Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 6 September 2011 [1]

Case C-249/10 P

Brosmann Footwear (HK) Ltd,
Seasonable Footwear (Zhongshan) Ltd,
Lung Pao Footwear (Guangzhou) Ltd,
Risen Footwear (HK) Co. Ltd
v

Council of the European Union

(Appeal — Common commercial policy — Dumping — Articles 2(7), 3(7), 5(4), 9(5) and (6), and 17(3) of Regulation (EC) No 384/96 — Imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam — Market economy treatment — Individual treatment — Sampling method — Cooperation on the part of the European Union industry)

I – Introduction

1. By their appeal, Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd (collectively, 'Brosmann Footwear and Others') claim that the Court should set aside the judgment of 4 March 2010 in *Brosmann Footwear (HK)* v *Council* ('the judgment under appeal'), [2] by which the General Court dismissed their action for the partial annulment of Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam [3] ('the Definitive Regulation').

2. Essentially, this case turns on the wording of certain provisions of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, [4] as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 [5] ('the Basic Regulation').

3. In effect, consideration of the appeal entails examining the implications of Article 17 of the Basic Regulation, under which the European Commission is free, in cases 'where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time', to limit its investigation to a representative sample of exporters or producers of the non-member country concerned and not to examine claims for the calculation of an 'individual margin of dumping' from undertakings which were not selected for sampling but had submitted the necessary information within the time-limits provided.

1 — Original language: French.
2 — Case T-401/06 [2010] ECR II-671.
3 — OJ 2006 L 275, p. 1.
4 — OJ 1996 L 56, p. 1.
5 — OJ 2004 L 77, p. 12.

4. More specifically, it falls to be determined in that connection whether the General Court was correct in holding that, on the basis of Article 17(3) of the Basic Regulation, the Commission is also entitled, in view of the number of exporters or producers concerned, to refuse to examine claims, governed by Article 2(7)(b) and (c) of the Basic Regulation, for recognition as an undertaking operating in market economy conditions (market economy treatment: 'MET') and claims for individual treatment ('IT') as referred to in Article 9(5) of that regulation, submitted by exporters or producers who were not included in the sample.

II – The background to the dispute and the judgment under appeal

5. Brosmann Footwear and Others are companies established in China which produce and export footwear.

6. Following a complaint lodged on 30 May 2005 by the Confédération européenne de l'industrie de la chaussure ('CEC'), the Commission initiated an anti-dumping proceeding concerning imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. The notice of initiation of that proceeding was published in the *Official Journal of the European Union* of 7 July 2005[6] ('the notice of initiation').

7. In view of the conspicuously large number of parties involved in the proceeding, reference was made in Section 5.1(a) of the notice of initiation to the possibility that the sampling technique would be used, in accordance with Article 17 of the Basic Regulation.

8. Additionally, it was stated in Section 5.1(b) of the notice of initiation that producers or exporters claiming an individual margin with a view to the application of Articles 9(6) and 17(3) of the Basic Regulation had to return a questionnaire, duly completed, within the time-limits fixed by the notice, that is to say, within 40 days of the date of publication of the notice in the Official Journal.

9. Point (e) of Section 5.1 of the notice of initiation, entitled 'Market economy status', stated that the normal value of shoes with leather uppers offered for sale by producers who considered that they were operating under market economy conditions, in accordance with Article 2(7)(c) of the Basic Regulation, would be determined in accordance with Article 2(7)(b) of that regulation. Producers who intended to submit an MET claim were required to ensure that their applications reached the Commission within the time-limits specified in Section 6(d) of the notice of initiation, that is to say, within 15 days of the publication of the notice.

10. In accordance with Section 6(d) of the notice of initiation, the same time-limits applied to IT claims under Article 9(5) of the Basic Regulation.

11. Brosmann Footwear and Others contacted the Commission and, within the specified time-limits, provided it with the information referred to in Sections 5.1(a)(i) and 5.1(e) of the notice of initiation in order to be included in the sample of exporting producers which the Commission proposed to select pursuant to Article 17 of the Basic Regulation and in order to be granted MET, failing which, IT.

12. On 23 March 2006, the Commission adopted Regulation (EC) No 553/2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam[7] ('the Provisional Regulation').

6 — OJ 2005 C 166, p. 14.

7 — OJ 2006 L 98, p. 3.

13. According to recital 9 in the preamble to the Provisional Regulation, the investigation of dumping and injury covered the period from 1 April 2004 to 31 March 2005 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2001 to 31 March 2005.

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

15. In ascertaining whether there had been dumping, the Commission applied the sampling technique. According to recital 55 to the Provisional Regulation, of the Chinese exporting producers which came forward to be included in the sample, 154 exported to the European Community during the investigation period. Recital 55 also states that those companies were initially considered to be cooperating companies and were taken into account in the selection of the sample.

16. According to recital 57 to the Provisional Regulation, the Commission finally selected a sample consisting of 13 Chinese exporting producers, representing more than 20% of the Chinese export volume to the Community. It emerges from recitals 67 to 69 to the Provisional Regulation that the requests for MET from those exporting producers were all refused by the Commission. According to recitals 91 to 94, their requests for IT were also refused.

17. Recital 62 to the Provisional Regulation states that exporting producers which were not finally included in the sample were informed that any anti-dumping duty on their exports would be calculated in accordance with Article 9(6) of the Basic Regulation. According to recital 64 to the Provisional Regulation, four Chinese exporting producers which were not included in the sample asked for an individual dumping margin to be calculated under Articles 9(6) and 17(3) of the Basic Regulation. However, their requests were not considered as the Commission took the view that, pursuant to Article 17(3) of the Basic Regulation, to examine individual cases would have been unduly burdensome and would have made it impossible to complete the investigation in good time. In those circumstances, their dumping margin was determined on the basis of the weighted average of the dumping margins of the companies in the sample (recitals 135 and 143 to the Provisional Regulation).

18. As regards the definition of the Community industry, the Commission observed in recital 150 to the Provisional Regulation that the complainants accounted for 42% of the total Community production of the product concerned. Recitals 65 and 151 state that the Commission selected a sample of 10 Community producers on the basis of their production volume and location. The producers in the sample represented approximately 10% of the production of the complainants. Accordingly, the 814 Community producers on whose behalf the complaint had been lodged were deemed to constitute 'the Community industry' for the purposes of Article 5(4) of the Basic Regulation (recital 152 to the Provisional Regulation).

19. As regards the identities of the Community producers included in the sample, the Commission observed that some of them had customers in the Community which also source their products in China and Vietnam and in consequence benefit directly from the imports in question. Those producers are therefore in 'a sensitive position', since some of their customers may not be satisfied with their having lodged or supported a complaint against allegedly injurious dumping. Accordingly, those producers considered that there was 'a risk of retaliation' by some of their customers, which could ultimately lead to the termination of those business relationships. The Commission therefore granted the request for confidential treatment of the identities of the companies selected for the sample (recital 8 to the Provisional Regulation).

