. Two essential questions are central to the appellants' present pleas.

155. First, it must be ascertained whether the General Court was correct to review the legality of the findings relating to the threat of injury made in the light of the relevant data from the post-investigation period; and, second, and if the answer is in the affirmative, it will be necessary to determine whether the General Court erred in law when it reviewed the institutions' assessment relating to the examination of the four factors set out in Article 3(9) of the basic regulation.

156. Before doing so, it is necessary, to my mind, to reject the pleas of inadmissibility raised by Hubei.

a) The pleas of inadmissibility raised by Hubei

157. It will be recalled that Hubei claims, in the first place, that the plea alleging an error of law in that the General Court took the post-investigation period data into consideration when assessing the legality of the institutions' conclusion that there was a threat of injury was a new plea.

158. In an appeal, the jurisdiction of the Court of Justice is limited to review of the findings of law on the pleas argued before the General Court. The Court of Justice therefore has jurisdiction only to examine whether the argument in the appeal identifies an of error law vitiating the judgment under appeal. [27]

159. In this case, the General Court took the post-investigation period data into consideration when responding to Hubei's complaint alleging, at first instance, contradictions between the institutions' conclusion and the relevant economic data. In so far as the General Court upheld the plea argued before it on the basis of those data and in so far as that assessment adversely affects the appellants, the latter are in my view necessarily permitted to challenge the merits of the General Court's findings.

27 — See, in particular, judgments in *Commission* v *Girardot* (C-348/06 P, EU:C:2008:107, paragraph 49), and *Council* v *Bamba* (C-417/11 P, EU:C:2012:718, paragraph 40).

160. In the second place, Hubei maintains that ArcelorMittal and Others' criticisms of the General Court's examination of the four factors set out in Article 3(9) of the basic regulation are inadmissible since their only purpose is to ask the Court to reassess the facts.

161. Without there being any need, at this stage, to analyse the arguments put forward by ArcelorMittal and Others, it is clear that Hubei's objection could at the most lead only to a finding that the pleas in their appeal are inadmissible in part. Furthermore, as the Court's jurisdiction in an appeal is limited to points of law, it is only subject to such a qualification that the criticisms put forward by ArcelorMittal and Others must be examined.

162. As Hubei's pleas of inadmissibility have been rejected, it is appropriate to ascertain first of all whether, as the appellants maintain, the General Court infringed Articles 3(9) and 6(1) of the basic regulation by taking the post-investigation period data into account in reviewing the legality of the institutions' finding that there was a threat of injury at the end of the investigation period.

b) The taking of post-investigation period data into account by the General Court in order to review the legality of the existence of a threat of injury

163. In order to examine this complaint, it is necessary first of all to recall to mind the particular features of the institutions' finding of a threat of injury.

164. As already indicated, in the context of the threat of injury, the actual injury has, by definition, not (yet) materialised.

165. Accordingly, as the Council acknowledges, a finding of the existence of a threat of injury requires not only the establishment of facts but also an analysis of the likelihood that future events (which must be foreseen and imminent, according to Article 3(9) of the basic regulation) will occur, giving rise to a situation in which the injury would materialise if no anti-dumping measures were adopted. By way of example, in order to determine the existence of a threat of injury, the institutions are required to consider whether there is a significant rate of increase of dumped imports into the EU market 'indicating the likelihood of substantially increased imports' (Article 3(9)(a) of the basic regulation).

166. Clearly, such a prospective analysis involves a number of uncertainties as to the occurrence of the future events, but is also entails the risk that economic operators in non-member countries will be exposed to arbitrary measures of a purely protectionist nature. [28]

167. Although, having regard to the discretion which the institutions enjoy, the uncertainties may in my view generally be tolerated, the Court has already held, in relation to the control of concentrations, an area in which a prospective analysis is necessary, that such an analysis must be carried out with 'great care', precisely because it entails the prediction of events which are more likely or less likely to occur in future if a decision prohibiting the planned concentration is not adopted. [29]

168. To my mind, it is in that sense that the taking into consideration by the institutions of the post-investigation period data in the present case must be understood. The institutions were required to assess whether, at the time of the adoption of the regulation at issue, the predictions in the provisional regulation of the likelihood that the events entailing the transition from a threat of injury to injury would occur if a protective measure was not adopted were or were not confirmed.

28 — See, in particular, on that point, Soprano, R., 'The Threat of Material Injury in Antidumping Investigations: a Threat to Free Trade', *The Journal of World Investment & Trade*, No 1, 2010, p. 9.

29 — See judgment in *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 42).

169. That verification entailed taking post-investigation period data into consideration, in such a way that the institutions did not rely solely on predictions based on economic data that had been established more than one year previously at the time when they adopted the regulation at issue. [30]

170. That is what follows, moreover, in substance, from recital 57 to the regulation at issue, where the Council observed that, in a threat of injury case, the investigating authority is 'entitled to verify that the events taking place after the end of the [investigation period] do confirm the findings of threat of injury reached at the provisional stage'.

171. That approach seems to me to be quite lawful and appropriate.

172. In terms of legality, it is true that Article 6(1) of the basic regulation, which relates to the dumping investigation and injury, provides that '[i]nformation relating to a period subsequent to the investigation period shall, normally, not be taken into account'.

173. As ArcelorMittal and Others observe, the rule in Article 6(1) of the basic regulation that post-investigation period data are not normally taken into account is intended to ensure that the results of the investigation are representative and reliable, by ensuring that the factors on which the determination of the dumping and injury is based are not influenced by the conduct of the producers concerned after the anti-dumping procedure has been initiated. [31]

174. However, I consider that, as the General Court has held, in essence, in a number of cases, by using the adverb 'normally' Article 6(1) of the basic regulation authorises the institutions to take data from the period after the investigation period into account and even requires that such data be examined when they may reveal new developments that may render the planned imposition of the anti-dumping duty manifestly inappropriate. [32]

175. In the present case, in so far as examination of the threat of injury entails a prospective analysis and the existence of such a threat, like the existence of actual injury, must be capable of being established at the time when a protective measure (whether provisional or definitive) is adopted, [33] I consider that it is for the institutions to ascertain whether, at the time when a definitive anti-dumping duty is adopted, the predictions resulting from the analysis carried out in the provisional regulation are confirmed and may justify the imposition of that definitive anti-dumping duty.

176. From that aspect, and in the context of the threat of injury, the institutions are therefore in my view not only entitled but strongly urged to take the post-investigation period data into consideration.

177. In that context, the institutions must be authorised to consider whether such data are sufficiently representative and reliable and, if they are not, to explain the reasons that led them to entertain doubts about the data and, where appropriate, to disregard them in whole or in part.

178. In the present case, it is not apparent from the case file that the institutions expressed any doubts as to whether the post-investigation period data on which they relied were representative and reliable.

30 — I would point out that the end of the investigation period was fixed at 30 June 2008, while the regulation at issue was adopted on 24 September 2009.

31 — See, in particular, to that effect, judgments in *Nanjing Metalink* v *Council* (T-138/02, EU:T:2006:343, paragraph 59), and *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council* (T-192/08, EU:T:2011:619, paragraph 223).

32 — See, in particular, to that effect, judgments in *Sinochem Heilongjiang* v *Council* (T-161/94, EU:T:1996:101, paragraph 88); *Nanjing Metalink* v *Council* (T-138/02, EU:T:2006:343, paragraph 61); and *HEG and Graphite India* v *Council* (T-462/04, EU:T:2008:586, paragraph 67).

33 — See, in particular, to that effect, judgments in *Epichirisseon Metalleftikon, Viomichanikon kai Naftiliakon and Others* v *Council* (C-121/86, EU:C:1989:596, paragraphs 34 and 35), and *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 90).

179. When the institutions have lawfully taken into consideration post-investigation period data which they consider to be representative and reliable, which has not been disputed, the General Court cannot be criticised for having ascertained whether the institutions had been correct to consider that those data confirmed the predictions made in the provisional regulation concerning the existence of a threat of injury.

180. Contrary to what the appellants also seem to imply, the institutions' use of post-investigation period data cannot escape judicial review by the General Court. In particular, as I have already emphasised at point 64 above, that review must include a review of the institutions' interpretation of the data of an economic nature, including the task of establishing whether the evidence which they used is accurate, reliable and consistent, but also of ascertaining whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

181. To my mind, such a review is all the more necessary in the case of the prospective analysis required by the examination of the existence of a threat of injury. [34]

182. I acknowledge that, as the Council maintains, the institutions may be mistaken about the future, without necessarily making errors of law or a manifest error of assessment.

183. However, once those institutions correctly take post-investigation period factors into account in order to establish the existence of a threat of injury and impose a definitive anti-dumping duty, the General Court must be able to satisfy itself that such factors are capable, to the requisite legal standard, of corroborating the predictions that led the Commission to adopt provisional protective measures.