20. On 5 October 2006, the Council of the European Union adopted the Definitive Regulation imposing a definitive anti-dumping duty on imports of footwear with uppers of leather or composition leather, excluding sports footwear, Special Technology Athletic Footwear (STAF), slippers and other indoor footwear and footwear with a protective toecap, originating in China and falling within a number of combined nomenclature codes (Article 1 of the Definitive Regulation).

21. As regards the representative nature of the sample of Chinese producers, the Council stated in recital 44 to the Definitive Regulation that the undertakings taking part accounted for more than 12% of exports to the Community by the producers which had cooperated in the investigation. Since Article 17 of the Basic Regulation lays down no threshold with respect to the representative nature of samples, the sample taken is representative for the purposes of that provision.

22. According to recital 72 to the Definitive Regulation, the Council decided to grant MET to one of the exporting producers included in the sample — namely, Golden Step — in view of the change in the circumstances relating to that company.

23. Under Article 1(3) of the Definitive Regulation, the definitive anti-dumping duty applicable, before duty, to the net free-at-Community-frontier price was fixed at 16.5% for the footwear produced by the 11 Chinese companies which were included in the sample but refused MET. The rate was fixed at 9.7% for Golden Step. Under Article 3 of the Definitive Regulation, those rates were applicable for two years.

24. With regard to the questions linked to the claims from a number of companies for MET and/or IT, to which the Commission had not responded, the Council decided that the fact that the Commission had not responded individually to each claim which it had received in that connection did not constitute an infringement of the Basic Regulation.

25. The rate of anti-dumping duty applicable to footwear made by those companies, including Brosmann Footwear and Others, was fixed at 16.5%.

26. As regards the sample of Community producers, the Council rejected, in recitals 53 to 59 to the Definitive Regulation, all the complaints questioning the representative nature of that sample and, accordingly, confirmed the findings made by the Commission in the Provisional Regulation.

27. As regards the definition of the Community industry, the Council emphasised in recital 157 to the Definitive Regulation that no finding had been made that any of the complainants had failed to cooperate with the investigation. Full injury questionnaires had been sent only to the Community producers included in the sample, which was a natural consequence of the sampling method (recital 158 to the Definitive Regulation).

28. In support of their action before the General Court for the partial annulment of the Definitive Regulation, Brosmann Footwear and Others raised eight pleas in law. Those pleas in law included pleas alleging: (i) infringement of Articles 2(7)(b) and 9(5) of the Basic Regulation and breach of the principles of equal treatment and protection of legitimate expectations; (ii) infringement of Articles 2(7)(c) and 18 of the Basic Regulation and breach of the rights of the defence; (iii) manifest error of assessment and infringement of Article 5(4) of the Basic Regulation; (iv) manifest error of assessment and infringement of Article 3(2) of the Basic Regulation and of Article 253 EC; and (v) manifest error of assessment and infringement of Article 3(2) of the Basic Regulation.

29. By the judgment under appeal, the General Court rejected all those pleas and ordered Brosmann Footwear and Others to pay the costs of the proceedings at first instance.

III – The proceedings before the Court of Justice and the forms of order sought

30. On 18 May 2010, Brosmann Footwear and Others lodged an appeal before the Court against the judgment under appeal.

31. Brosmann Footwear and Others claim that the Court should:

— set aside the judgment under appeal, in so far as the General Court did not annul the Definitive Regulation and in so far as it ordered Brosmann Footwear and Others to pay the costs of the proceedings before the General Court;

— adopt a definitive ruling and annul the Definitive Regulation;

— order the Council to pay the costs of the appeal and of the proceedings before the General Court.

32. In its response, the Council contends that the Court should:

— dismiss the appeal;

— in the alternative, refer the case back to the General Court;

— in the further alternative, dismiss the action and, in any event, order Brosmann Footwear and Others to pay the costs of the appeal.

33. In its response, the Commission contends that the Court should dismiss the appeal and order Brosmann Footwear and Others to pay the Commission's costs.

IV – Discussion

34. Brosmann Footwear and Others rely in essence on five grounds of appeal, which correspond to the five pleas listed in point 28 above which were raised at first instance.

35. The first two grounds of appeal are essentially that the General Court erred in law in interpreting the Basic Regulation as meaning that the institutions need not examine MET/IT claims from exporting producers which have not been included in the sample. The third ground of appeal is that the General Court made various errors of law and distorted the evidence relating to a sufficient degree of cooperation on the part of the Community industry in the course of the investigation and to the conduct of that investigation. The fourth ground is that the General Court erred in law and misinterpreted the evidence relating to the assessment of the injury caused to the Community industry. Lastly, by the fifth ground of appeal, Brosmann Footwear and Others allege that the General Court erred in law and misinterpreted the evidence in the context of the assessment of the causal connection between the dumping and the injury suffered by the Community industry.

A – *The first and second grounds of appeal: errors of law in finding that the institutions have no obligation to examine MET/IT claims from exporting producers which have not been included in the sample*

36. Before setting out and considering the first two grounds of appeal, it is necessary to rehearse the essential steps in the reasoning which led the General Court to reject the argument put forward by Brosmann Footwear and Others at first instance to the effect that, in essence, it was incumbent upon the institutions to examine MET/IT claims from the Chinese exporting producers who had not been included in the sample selected during the anti-dumping investigation.

1. The reasoning of the General Court

37. First of all, in paragraph 72 of the judgment under appeal, the General Court observed that the use of sampling as a technique for dealing with a large number of complainants, exporters, importers, types of product or transactions constituted a limitation of the investigation, in accordance with Articles 9(6) and 17(1) of the Basic Regulation. With regard to the same provisions, the General Court explained that the use of the sampling technique is nevertheless subject to two conditions: (i) the sample must be representative and (ii) the dumping margin established for producers who are not included in the sample must not exceed the weighted average margin of dumping established for the parties in the sample (paragraph 73 of the judgment under appeal).

38. The General Court noted that Articles 9(6) and 17(1) of the Basic Regulation give each producer who is not included in the sample the possibility of requesting calculation of an individual dumping margin, provided that the producer submits all the necessary information within the time-limits provided for and that that process neither proves unduly burdensome for the Commission nor makes it impossible for the investigation to be completed in good time (paragraph 74 of the judgment under appeal).

39. After explaining additionally the content of Article 2(7)(b) of the Basic Regulation, the General Court found, in paragraph 76 of the judgment under appeal, that 'producers who are not included in the sample may request that an individual dumping margin be calculated — which presupposes the acceptance of an MET/IT claim where countries concerned by Article 2(7)(b) of the Basic Regulation are involved — only on the basis of Article 17(3) of that regulation. However, Article 17(3) gives the Commission the power to assess whether, having regard to the number of MET/IT claims, examining them would be unduly burdensome and would prevent completion of the investigation in good time'.