184. Accordingly, at the time when the Council must adopt a regulation imposing a definitive anti-dumping duty, I do not think that, if the post-investigation period factors do not corroborate the prospective analysis carried out by the Commission in the context of the provisional regulation, the Council should none the less be entitled, as it claims, to exercise its discretion in order to find the existence of a threat of injury and adopt a definitive anti-dumping duty.

185. That conviction is based on a number of considerations.

186. In the first place, as already indicated at point 173 above, the existence of a threat of injury, like the existence of actual injury, must be capable of being established at the time when a protective measure, whether definitive or provisional, is adopted. If the evidence does not allow the Commission's initial predictions to be confirmed, the occurrence of material injury seems to be remote and it therefore does not seem that the imposition of definitive anti-dumping duties can be justified.

187. In the second place, it must be borne in mind that Article 3(9) of the basic regulation requires that the finding of a threat of material injury is to be based on facts and not merely allegation, conjecture or remote possibility and that the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

188. Last, in the third place, if the Council's argument were to be accepted, that would ultimately amount to conferring on the institutions the right to adopt arbitrary and purely protectionist protective measures. The basic regulation does not prohibit dumping per se, but only dumping which causes or threatens to cause material injury to the EU industry. Accordingly, I consider that if, on the evidence,

34 — See, by analogy, with the prospective analysis in the control of concentrations, judgments in *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39), and *Éditions Odile Jacob* v *Commission* (T-471/11, EU:T:2014:739, paragraph 136).

it cannot be concluded with a sufficiently high degree of probability that there is a threat of material injury, the institutions, even at the stage of adopting the definitive anti-dumping regulation, must merely draw the necessary conclusions and refrain from adopting the definitive protective measures that were initially envisaged.

189. In those circumstances, I consider that the General Court did not infringe Article 3(9) or Article 6(1) of the basic regulation in taking post-investigation period data into account for the purpose of reviewing the legality of the institutions' finding of the existence of a threat of injury which the institutions had themselves taken into consideration in the regulation at issue.

190. I must now consider whether, as ArcelorMittal and Others claim, the General Court erred in law in verifying the institutions' assessment relating to the examination of the four factors set out in Article 3(9) of the basic regulation.

c) The errors of law supposedly made by the General Court in reviewing the institutions' assessment relating to the examination of the four factors set out in Article 3(9) of the basic regulation

191. The second subparagraph of Article 3(9) of the basic regulation sets out, in a non-exhaustive list, four factors that the institutions must examine in order to determine the existence of a threat of material injury.

192. As summarised by the General Court at paragraph 70 of the judgment under appeal, those factors cover the development of dumped imports (Article 3(9)(a)), the availability of free capacity of the exporters (Article 3(9)(b)), the price of dumped imports (Article 3(9)(c)) and the level of inventories of the relevant product (Article 3(9)(d)).

193. The third subparagraph of Article 3(9) of the basic regulation states that no one of those factors by itself can necessarily give decisive guidance but that the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.

194. In the present case, as the General Court observed at paragraph 70 of the judgment under appeal, the institutions examined the first three factors, as the Council had concluded, in essence, that the level of inventories was not relevant to the analysis of the threat of injury.

i) The errors of law relating to the examination of the first factor (Article 3(9)(a) of the basic regulation)

– Reasoning of the General Court

195. As regards the *first* factor taken into consideration by the institutions and examined by the General Court, the General Court first of all referred, at paragraph 72 of the judgment under appeal, to the Commission's prediction, confirmed in the regulation at issue, that 'the market share of the dumped Chinese imports [was] set to increase [and] the pressure of these dumped imports on the [EU] market [was] likely to increase substantially'.

196. The General Court observed, however, that, according to the data set out in the regulation at issue, the volume of imports originating in China had decreased significantly in the post-investigation period, a decrease which was very large in absolute terms (a decrease of 24.6%), while in relative terms the increase of the market share held by those imports had been small, namely 0.7 percentage points over that period (paragraph 73 of the judgment under appeal).

197. At the conclusion of its reasoning, the General Court held that there was a significant difference between the Commission's estimates in the provisional regulation and the economic data from the post-investigation period which had been taken into account by the Council in the context of the regulation at issue. Observing that, according to Article 3(9) of the basic regulation, the first factor requires a significant rate of increase in dumped imports, indicating the likelihood of substantially increased imports, the General Court noted that the Council's own statements in the regulation at issue that imports originating in China had 'slightly increased' during the post-investigation period did not support the conclusion that in the present case a 'significant' increase in dumped imports was likely. The General Court also stated that the 0.7 percentage point increase in the market share of imports originating in China must be considered in the light of the 0.1 percentage point decrease in the market share corresponding to the EU industry's products during the post-investigation period (paragraph 78 of the judgment under appeal).

198. Accordingly, the General Court concluded that the first factor showed inconsistencies between the Commission's estimates, confirmed by the Council in the regulation at issue, and the relevant post-investigation period data (paragraph 91 of the judgment under appeal).

– Summary of the arguments of ArcelorMittal and Others

199. Essentially, ArcelorMittal and Others maintain that the General Court was wrong to hold that the Council had infringed Article 3(9) of the basic regulation by merely identifying inconsistencies and not a manifest error of assessment as regards the volume of imports originating in China. They also claim that the General Court did not examine a part of the assessments at recital 68 to the regulation at issue and that it was not for that Court to determine whether the rate of increase of the market share of dumped imports was 'sufficient'.

– Assessment

200. To my mind, ArcelorMittal and Others' argument must be rejected.

201. First of all, as expressly stated at paragraph 92 of the judgment under appeal, it was, in particular, in the light of 'all of those considerations' relating to the examination of the three factors used to determine the existence of a threat of injury that the General Court found that the Council had infringed Article 3(9) of the basic regulation.

202. ArcelorMittal and Others therefore misread the judgment under appeal when they maintain that the General Court relied exclusively on the inconsistencies linked with the first factor, relating to volumes of imports, in order to find that the Council infringed Article 3(9) of the basic regulation.

203. Next, as I have already indicated, the judicial review which the General Court is authorised to carry out includes a review of the institutions' interpretation of the economic data, which includes ascertaining that the evidence is consistent and whether it is capable of substantiating the conclusions drawn from it.

204. The examination which the General Court is required to carry out therefore does not concern exclusively the manifest error of assessment vitiating the regulation at issue, but also, in particular, the legal characterisation of the facts. In addition, the General Court is not required to identify a particular kind of error, such as a manifest error of assessment relating to each of the factors taken individually, in order to find, where appropriate, that there has been an infringement of Article 3(9) of the basic regulation. On the contrary, such an error may emerge from an overall examination of all the factors taken into consideration.

205. Nor did the General Court err in law in referring to the words of Article 3(9) of the basic regulation relating to the first factor, according to which, in essence, the likelihood of an increase in dumped imports must be substantial, and in ascertaining whether the evidence, including the post-investigation period data, used by the Council substantiated the finding which the latter had reached in the regulation at issue.

206. Last, as regards the argument relating to the failure to state reasons in respect of certain passages in recital 68 to the regulation at issue, it should be made clear that in that recital the Council claimed that 'the level of Chinese imports might be considered as an element of threat of injury even in the case that volumes would start to decrease proportionally more than the decrease in consumption, since the presence itself of substantial volumes of low-priced Chinese goods in a context of decreasing consumption will exert an important downward pressure on the general level of prices in the market'. The Council added that '[i]n any case, no single factor mentioned in Article 3(9) of the basic regulation can necessarily give decisive guidance on the existence of a threat of injury. Rather, all the factors must be considered in their totality'.

207. It is true, as ArcelorMittal and Others submit, that the judgment under appeal contains no assessment relating to those passages of that recital to the regulation at issue, while the General Court based its reasoning on other parts of that recital, including, in particular, those relating to the post-investigation period data.

208. I do not believe, however, that that partial omission on the part of the General Court can lead to the judgment under appeal being set aside.

209. As regards the last part of recital 68 to the regulation at issue, relating to the interpretation of Article 3(9) of the basic regulation, the General Court was in my view under no specific obligation to respond to that point, since it did not infer an infringement of that article by the Council solely from the inconsistencies linked with the institutions' assessment of the first factor.

210. As regards the passage immediately preceding recital 68 to the regulation at issue, it is clear from a mere reading of that passage that it constituted a simple theoretical hypothesis, as is illustrated by the use of the conditional of the verb 'may', already formulated at the stage of the provisional regulation and presented as a possible element of threat of injury for the future.