40. The General Court inferred from this that: (i) where sampling is used, the Basic Regulation does not give traders who are not included in the sample an unconditional right to the calculation of an individual dumping margin, since the acceptance of such a claim depends on the Commission's decision as to the application of Article 17(3) of the Basic Regulation (paragraph 77 of the judgment under appeal); (ii) as the grant of MET or IT serves, pursuant to Article 2(7)(b) of the Basic Regulation, only to establish the method for calculating normal value with a view to the calculation of individual dumping margins, the Commission is not required to examine MET/IT claims from traders who are not included in the sample in cases where, in applying Article 17(3) of the Basic Regulation, the Commission has concluded that the calculation of such margins would be unduly burdensome and would prevent it from completing the investigation in good time (paragraph 78 of the judgment under appeal); and (iii) in the case before the General Court, it was not disputed that the calculation of individual dumping margins for every non-sampled trader who had made a claim to that effect would have been unduly burdensome for the institutions and would have prevented completion of the investigation in good time (paragraph 79 of the judgment under appeal).

41. The General Court inferred from this that it was necessary to reject the argument put forward by Brosmann Footwear and Others to the effect that Article 2(7)(b) and (c) of the Basic Regulation places the Commission under an obligation to examine MET/IT claims from non-sampled traders, including those to whom an individual dumping margin has not been applied (paragraph 80 of the judgment under appeal).

42. The General Court also rejected the argument put forward by Brosmann Footwear and Others alleging breach of the principle of equal treatment, on the one hand, as between the companies included in the sample and those who were not, on the ground that the two categories of company were in different situations (paragraph 81 of the judgment under appeal) and, on the other hand, as

between the non-sampled companies which were 'entitled' to MET or IT and the non-sampled companies whose MET or IT claim would in any case have been rejected, on the ground that, in view of its discretion under Article 17(3) of the Basic Regulation, the Commission was not required to give a decision on all MET/IT claims (paragraphs 83 to 85 of the judgment under appeal).

43. As regards the failure to observe the three-month time-limit laid down in Article 2(7)(c) of the Basic Regulation for examining an MET claim, the General Court held in paragraph 92 of the judgment under appeal that, in the light of its earlier findings that 'the Commission did not … err in not examining the MET/IT claims [made by Brosmann Footwear and Others]', those companies 'may not rely on the expiry of the three-month period … since that period relates to cases in which the Commission [was] required to examine those claims'.

2. The parties' arguments

44. In the context of their first ground of appeal, Brosmann Footwear and Others take issue with the finding made by the General Court in paragraph 78 of the judgment under appeal that the institutions were not required to examine their MET/IT claims. On that point, Brosmann Footwear and Others submit that the General Court erred in law in finding, in the same paragraph, that the grant of MET or IT serves only to establish the method for calculating normal value with a view to the calculation of individual dumping margins.

45. As a consequence, in paragraphs 76 to 85 of the judgment under appeal, the General Court erroneously reduced the MET/IT claims made by Brosmann Footwear and Others to the status of requests for the calculation of an individual dumping margin for the purposes of Article 17 of the Basic Regulation. As it is, Brosmann Footwear and Others had not requested the calculation of individual dumping margins or of individual duty rates. Rather, they had requested recognition of the fact that they operate in 'market economy China' and that they should accordingly be granted the weighted average rate applicable to producers operating in 'market economy China' (that is to say, those with MET or IT and included in the sample). Brosmann Footwear and Others maintain that all the producers who were not included in the sample but who 'were entitled' to MET should have been granted an anti-dumping duty equal to that granted to Golden Step (9.7%), the only company in the sample to which MET was applied rather than the weighted average duty of all the companies included in the sample (16.5%). To accept that the institutions may proceed otherwise would amount to breach of the principle of equal treatment.

46. In consequence, according to Brosmann Footwear and Others, it was not open to the General Court to find that it was permissible for the institutions not to examine MET/IT claims on the ground — applicable to claims for the calculation of an individual dumping margin — that the number of claims was so great that examining them would make it impossible to complete the investigation in good time.

47. With regard to the second ground of appeal, Brosmann Footwear and Others submit, first, that the General Court infringed Article 2(7)(c) of the Basic Regulation by finding, in paragraph 92 of the judgment under appeal, that the Commission was not required to observe the mandatory three-month time-limit laid down in that provision for examining MET/IT claims made by companies not included in the sample.

48. Secondly, Brosmann Footwear and Others argue that the General Court acted in breach of its obligation to state reasons by not stating the reasons for which it had forborne examination of the allegation that the institutions had infringed Article 2(7)(c) of the Basic Regulation by not giving a decision, within three months of the initiation of the investigation, regarding the MET and/or IT of the Chinese producers included in the sample.

49. The Council and the Commission contend that those two grounds of appeal should be rejected.

50. The Council argues that, correctly, the General Court explained the links between Article 17 and Article 2(7) of the Basic Regulation. Where sampling is used, only sampled exporters, or non-sampled exporters who successfully claim an individual dumping margin under Article 17(3) of the Basic Regulation, can obtain an individual dumping margin. Non-sampled exporters who do not make a successful claim under Article 17(3) of that regulation cannot obtain an individual dumping margin, whether or not they are established in a market-economy country. Accordingly, the Council maintains that, in the case of a country which does not have a market economy, MET/IT claims serve to enable the companies which are not in the sample, or those who make a successful request under Article 17(3), to obtain an individual dumping margin. The allegation made by Brosmann Footwear and Others is in any event irrelevant because, as they themselves rightly point out, they did not claim the right to an individual dumping margin.

51. The finding made in paragraph 78 of the judgment under appeal is also well founded, according to the Council, as the General Court did not state that Brosmann Footwear and Others had claimed MET and/or IT in order to obtain an individual dumping margin. The Council contends that the other submissions made by Brosmann Footwear and Others alleging errors of law are likewise unfounded or inadmissible.

52. The Commission adds that, as the General Court found, there is no obligation for the institutions to assess each MET/IT claim, even if they decide to use sampling. As the Court found in paragraph 77 of the judgment under appeal, the institutions could limit themselves to examining claims included in the sample because — as the Court stated in paragraph 84 of the judgment under appeal — it was common ground in the case before it that the calculation of individual dumping margins for all traders not included in the sample who had submitted claims to that effect would have been unduly burdensome and would have prevented the completion of the investigation in good time.

53. With regard to the second ground of appeal, the Council and the Commission contend that it is partly unfounded and partly inadmissible. With regard to the alleged exceeding of the three-month period for examining the MET/IT claims made by Brosmann Footwear and Others, the Council and the Commission refer to the finding made by the General Court in paragraph 92 of the judgment under appeal. As the institutions were not under an obligation to examine MET/IT claims from companies which were not included in the sample, the Council and the Commission argue that the three-month time-limit referred to in Article 2(7)(c) of the Basic Regulation was not relevant for them. As for the alleged failure to observe that time-limit in connection with the examination of MET/IT claims from companies in the sample, the Council and the Commission contend that this point was not raised before the General Court and accordingly constitutes a new plea which is inadmissible on appeal.

3. Discussion

54. The first two grounds of appeal concern the implications of Article 17(3) of the Basic Regulation.

55. It is common ground that Article 17 of the Basic Regulation authorises the Commission to use the technique of sampling, in particular where the number of complainants or exporters is high.

56. Moreover, Brosmann Footwear and Others do not object to the observation made by the General Court in paragraph 72 of the judgment under appeal that the use of sampling constitutes a limitation of the investigation.