211. While it is true that the General Court must give reasons for its decisions, that obligation cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party, particularly if the argument was not sufficiently clear and precise and was not adequately supported by detailed evidence.[35] As the threat of injury must be based on facts and a foreseen and imminent change of circumstances, and as ArcelorMittal and Others do not claim that detailed evidence of that hypothesis was put forward, in particular in the context of the consideration of the post-investigation period data by the institutions or before the General Court, it does not appear to me that the General Court was under an obligation to take that hypothesis specifically into account when it ascertained whether the institutions' analysis of the economic data relating to the first factor set out in Article 3(9)(a) of the basic regulation was sufficiently convincing.

212. I therefore propose that ArcelorMittal and Others' complaint relating to that factor should be rejected.

35 — See, in particular, judgments in *Technische Glaswerke Ilmenau* v *Commission* (C-404/04 P, EU:C:2007:6, paragraph 90), and *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 41).

ii) The errors of law relating to the second factor set out in Article 3(9)(b) of the basic regulation

213. The *second* factor, set out in Article 3(9)(b) of the basic regulation, concerns 'sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the [EU], account being taken of the availability of other export markets to absorb any additional exports'.

– Reasoning of the General Court

214. At paragraph 79 of the judgment under appeal, the General Court first of all observed that the institutions had analysed the Chinese exporters' free production capacity in itself and the risk that Chinese exports would be redirected to the EU market.

215. The General Court then pointed out, at paragraph 81 of the judgment under appeal, that where the institutions examine the risk of redirection of exports to the European Union, they must take into account not only the existence of other export markets, but also the potential development of internal consumption in the exporting country.

216. After noting that the Commission predicted, in the provisional regulation, which was confirmed by the Council in the regulation at issue without any additional evidence, that it could be expected that a significant part of the newly created excess capacity in China would be directed to the European market (paragraph 82 of the judgment under appeal), the General Court observed that the institutions '[had] not take[n] into account, in their analysis, "the availability of other export markets to absorb any additional exports", as required under Article 3(9) of the basic regulation'. Although the General Court noted that the Commission had referred to the United States, Algeria and South Korea in order to indicate what share of total Chinese exports corresponded to those countries, and stated that a significant shrinking, in particular of the United States market, was to be expected, the General Court none the less pointed out that '[n]o specific data [had been] advanced concerning the development of those markets and their potential capacity to absorb additional exports'. It added that '[i]f, as the institutions state, the production capacity in China and the volume of exports increased (recital 118 [to] the provisional regulation) and, at the same time, the share of total Chinese exports of the abovementioned three countries also increased, as can be seen from recital 119 [to] the provisional regulation, that means that the volumes of exports to those three countries increased as well'. The General Court also considered that the Commission's conclusion that exports would be directed to the European market must be viewed in the light of the fact that the institutions predicted a significant contraction in demand on the EU market, a consideration that was absent from the institutions' analysis (paragraph 83 of the judgment under appeal).

217. Last, at paragraphs 84 and 85 of the judgment under appeal, the General Court emphasised that the institutions had not at any time considered the Chinese internal market and the possible effect of that market on the potential absorption of additional production capacity or the concomitant disappearance of the closest Russian and Ukrainian competitors in terms of prices, which had been subject to anti-dumping duties since 2006, which might explain, at least in part, the increase of the percentage of Chinese exports to the European Union during the period considered.

218. The General Court therefore concluded that the institutions' analysis of the second factor was 'incomplete in respect of the relevant evidence to be taken into account' (paragraph 91 of the judgment under appeal).

– Summary of the arguments of ArcelorMittal and Others

219. Essentially, ArcelorMittal and Others note that the General Court did not invalidate the finding at recital 117 to the provisional regulation that there was substantial available capacity in China, which is sufficient to conclude that the second factor set out in Article 3(9)(b) of the basic regulation was satisfied. The General Court was also wrong to hold, at paragraph 84 of the judgment under appeal, that the institutions' analysis was incomplete because they had not considered the ability of the Chinese internal market to absorb additional production capacity. Such an analysis was, however, carried out at recitals 69 and 70 to the regulation at issue. Last, the General Court required that the institutions provide 'specific data' concerning the capacity of other export markets to absorb additional exports, which is not required by Article 3(9) of the basic regulation, just as there is no obligation to provide reasons for an increase in dumped exports to the European Union.

– Assessment

220. To my mind, the second factor set out in Article 3(9) of the basic regulation requires an examination in two stages. As regards the first stage, the institutions must ascertain whether there is 'sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports'. In the context of that first stage, the institutions are required to ascertain whether present production capacity, 'freely disposable' capacity or the imminent and substantial increase in such capacity in the exporting country may be attributable to the development of demand in that country. In the second stage, if a substantial increase in dumped imports is likely, the institutions must '[take] account … of the availability of other export markets to absorb [those] additional exports'.

221. Therefore, contrary to ArcelorMittal and Others' contention, the mere fact that substantial export capacity is freely disposable in the exporting country is not in itself sufficient to conclude that that factor is satisfied; that capacity must also 'indicat[e] the likelihood of substantially increased dumped exports' to the EU market. Accordingly, the fact that the General Court did not declare the finding at recital 117 to the regulation at issue invalid is inoperative.

222. On the other hand, ArcelorMittal and Others are in my view correct when, taking issue with paragraph 85 of the judgment under appeal, they assert that the reasons for the increase in exports are irrelevant for the purpose of ascertaining whether the factor set out in Article 3(9)(b) of the basic regulation is satisfied.

223. None the less, the error of law made by the General Court in that regard has no impact on the validity of the other assessments on the basis of which it concluded that the institutions had not taken account of all the relevant evidence linked with the examination of the second factor on which the existence of a threat of injury may be determined.

224. In fact, the General Court's assessment of that factor is principally based on the insufficiently precise analysis carried out by the institutions when examining the capacity of markets other than the EU market to absorb additional exports originating in China and also the impact of Chinese internal demand.

225. As regards the first aspect, the General Court was in my view correct to hold that the institutions were required, in this case, to provide specific data concerning the development of markets in the United States, Algeria and South Korea and their potential capacity to absorb additional exports.

226. First, it follows from a simple reading of paragraph 83 of the judgment under appeal that, contrary to ArcelorMittal and Others' contention, the General Court did not require the institutions to verify all possible or imaginable export markets. It merely took issue with them for having provided no specific data concerning those three markets, which were none the less referred to in general terms in the provisional regulation and the regulation at issue. Second, when the institutions refer to a number of export markets, they are required, in the context of the prospective analysis of the threat of injury, to provide sufficiently precise data concerning the development of those markets and their capacity to absorb additional exports of the dumped goods. In fact, once the institutions have identified those markets, it is only on condition that they provide such data that their analysis '[takes] account' of those exports, within the meaning of Article 3(9)(b) of the basic regulation, as potential alternative outlets to the EU market for the additional exports of the product concerned. Those data may relate to, inter alia, the export strategies of the producers concerned, the development of demand on the other export markets or the existence of trade protection measures on those other markets.

227. As the General Court held, in essence, at paragraph 83 of the judgment under appeal, without that finding being challenged, once it was apparent from the provisional regulation and the regulation at issue that the share of the three markets referred to above in the total of Chinese exports had increased during the period concerned, it was logical to infer that the volumes of Chinese exports to those markets had also increased. In that context, the institutions had to be able to provide sufficiently precise data in order to conclude, as they did in their prospective analysis, that, none the less, the excess production capacity or new production capacity in China would be directed rather to the European market, giving rise to a threat of injury for the EU industry.

228. As regards the impact of Chinese internal demand, in my view ArcelorMittal and Others merely take issue with the General Court's assessment of the evidence, but do not claim or, *a fortiori*, demonstrate that it distorted the clear sense of that evidence. Those complaints are therefore inadmissible.

229. In any event, apart from the general considerations relating to Chinese internal demand, set out at recital 70 to the definitive regulation, in order to respond to the observations of certain Chinese producers during the investigation procedure, the institutions appear to have reasoned in such a way that the Chinese demand did not exist, since recitals 117 to 119 to the provisional regulation, confirmed by the regulation at issue, do not address it in any of their passages. However, neither the Council nor ArcelorMittal and Others deny that, as the General Court held, in essence, at paragraph 81 of the judgment under appeal, an (objective) examination of the factor set out in Article 3(9)(b) of the basic regulation requires an analysis of the development of internal consumption in the exporting country. To my mind, therefore, the General Court was correct, at paragraph 84 of the judgment under appeal, to take issue with the institutions for not having referred to the potential effect of the Chinese domestic market on the possibility of absorbing additional production capacity.

230. I therefore suggest that the alleged errors of law relating to the second factor, set out in Article 3(9)(b) of the basic regulation, alleged by ArcelorMittal and Others should be rejected.

iii) The errors of law relating to the third factor laid down in Article 3(9)(c) of the basic regulation

– Reasoning of the General Court

231. The General Court examined compliance with the factor laid down in Article 3(9)(c) of the basic regulation at paragraphs 86 to 90 of the judgment under appeal.