57. Accordingly, as the General Court found, exporters or producers not included in the sample do not form part of the investigation.

58. On the other hand, it should be noted that Article 17(3) of the Basic Regulation somewhat qualifies that statement in the specific case of claims for the calculation of 'an individual margin of dumping'.

59. Thus, Article 17(3) of the Basic Regulation provides that, where the Commission uses the sampling method, any exporter or producer who is not included in the sample but who submits the necessary information within the time-limits provided for may 'nevertheless' have an 'individual margin of dumping' calculated. That option is open to any exporter or producer who is not included in the sample, 'except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time'.

60. The General Court found, first, in paragraphs 76 and 77 of the judgment under appeal, that where countries concerned by Article 2(7)(b) of the Basic Regulation are involved, the acceptance of a claim for the calculation of an individual dumping margin presupposes the acceptance of an MET/IT claim without, however, traders who are not included in the sample being able to claim an unconditional right under Article 17(3) to the calculation of an individual dumping margin. The General Court found, secondly, in paragraph 78 of the judgment under appeal, that, since the grant of MET or IT serves only to establish the method for calculating normal value with a view to the calculation of individual dumping margins, Article 17(3) of the Basic Regulation made it possible for the Commission not to examine MET/IT claims from traders who were not included in the sample, if the calculation of such margins would be unduly burdensome and would prevent the Commission from completing the investigation in good time.

61. The reasoning in paragraphs 76 and 77 of the judgment under appeal has not — quite rightly — been criticised by Brosmann Footwear and Others.

62. In short, to enable the Commission to calculate individual dumping margins, the exporters or producers of a country which does not have a market economy but is a member of the World Trade Organisation must, beforehand, be in a position to rely on MET — that is to say, they must satisfy the conditions laid down in Article 2(7)(b) and (c) of the Basic Regulation — or, if they are not covered by those provisions and, accordingly, the normal value is to be calculated on the basis of Article 2(7)(a) of the Basic Regulation, they must obtain individual treatment, the conditions for which are governed by Article 9(5) of that regulation.

63. Consequently, as the General Court found in paragraph 76 of the judgment under appeal, the calculation of an individual dumping margin depends on the grant either of MET or of IT. Yet, as the General Court went on to indicate in the same paragraph, the calculation is subject to the reservation provided for in Article 17(3) of the Basic Regulation, under which individual examination must not be unduly burdensome and prevent completion of the investigation in good time.

64. More problematical, in my view, is the reasoning of the General Court in paragraph 78 of the judgment under appeal to the effect that, in substance, MET and IT serve only in the calculation of individual dumping margins and that, in consequence, the Commission may, on the basis of Article 17(3), refuse to examine MET/IT claims from traders who are not included in the sample if the calculation of such margins would be unduly burdensome and would prevent it from completing the investigation in good time.

65. Although it must be accepted that a claim for the grant of MET or IT is a condition for obtaining the calculation of an individual dumping margin, the purpose of such a claim is not necessarily to request the calculation of such a margin. Claims for the grant of MET or IT, on the one hand, and a claim for the calculation of an individual dumping margin, on the other, are governed by different provisions and different time-limits.

66. Thus, in the present case, the notice of initiation stated that MET claims submitted on the basis of Article 2(7)(b) of the Basic Regulation and IT claims submitted under Article 9(5) of that regulation had to be sent to the Commission within 15 days of the publication of the notice, whereas claims for the calculation of individual dumping margins under Articles 9(6) and 17(3) of the Basic Regulation had to be sent within 40 days of the publication of the notice. Footnote No 1 to the initiation notice, to which the General Court referred in paragraph 89 of the judgment under appeal, stresses the optional nature of claims for the calculation of individual dumping margins made by exporters or producers who claimed MET or IT. As Brosmann Footwear and Others also point out, claims for the calculation of individual dumping margins must include information additional to that required for MET or IT claims.

67. Moreover, it emerges from recital 64 to the Provisional Regulation — mentioned in paragraph 95 of the judgment under appeal — that only four of the Chinese exporting producers not included in the sample selected by the Commission sought the calculation of an individual dumping margin and provided within the time-limits laid down the necessary information under Articles 9(6) and 17(3) of the Basic Regulation, whereas it is common ground that 141 Chinese exporting producers, including Brosmann Footwear and Others, had submitted MET or IT claims, even though Brosmann Footwear and Others did not complete within the time-limits laid down the questionnaire enabling them to request calculation of an individual dumping margin.

68. It is very clear, therefore, from the legal context and from the documents before the Court that a trader claiming MET or IT is not necessarily claiming the calculation of an individual dumping margin. Nor is he obliged to do so.

69. Since a claim for MET or IT is not necessarily linked to a claim for the calculation of an individual dumping margin, I do not see how — in the absence of a specific claim for the calculation of a margin — Article 17(3) of the Basic Regulation can be extended to the treatment of claims for MET and/or IT from exporters or producers who are not included in the sample.

70. To my mind, therefore, the General Court erred in law by finding, in paragraph 78 of the judgment under appeal, that Article 17(3) of the Basic Regulation made it permissible for the Commission not to examine MET/IT claims from companies which, like Brosmann Footwear and Others, were not included in the sample. Article 17(3) of the Basic Regulation merely permits the Commission, in the circumstances specified in that provision, not to examine claims for the calculation of an individual dumping margin made by non-sampled companies.

71. However, I consider that error of law to be ineffective in so far as it cannot lead to the judgment under appeal being set aside.

72. On that point, it should be observed that the General Court was quite right to find — and has not thereby given rise to any objections on the part of Brosmann Footwear and Others — that sampling constitutes a limitation of the investigation. Accordingly, the investigation does not concern the companies which are not included in the sample.

73. As I mentioned above, the only exception to the limitation of the investigation — albeit itself immediately qualified in turn — concerns the examination, provided for in Article 17(3) of the Basic Regulation, of claims for the calculation of an individual dumping margin made by exporters or producers who are not included in the sample. As that exception must be narrowly construed, it does not extend to MET claims or IT claims from producers or exporters which were not included in the sample.

74. In those circumstances, the Commission was right, pursuant to Article 17(1) of the Basic Regulation, not to examine MET or IT claims from companies which were not included in the sample. The fact that those claims are not examined is a logical consequence of the sampling method, quite separate from the question whether Article 17(3) applies.

75. In that connection, it should be noted that Brosmann Footwear and Others do not dispute the composition of the sample of Chinese exporting producers and its representative nature. In paragraph 22 of the appeal, they merely criticise the General Court's interpretation of Article 17 of the Basic Regulation, submitting that a sample cannot be properly selected until the Commission has reached a decision on MET/IT claims.

76. However, it cannot sustainably be argued that the investigation cannot be limited as a result of sampling until the Commission has reached a decision on all MET/IT claims, including, therefore, those made by companies not included in the sample. Since, under Article 5(10) of the Basic Regulation, the notice of initiation announces the initiation of an investigation and MET/IT claims cannot be submitted until the investigation has been initiated, the limitation of the investigation brought about by use of the sampling method necessarily implies that MET claims or IT claims from companies not included in the sample need not be examined.

77. Contrary to the submissions made by Brosmann Footwear and Others, the fact that no such examination is undertaken does not amount to a breach of the principle of equal treatment as between the companies not included in the sample, to the detriment of non-sampled companies which would have been 'entitled' to MET or IT in that, for the purposes of the calculation of the dumping margin, they are thereby treated in the same way as non-sampled companies whose MET/IT claims would have been rejected.

78. Apart from the fact that that argument is by definition hypothetical in the case of Brosmann Footwear and Others, it should be noted that Article 9(6) of the Basic Regulation provides that anti-dumping duty for exporters or producers who have not been included in the investigation must not exceed the weighted average margin of dumping established for the parties in the sample. Accordingly, that provision — the validity of which has never been disputed by Brosmann Footwear and Others — does not confer any right upon non-sampled exporters or producers who have claimed MET or IT to obtain a calculation from the institutions of the weighted average margin of dumping other than the calculation resulting from the taking into account of all the companies in the sample, whether or not those companies have themselves obtained MET or IT.

79. In view of those considerations, and in spite of the error of law made by the General Court in the interpretation of Article 17(3) of the Basic Regulation, the General Court was nevertheless correct in finding, in substance, in paragraph 92 of the judgment under appeal, with regard to the argument that the three-month time-limit for the Commission to examine MET/IT claims made by Brosmann Footwear and Others had not been observed, that that time-limit concerns only the examination of claims made by companies which are covered by the investigation, that is to say, by the producers and exporters included in the sample.

80. As for the failure to observe the time-limit for examining the MET/IT claims made by those companies, Brosmann Footwear and Others cannot, in my view, complain that the General Court did not reply, as such a complaint was not in effect raised at first instance. Notwithstanding the assertion made at the hearing before the Court of Justice by the representative of Brosmann Footwear and Others, to the effect that that complaint had been raised in paragraph 67 of the application, it is clear from the context in which that paragraph was drafted that the failure to observe the three-month time-limit related only to the MET/IT claims entered by Brosmann Footwear and Others and, at most, those entered by the other Chinese producers and exporters who were not included in the sample. In fact, that paragraph appears in a part of the application alleging infringement of Article 2(7)(c) of the Basic Regulation and, in particular, of the *rights of the defence*. As such rights

attach by nature to the person, that paragraph, as worded, quite obviously could not properly refer to the Chinese companies which were included in the sample and whose MET/IT claims had been examined by the institutions. I suggest, therefore, that this complaint should be rejected as inadmissible on appeal.

81. For all those reasons, I propose that the first two grounds of appeal should be rejected, the first as ineffective and the second as unfounded.

B – *Third ground of appeal: errors of law and distortion of the evidence relating to a sufficient degree of cooperation on the part of the Community industry in the course of the investigation and to the conduct of the investigation*

82. This ground of appeal is in two parts, alleging errors of law and distortion of the evidence relating, respectively, to a sufficient degree of cooperation on the part of the Community industry during the investigation and to the conduct of the investigation.

1. First part: errors of law and distortion of the evidence relating to a sufficient degree of cooperation on the part of the Community industry during the investigation

a) The parties' arguments

83. According to Brosmann Footwear and Others, the General Court confined itself to considering whether there was sufficient support for the complaint to justify the initiation of an anti-dumping investigation, but did not consider whether the institutions had been correct in finding that the 804 Community producers who were not included in the sample and who responded only to the first questionnaire sent before the investigation ('the standing questionnaire') had cooperated sufficiently in order to determine whether 'the standing requirement was met during the investigation'. In other words, the General Court did not verify whether the institutions had been correct in finding that the requirement relating to *locus standi* remained fulfilled throughout the investigation. Brosmann Footwear and Others submit that it is not certain that the high level of support for the complaint before the investigation had been initiated was the same as the level of cooperation and standing once the investigation had been initiated. The General Court should therefore have found that the institutions were required to verify the cooperation of the 804 complainants by sending them the sampling questionnaire. The reason for this is that, as the General Court conceded in paragraph 108 of the judgment under appeal, it is that questionnaire which is normally sent to Community producers in order to verify their cooperation in the investigation. As it is, by reasoning, in effect, in paragraphs 110 to 112 of the judgment under appeal that it was permissible for the institutions not to send the sampling questionnaire to the 804 Community producers who were not included in the sample in order to verify their cooperation during the investigation, and by accepting that the mere statement made by those producers, in response to the standing questionnaire, that they supported the complaint was sufficient verification, the General Court infringed Articles 4(1) and 5(4) of the Basic Regulation and failed to fulfil the obligation to state the reasons for its judgment.

84. The findings made in paragraph 111 of the judgment under appeal are also affected by distortion of the evidence, as it was impossible for the General Court to infer from the standing questionnaire that the Community producers were aware that the information which they communicated might be verified in the course of the investigation and that the replies to that document were sufficient to prove cooperation during the investigation.

85. For all those reasons, Brosmann Footwear and Others submit that the General Court should have held that only the 10 European Union companies included in the sample had cooperated in the investigation: a number which was insufficient, however, to 'meet the 25% standing threshold during the investigation'. In those circumstances, those companies could not legitimately represent 'the Community industry' for the purposes of the anti-dumping proceeding.

86. The Council and the Commission contend that this first part of the third ground of appeal should be rejected. In essence, they argue that the European Union producers cooperated, in that they responded to the standing questionnaire and confirmed that they supported the complaint. Consequently, the 814 companies must be regarded as constituting 'the Community industry' for the purposes of Article 5(4) of the Basic Regulation. According to the Council and the Commission, nothing obliged the Commission to verify again whether those companies were cooperating after the initiation of the investigation.

b) Discussion

87. As provided in Article 6(2) of the Basic Regulation, in an anti-dumping investigation the Commission is to send various types of questionnaire to the interested parties.

88. However, the nature and functions of those questionnaires are not specified in the Basic Regulation.

89. As the Council has emphasised, without being contested on that point by Brosmann Footwear and Others, the Commission generally sends two types of questionnaire to European Union producers who make a complaint.

90. The questionnaire concerning *locus standi*, the 'standing questionnaire', the exact title of which — as was stated in paragraph 110 of the judgment under appeal — was, in the present case, 'Possible initiation of an anti-dumping investigation concerning imports of footwear with uppers of leather originating in the People's Republic of China and Vietnam', is the questionnaire which assesses the degree of support for the complaint. Accordingly, it is sent before the investigation is initiated.

91. The second questionnaire, called the 'sampling questionnaire', is sent to European Union producers after the initiation of the investigation. It is generally completed in two stages. First, all the producers receive a short sampling questionnaire asking for the necessary information and, in particular, for production and sales figures and the replies are normally used to select the representative sample. In the short sampling questionnaire, the Commission also asks whether, if the sampling technique were used, the European Union producers would be prepared to be included in the sample, to provide the necessary information for evaluating the injury and to permit the Commission to carry out checks on-site. Then, when the sample has been selected, the Commission sends the second part of the questionnaire — known as the 'full sampling questionnaire' — only to the European Union producers included in the sample. That second part relates to the evaluation of the injury to the European Union industry.