232. The General Court first of all observed, at paragraph 86 of the judgment under appeal, that the Commission stated in the provisional regulation that there was no reason to believe that in an economic environment characterised by a substantial contraction in demand there might be a tendency for low prices to increase, but that, on the contrary, they were expected to be kept low and that, in particular, the existence of such low prices was likely to be used to depress prices offered by the EU producers, causing a depressive effect on both volumes and prices.

233. The General Court then observed, at paragraph 87 of the judgment under appeal, that the post-investigation period data showed that, contrary to what was asserted by the Commission, the prices of imports originating in China had significantly increased in a context of contraction of the EU market, the available data showing an increase of the prices of those imports of more than 35% during the post-investigation period, while at the same time the prices of the EU industry had increased by 18.7%.

234. At paragraph 88 of the judgment under appeal, the General Court noted that the Council had not provided any evidence to explain the contradiction between the evidence put forward in the provisional regulation and the evidence resulting from the post-investigation period data. Although the Commission had attributed that increase to the increase in the prices of raw materials, the most recent of which had taken place in October 2008, the General Court emphasised that the Council had not provided any explanation or additional details concerning the development of prices of raw materials and energy costs in the post-investigation period.

235. In any event, at paragraph 90 of the judgment under appeal, the General Court considered that, even if that was the reason for the increase in prices, it did not support the Commission's conclusions concerning the negative effect of the very low prices of imports originating in China on the prices and volumes of the EU industry. In that regard, the General Court held that, in the light of the post-investigation period data, it did not follow from the facts of the case that the criterion laid down in Article 3(9)(c) of the basic regulation might be regarded as having been met. The General Court also emphasised that during the post-investigation period the market share of the EU industry had decreased by only 0.1 percentage point.

236. The General Court also rejected the Council's argument that there was a 'parallelism' in price movements, also observing that the difference between the sales prices of the EU industry and the imports originating in China had decreased significantly during the post-investigation period (paragraph 89 of the judgment under appeal).

237. The General Court concluded that examination of the third factor showed inconsistencies between the Commission's estimates, confirmed by the Council in the regulation at issue, and the relevant post-investigation period data (paragraph 91 of the judgment under appeal).

– Summary of the arguments of ArcelorMittal and Others

238. ArcelorMittal and Others essentially take issue with the General Court because, at paragraphs 87 to 90 of the judgment under appeal, it substituted its own assessment of the facts for that of the institutions, without taking account of the fact that even though the EU producers had increased their prices and retained their market share after the investigation period, the profitability of the EU industry had fallen considerably during that period, which shows that prices were actually depressed. Furthermore, although ArcelorMittal and Others accept that the post-investigation period data show that the prices of imports and EU producers' prices had increased after the investigation period, they take issue with the General Court for having failed to take account of the fact that that increase was due to the increase in the price of raw materials and that, in any event, such an increase had not eliminated undercutting by imports, which remained substantial, as the institutions had found.

– Assessment

239. I do not think that ArcelorMittal and Others' argument can succeed.

240. It must be borne in mind that, in the context of the threat of injury, the dumped imports, in spite of their price level, have not (yet) created injury to the EU industry.

241. Under Article 3(9)(c) of the basic regulation, the institutions are required to examine 'whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports'.

242. The 'further imports' referred to in that article must therefore be fixed at a price level such that the prices of the EU industry would be significantly depressed or would be unable to increase significantly, allowing demand for further imports to be foreseen.

243. In that context, I note that ArcelorMittal and Others acknowledge that both the prices of imports originating in China and the EU industry's prices increased after the investigation period, but maintain that EU industry's prices were none the less depressed, since the profitability of the EU industry had significantly decreased.

244. Such an argument amounts to an invitation to the Court to reassess the facts, which is not within its jurisdiction in an appeal.

245. Furthermore, the fact, emphasised by ArcelorMittal and Others, that in spite of the increase in prices during the post-investigation period there was still undercutting by imports originating in China, is inherent in the fact that those imports are made at lower prices than those offered by the EU industry. That fact, particularly when the price differential is reduced and it is necessary to examine a threat of injury, does not in itself make it possible to determine whether, in the context of the prospective analysis that must be carried out in the light of the third factor set out in the second subparagraph of Article 3(9) of the basic regulation, it is likely that further imports will arrive on the EU market at such a price level that they will significantly depress the prices of the EU industry or to a significant degree prevent that industry from increasing its prices.