92. In the present case, it is common ground — as the General Court noted in paragraph 109 of the judgment under appeal — that the Commission used a different procedure because of the exceptionally high number of European Union producers. It therefore selected the sample on the basis of the information collected by means of the standing questionnaire and sent the second questionnaire only to the European Union producers who had made the complaint and who were included in the sample, so that they could provide the information relating to the evaluation of the injury. Accordingly, the European Union producers who were not included in the sample — that is to say, 804 out of the 814 producers on whose behalf the complaint had been lodged — did not receive the short sampling questionnaire.

93. According to Brosmann Footwear and Others, to accept — as the General Court did — that the Commission could proceed in that way would be contrary to Articles 4(1) and 5(4) of the Basic Regulation. From that point of view and in those circumstances, the Commission would not have to verify the cooperation in the investigation of the companies not included in the sample. Those companies should therefore be excluded from the definition of 'Community industry' for the purposes of Article 5(4) of the Basic Regulation. Accordingly, that should in turn lead to a finding that the conditions required for support for the complaint, cooperation in the investigation and evaluation of the injury caused to the European Union industry by dumping are not satisfied.

94. That argument does not persuade me.

95. First of all, it is common ground, as the General Court observed in paragraph 103 of the judgment under appeal, that under Article 5(1) and (4) of the Basic Regulation, an anti-dumping investigation is initiated properly — save where Article 5(6) applies, which is not the position in the present case — if a complaint has been made by or on behalf of 'the Community industry'. A complaint is deemed to have been made by or on behalf of the Community industry if it is supported by European Union producers representing, as regards the like product, more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. Furthermore, the producers expressly supporting the complaint must also represent at least 25% of total production of the like product produced by the Community industry.

96. As the General Court also found, in paragraph 105 of the judgment under appeal, without attracting any objection at all from Brosmann Footwear and Others on that point, 'support' for a complaint made by or on behalf of 'the Community industry' for the purposes of Article 5(2) and (4) of the Basic Regulation means, first, that the complainant or complainants, as well as the persons on behalf of whom the complaint was made, must supply the evidence which the Commission requests with a view to verifying that the necessary conditions for the imposition of an anti-dumping duty have been satisfied and, secondly, that they must consent to undergo any checks which the Commission may make in order to determine whether the information supplied is accurate.

97. That second commitment means 'cooperation in the investigation', a notion for which the Basic Regulation provides no positive definition but which, as emerges from Articles 6(8) and 18 of the Basic Regulation, relates in essence to the attitude of the interested parties to taking part in the proper conduct of the investigation, in particular by undertaking to allow the Commission access to information, or to provide it with information, and to undergo checks carried out by the Commission.

98. In that connection, it should be noted that the Basic Regulation does not specify any particular method for establishing support for the complaint or for verifying that the European Union producers cooperated in the investigation. Furthermore, Brosmann Footwear and Others concede at several points in their appeal that, as the General Court in effect found, no particular method is incumbent upon the Commission.[8] Given the broad discretion enjoyed by the institutions, it is right that the Commission cannot be compelled to proceed in a particular way for the purposes of establishing support for a complaint or for verifying that the European Union producers have cooperated in the investigation, especially where it is common ground, as in the present case, that the complaint has been made by an exceptionally high number of European Union producers.

8 — See paragraphs 50 and 51 of the appeal.

99. Secondly, although it is clear that the companies included in the sample must cooperate in full throughout the investigation, the cooperation of European Union producers not included in the sample consists in the provision of information which makes it possible, first, to decide whether those producers belong to 'the Community industry' so as to verify their support for the complaint and, secondly, to proceed with selecting the sample. Under Article 17(1) of the Basic Regulation, once the sample has been selected, European Union producers who have not been selected no longer, by definition, take part in the investigation.

100. As it is, with regard to the first element — verification of the support for the complaint — Brosmann Footwear and Others do not dispute the material accuracy of the General Court's scrutiny of that aspect in paragraphs 110 and 111 of the judgment under appeal. I would add that, in the light of the point made in the preceding paragraph, and contrary to the assertions made by Brosmann Footwear and Others, it was not for the court hearing the case at first instance to verify 'the standing threshold [of the companies not included in the sample] during the investigation'. Inasmuch as this last expression must be taken to mean verification of cooperation after the sample has been selected, that operation takes place in full only in relation to the companies included in the sample.

101. With regard to the second element — the selection of the sample — Brosmann Footwear and Others observe correctly that, in paragraph 164 of the judgment under appeal, the General Court found that, on the basis of the questionnaire sent to the 814 European Union producers,[9] the Commission had the information needed to select the sample of Community producers on the basis of the criteria which it considered relevant. Although Brosmann Footwear and Others claim that the General Court distorted the evidence in stating that the standing questionnaire contained questions relating to a period other than that covered by the investigation, that claim is not only unsupported but also, and more importantly — as the Council rightly pointed out — confuted by the very contents of the questionnaire, which related, inter alia, to the production of each company making the complaint over the period covered by the investigation.[10]

102. Accordingly, I propose that the first part of the third ground of appeal should be rejected.

2. Second part: errors of law and distortion of the evidence relating to the conduct of the investigation

a) The parties' arguments

103. Brosmann Footwear and Others submit that the General Court erred in law with regard to Article 6(1) of the Basic Regulation by finding that the institutions could legitimately use for sampling purposes information collected before the notice of initiation.

104. Alternatively, Brosmann Footwear and Others claim that, by using information obtained from the standing questionnaire, the Commission began the investigation before the date of the notice of initiation. Accordingly, they claim that the Commission did not conclude the investigation within the 15-month period specified in Article 6(9) of the Basic Regulation.

105. The Council and the Commission contend that those arguments are unfounded.

9 — It should be noted that it was undoubtedly a clerical error which led the General Court to refer, in this paragraph of the judgment under appeal, to the sampling questionnaire and not to the standing questionnaire.

10 — See Annex 7 to the appeal (p. 289), which contains tables addressed to the European Union producers making the complaint, referring to the years 2003, 2004 and the first quarter of 2005.

b) Discussion

106. It is undisputed that the information collected by the Commission from the replies to the standing questionnaire was collected before the notice of the initiation of the investigation was published.

107. However, as the General Court in effect observed in paragraph 114 of the judgment under appeal, if the Commission has to collect and verify certain information provided by the complainants before the procedure is initiated, there is nothing in the Basic Regulation to prevent the Commission from taking the information into account in the investigation.

108. The fact that the Commission begins the investigation after the notice of initiation, as specified in Article 6(1) of the Basic Regulation, does not mean that the information made available to it before the investigation cannot be used during the investigation.

109. If it were otherwise, the Commission would in effect be compelled to request the European Union producers who made the complaint to provide once again substantially the same information, thus flouting the requirement of sound administration and the effective management of limited resources, particularly in cases, such as this, where the number of complainants is exceptionally high.

110. Furthermore, as I have already said, Brosmann Footwear and Others do not seriously dispute the fact that the information collected before the notice of the initiation of the investigation was published made it possible to select the sample of European Union producers to the requisite legal standard.

111. Moreover, as regards the 15-month period allowed, with effect from the publication of the initiation of the investigation, for the imposition of definitive duties, the General Court was correct in finding in paragraph 118 of the judgment under appeal that the Definitive Regulation had fully observed that requirement under the Basic Regulation. Although some of the information from the European Union producers who made the complaint was collected by the Commission before the initiation notice was published, that information, for the purposes of selecting the sample, was used and verified after the investigation had been initiated. Thus the Commission did not initiate the investigation before the notice of initiation was published.

112. For those reasons, I propose that the second part of the third ground of appeal should be rejected, as should the third ground of appeal in its entirety.

C – *Fourth ground of appeal: error of law and distortion of the evidence relating to the evaluation of the injury to the Community industry*

1. Reasoning of the General Court

113. At first instance, Brosmann Footwear and Others submitted that the institutions had relied on unreliable data for the purposes of assessing the macroeconomic and microeconomic factors relating to the injury suffered by the Community industry. In particular, Brosmann Footwear and Others claimed, on the basis of information gathered essentially from the press and sent to the Commission, that some Italian companies which were probably included in the sample of European Union producers had submitted false information and engaged in a certain number of fraudulent acts at national level in order to profit from subsidies or offences under employment law.

114. The General Court rejected those claims.

115. First of all, in paragraph 168 of the judgment under appeal, the General Court observed that the fact that a company has committed fraud at national level does not necessarily imply that it is not cooperating in a Commission anti-dumping investigation and that it is providing incorrect information in that connection. Even if shown to be true, that does not in itself lead to the conclusion that the data provided in an anti-dumping investigation are not reliable if the data are unconnected with those fraudulent activities. Furthermore, in relation to a submission concerning the conviction of a director of one of the Italian companies for false accounting, the General Court found in essence, in paragraph 169 of the judgment under appeal, that the facts in question related to a period falling a number of years prior to the investigation period and could not call in question the reliability of the data provided in the anti-dumping investigation.

116. Secondly, with regard specifically to the claims made by Brosmann Footwear and Others concerning the allegedly falsified data provided by two Italian companies, the General Court observed, in substance, in paragraph 173 of the judgment under appeal, that the information could be considered relevant only if it was capable of calling in question the (macroeconomic and microeconomic) factors taken into account by the Council in order to show that there was injury to the Community industry.

117. Moving on to the examination of the effect that those data may have had on the indicators of macroeconomic injury, the General Court, in paragraphs 174 to 176 of the judgment under appeal, rejected one by one the arguments put forward by Brosmann Footwear and Others. In particular, with regard to the reference to fraudulent acts committed by one of the two Italian companies, consisting in the collection of State aid in order to buy new machines which were, however, installed in a non-member country, the General Court observed in paragraph 176 that, even if that allegation were proved, such conduct could only have had an adverse impact on the actual level of investments within the common market, thus bearing out the Council's findings in that regard.

118. As for the influence of those data on the indicators of microeconomic injury, which was examined in paragraphs 178 and 179 of the judgment under appeal, the General Court found in effect that, even if the information provided by the two Italian companies could have affected the calculation of the average price of shoes with leather uppers in the European Union, the criterion of the average price was not in itself a decisive factor. If the price had in fact been higher, that would not have been enough to call in question the findings relating to cash flow, to profitability, to return on investments, to the ability to raise capital or to investments, all of which show a significant deterioration in the position of the Community industry.

2. The parties' arguments

119. In the first place, Brosmann Footwear and Others submit that the General Court erred in law and distorted the evidence by finding, in paragraph 179 of the judgment under appeal, concerning indicators of microeconomic injury, that if the average price of shoes with leather uppers had in fact been higher, that would not suffice to call in question the Council's findings relating to cash flow, to profitability, to return on investments, to the ability to raise capital or to investments. According to Brosmann Footwear and Others, higher prices of those shoes would necessarily have had a positive effect on each of those factors and would have led to higher profit margins and a higher cash flow. Likewise, with regard to indicators of macroeconomic injury, Brosmann Footwear and Others claim, first, that the General Court merely referred to the assessment made by the Council and did not mention the fact that the Italian companies which they have named in the case had received a conviction for false records and false invoices, which indicated that it was not possible for the Commission to have any confidence in the accuracy of information provided by those companies. Secondly, Brosmann Footwear and Others claim that, in paragraph 176 of the judgment under appeal, the General Court ignored the obvious impact of the fraud on the trend in investments, which consisted in overstating greatly the decline which took place during the period of the investigation.

120. Secondly, Brosmann Footwear and Others submit that the judgment under appeal is flawed by an error of law, in that the General Court failed to verify whether the institutions had examined carefully and impartially the information which they had received concerning the fraudulent conduct on the part of the Italian companies which cooperated in the investigation.

121. Thirdly, Brosmann Footwear and Others submit that the General Court erred in law by finding, in paragraph 182 of the judgment under appeal, that the Council had fulfilled its duty to state reasons.

122. The Council contends that the present ground of appeal is in part inadmissible and in part unfounded. The Commission supports that contention.

3. Discussion

123. To my mind, the present ground of appeal is in part inadmissible and in part unfounded

124. It should above all be borne in mind that, according to established case-law, the Court of Justice has no jurisdiction in an appeal to find the facts or, as a rule, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and that the general principles of law and the rules of procedure relating to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. That appraisal does not therefore constitute — save where the clear sense of that evidence has been distorted — a point of law which, as such, is open to review by the Court of Justice. [11]

125. In the present case, it must be found that, through their first series of complaints concerning (i) the effects on investment of the fraud allegedly committed by the Italian companies which they have named in the case and on the indicators of macroeconomic injury and (ii) the effect on the indicators of microeconomic injury of a possible rise in the average price in the European Union of shoes with leather uppers, Brosmann Footwear and Others are asking the Court of Justice to review the findings as to the facts made by the General Court in paragraphs 176 and 179 of the judgment under appeal, an exercise which falls outside the appellate jurisdiction of the Court of Justice.

126. I would add that Brosmann Footwear and Others offer no evidence at all to substantiate their allegation regarding the distortion of the evidence which — they argue — flawed the same paragraphs of the judgment under appeal. As it is, it has been established that such a distortion must be obvious from the documents before the Court, without there being any need to carry out a new assessment of the facts and the evidence. [12]

127. Furthermore, contrary to the submissions made by Brosmann Footwear and Others, far from merely referring to the Council's findings concerning indicators of macroeconomic injury, the General Court did indeed examine the influence of the alleged fraudulent acts and false invoices on the factors taken into account by the Council in order to show the existence of injury or, more generally, on the reliability of the information given to the Commission during the anti-dumping investigation by the Italian companies in question, as borne out by paragraph 169 and paragraphs 174 to 176 of the judgment under appeal.

128. Accordingly, the first series of complaints should be held in part inadmissible and in part unfounded.

11 — See, inter alia, Case C-419/08 P *Trubowest Handel and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraph 31 and the case-law cited.

12 — Ibid., paragraph 32 and the case-law cited.