246. In addition, it is clear, on a simple reading of paragraphs 88 and 90 of the judgment under appeal, that the General Court did not 'disregard' the Council's explanation that the increase in prices of imports originating in China was due to the increase of the prices of raw materials. Even on the assumption that that were so, the General Court rejected, at paragraph 90 of the judgment under appeal, the possibility that that fact, in this instance (that is to say, having regard to the finding that there had been an increase in the prices of imports originating in China and the prices of the EU industry), might support the Commission's conclusion that imports originating in China had a 'very low' depressive effect on the EU industry's prices.

247. Whatever ArcelorMittal and Others may say, the General Court did not in my view substitute its own assessment for that of the institutions. In accordance with the case-law referred to at points 63 and 67 above, it ascertained whether the post-investigation period economic data used by the institutions corroborated the hypotheses which the Commission had envisaged in the provisional regulation and which, in spite of the data in question, had been confirmed by the Council in the regulation at issue.

248. Such a judicial review is all the more justified in view of the prospective examination which the institutions are required to carry out when determining the existence of a threat of injury within the meaning of Article 3(9) of the basic regulation.

249. Accordingly, I propose that the complaints put forward by ArcelorMittal and Others alleging that the General Court erred in law when examining the third factor set out in the second subparagraph of Article 3(9) of the basic regulation should be rejected.

250. For all of those reasons, I also propose that the Court should reject the Council's third plea and ArcelorMittal and Others. second plea and the second part of their third plea, alleging misinterpretation of Articles 3(9) and 6(1) of the basic regulation and errors in the examination of the factors relating to the threat of injury.

D – *The Council's fourth plea, alleging that the General Court erred in law in substituting its own assessment of the economic factors for that of the institutions*

1. Summary of the arguments of the parties

251. The Council, supported by the Italian Republic, claims that the examination of the situation of the EU industry and the subsequent analysis relating to the existence of a threat of injury are complex and of an economic nature. Therefore, in accordance with settled case-law, the General Court cannot, in the exercise of its power of review, substitute its own assessment of the complex economic factors for that of the EU institutions. That, however, is what the General Court did in the judgment under appeal, putting a selective interpretation on the evidence, attributing different significance to certain facts and disregarding other findings made in the regulation at issue. In the Council's and the Italian Republic's submission, the General Court therefore overstepped its competence.

252. Hubei observes, in particular, that while the institutions are afforded a wide margin of discretion when making complex factual and economic assessments, they are not immune from judicial scrutiny.

2. Assessment

253. As I have already stated on a number of occasions in this Opinion, the review which the General Court is required to carry out of the institutions' examination of economic data in the context of the anti-dumping measures includes a review of the interpretation of the economic data by the institutions, consisting in the task of ascertaining that the evidence which they have used is accurate, reliable and consistent, but also whether that evidence constitutes all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

254. To my mind, the outcome of the Council's present plea, which is formulated in extremely wide terms, depends intrinsically on the outcome of the previous pleas. The present plea ultimately supports the more detailed claims set out by the appellants against the assessments of the General Court relating to the examination of the state of vulnerability of the EU industry and to the examination of the factors in the light of which a threat of injury, within the meaning of Article 3(9) of the basic regulation, can be determined.

255. In so far as I consider that those pleas cannot be upheld, I propose that the Council's fourth plea should also be rejected.

256. Accordingly, as none of the pleas can in my view succeed, I propose that they be rejected in their entirety.

VII – **Costs**

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

258. Under Article 138(1) of those rules, which is applicable to the procedure on appeal pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

259. Under the Article 140(1) of the Rules of Procedure of the Court of Justice, Member States and institutions which have intervened in the proceedings are to bear their own costs.

260. As Hubei has claimed that the Council and ArcelorMittal and Others should be ordered to pay the costs, and as in my view the Court should find that the appellants have been unsuccessful, I propose that they be ordered, in addition to bearing their own costs, to pay the costs incurred by Hubei.

261. As the Commission and the Italian Republic have intervened in the proceedings, they must be ordered to bear their own costs.

VIII – **Conclusion**

262. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeals;

— order the Council of the European Union and ArcelorMittal Tubular Products Ostrava a.s. and Others to pay the costs;

— order the European Commission and the Italian Republic to bear their own costs.