129. The finding of inadmissibility should extend, in part, to the other two complaints raised by Brosmann Footwear and Others in support of the present ground of appeal, both of which are directed at paragraphs 174, 175, 178 and 181 of the judgment under appeal: both complaints include an allegation of distortion of evidence, but nothing at all is adduced in support.

130. In addition, Brosmann Footwear and Others cannot complain that the General Court did not reply to their claim that the relevant information which they had given the Commission concerning the conduct of two Italian companies fell to be examined carefully and impartially, because that allegation — as they point out in referring to paragraph 69 of their reply at first instance — was made only at a late stage, in a single sentence of that document, which furthermore was put forward as an alternative in the context of the institutions' duty to state reasons.

131. In any event, it is clear from the judgment under appeal that, rather than casting doubt on the material accuracy of the information given to the Commission by Brosmann Footwear and Others concerning the conduct of the two Italian companies which they had named in the case, the General Court was concerned to examine the influence which that information — if it were proved — could have had on the Council's evaluation of the injury caused to the Community industry. In ruling on the substance of the arguments put forward by Brosmann Footwear and Others and in finding that the information provided by those companies was not relevant to the finding that there was considerable injury to the Community industry, the General Court thus — implicitly but necessarily — gave a ruling on the institutions' obligation to examine 'carefully and impartially the relevant information' in each particular case, by replying in the negative. In other words, by finding that the information provided by Brosmann Footwear and Others was irrelevant, the General Court implicitly concluded that the institutions were under no obligation at all to examine it.

132. It follows that, assuming it to be admissible, the second complaint raised by Brosmann Footwear and Others should be considered unfounded.

133. Lastly, as regards the error of law which, according to the third complaint, flawed paragraph 181 of the judgment under appeal, Brosmann Footwear and Others have failed to show this, the General Court having merely found — correctly — that the Council had clearly set out in the Definitive Regulation the reasons why it considered that the Community industry had suffered considerable injury.

134. In any event, as the information in question which was given to the Commission by Brosmann Footwear and Others was considered to have no influence at all on the injury indicators and, accordingly, as wholly irrelevant to the evaluation of the injury suffered by the Community industry, the General Court correctly concluded that the Council did not have specifically to state the reason why the information had not been taken into account for that purpose.

135. In the light of the above considerations, I propose that the fourth ground of the appeal should be rejected.

D – *Fifth ground of appeal: error of law and distortion of the evidence relating to the evaluation of the causal connection between the dumping and the injury to the Community industry*

1. The parties' arguments

136. Brosmann Footwear and Others claim that the General Court erred in law and distorted the evidence, thus affecting the assessment of the causal connection between the dumping and the injury to the Community industry, in breach of Article 3 of the Basic Regulation. The criticisms made by Brosmann Footwear and Others relate to two aspects.

137. First, the General Court is said to have failed to recognise that the lack of competitiveness of the Community industry was the main factor in causing it injury, irrespective of the imports of leather shoes from China. The Court is said to have ignored the fact, which was made clear in a number of the recitals to the Definitive Regulation, that the Community industry had never made reasonable profits in the preceding 15 years and the fact that the industry's constant loss of market shares in the long term was brought about by the relative lack of competitiveness within the European Union. The lack of competitiveness is said to be confirmed by the decrease in the Community industry's exports.

138. Secondly, Brosmann Footwear and Others complain that the General Court ignored the fact that the extra reduction in the prices of Chinese exporting producers was explained by a change, after 2002, in the product range, together with the lifting of quotas. The change in the product range explains why the average unit price of Chinese imports fell further than the price of exports from other non-member countries. According to Brosmann Footwear and Others, that argument, which was put forward at first instance, was rejected without explanation by the General Court, which also disregarded the obligation to give reasons for its decisions.

139. The Council suggests that this ground of appeal should be rejected as being in part inadmissible and in part unfounded.

2. Discussion

140. As the General Court correctly observed in paragraph 190 of the judgment under appeal, the Council and the Commission are under an obligation, in determining the injury to the Community industry, to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves.[13] That obligation follows from Article 3(7) of the Basic Regulation.

141. It is common ground in the present case that, in accordance with Article 3(7) of the Basic Regulation, the institutions verified the causal connection between the damage suffered by the Community industry and the imports from China of shoes with leather uppers.

142. Nor is it disputed that the soundness of the institutions' findings was reviewed by the General Court in paragraphs 192 to 200 of the judgment under appeal, by reference to the submissions made by Brosmann Footwear and Others at first instance to the effect, in essence, that the poor export performance of the Community industry, the imports from other non-member countries and the lifting of the quota regime from the first quarter of 2005 ought to have been taken into account for the purposes of determining whether or not there was a causal connection.

143. However, Brosmann Footwear and Others object, first, that the General Court distorted the evidence by refusing to recognise that the European Union industry's lack of competitiveness was the main factor leading to the injury sustained by that industry. They base their claim on three grounds which are said to have been ignored by the General Court.

144. Apart from the fact that, first, two of those three factors were not made known at first instance and the third could not have altered the General Court's assessment because, as Brosmann Footwear and Others implicitly admit, it had been taken into account by the Council in the Definitive Regulation[14] and, secondly, that the alleged distortion of the evidence is not manifest from the documents on the file, I agree with the Council that 'lack of competitiveness' is not another factor for the purposes of Article 3(7) of the Basic Regulation.

13 — See, to that effect, Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 87 and the case-law cited.

14 — See point 137 above.

145. 'Lack of competitiveness' is a generic term which, in reality, is only the result of factors such as high production costs, lack of investment, insufficient productivity and poor export performance — factors which are listed in Article 3(7) of the Basic Regulation or which, in any case, may be taken into account by the institutions under that provision.

146. In that context, the General Court was correct in considering, in paragraph 192 of the judgment under appeal, in response to the specific arguments put forward by Brosmann Footwear and Others at first instance, whether the allegedly poor export performance of the European Union industry could, by virtue of the other factors referred to in Article 3(7) of the Basic Regulation, have caused significant injury to the Community industry.

147. Secondly, with regard to the claim that the General Court failed to give a ruling on the extra reduction in Chinese exporters' prices by reason of a change in the product range with effect from 2002, it should be observed that the claim was not framed in those terms at first instance. As is clear from paragraph 106 of the appeal, Brosmann Footwear and Others claimed before the General Court that the decrease in sales prices was the result of a change in product mix as a result of the lifting of the quota, that is to say, from January 2005 and not from 2002. Consequently, they cannot now complain that the General Court failed to give a ruling on such an argument.

148. In any event, as regards the substance of the case, it is my view that, in an anti-dumping investigation, the institutions are under no obligation to seek the reason for an extra reduction in the prices of products imported into the European Union as a result of dumping.

149. I therefore propose that the fifth ground of appeal should be rejected, and that the appeal should be dismissed in its entirety.

V – Costs

150. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2) of those rules, which applies to the appeal procedure pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied in its pleadings for Brosmann Footwear and Others to be ordered to pay the costs and since the latter must, in my view, be unsuccessful in their pleas, they should be ordered to pay the costs of the appeal.

VI – Conclusion

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

(1) dismiss the appeal;

(2) order Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd to pay the costs.