OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 21 March 1991 *

My Lords,

Introduction

1. In these proceedings, a French company, Extramet Industrie SA ('Extramet'), seeks the annulment under the second paragraph of Article 173 of the EEC Treaty of Council Regulation No 2808/89, Official Journal 1989 L 271, p. 1 ('the contested regulation'). That measure imposed a definitive anti-dumping duty on imports into the Community of calcium metal from China and the Soviet Union and provided for the definitive collection of the provisional anti-dumping duty imposed on such products by Commission Regulation No 707/89, Official Journal 1989 L 78, p. 10. In the alternative, Extramet seeks the annulment of the 24th recital of the contested regulation, which records the Council's refusal to grant Extramet a special exemption from the duty imposed by the operative part of that regulation. An interim application by Extramet for the suspension of the contested regulation pending the outcome of the main proceedings was rejected by order of the President dated 14 February 1990.

2. The Council is supported by the Commission, by a French company, Péchiney Electrometallurgie SA ('Péchiney'), which is a producer of the product in question, and by the Chambre Syndicale de l'Electrometallurgie et de l'Electrochimie ('the Chambre Syndicale'), a trade association which lodged the complaint that triggered the Commission's investigation.

3. The Council has raised an objection of inadmissibility pursuant to Article 91(1) of the Rules of Procedure on the ground that Extramet does not have standing under Article 173 of the Treaty to challenge the contested regulation. Observations supporting the Council's objection were lodged by Péchiney and by the Chambre Syndicale. The Commission declined to express a view in writing on the admissibility of Extramet's claim, although at the hearing it argued that the application was inadmissible.

4. Although Extramet contends to the contrary, its action is plainly, as the Court's case-law stands at present, inadmissible. However, it was decided that the admissibility of the action should be examined by the Full Court separately from the substance of Extramet's claim. The case therefore presents the Court with an opportunity to review its case-law on the admissibility of actions for the annulment of regulations imposing anti-dumping duties.

* Original language: English.

Background

5. In July 1987, the Commission received a complaint from the Chambre Syndicale pursuant to Article 5 of Council Regulation No 2423/88 on protection against dumped or subsidized imports from countries not members of the European Economic Community, Official Journal 1988 L 209, p. 1 ('the basic regulation'). The complaint alleged that calcium metal originating in China and the Soviet Union was being dumped in the Community. It was made on behalf of Péchiney, the only Community producer of calcium metal.

6. The Commission decided to commence an investigation and it received representations from, *inter alia*, the Chambre Syndicale and from Extramet. Extramet is the leading Community importer of calcium metal and is not associated with an exporter. It also transforms the product and is Péchiney's principal competitor.

7. The Commission carried out inspections at the premises of Extramet and at those of Péchiney. On 17 March 1989, it adopted Regulation No 707/89, already cited, which imposed a provisional anti-dumping duty on imports into the Community of calcium metal originating in China and the Soviet Union. Péchiney and Extramet are both mentioned by name in the preamble to that regulation (see Recital 3). Each company subsequently made further representations to the Commission and, on 18 September 1989, the Council adopted the contested regulation. The preamble to that regulation contains a number of references to 'the' or 'an' importer. The Council accepts that the importer in question is Extramet, although it is common ground that there are also other Community importers of the product concerned.

8. The product which is the subject of the contested regulation, calcium metal, is used chiefly in the metallurgical industry. Extramet processes it into granules of pure calcium and for this purpose requires calcium of a very high level of purity. The number of producers of calcium metal in the world is limited. As I have mentioned, Péchiney is the only such producer in the Community. According to Extramet, Péchiney was unwilling to supply it with calcium metal of sufficient quality when supplies were necessary for the purposes of Extramet's activities. Extramet therefore turned to producers of calcium metal outside the Community, in particular in China and in the Soviet Union.

9. Extramet alleges that Péchiney was unwilling to supply Extramet because Péchiney was trying to perfect its own process for producing calcium granules. Extramet has lodged a complaint with the Conseil Français de la Concurrence claiming that Péchiney's refusal to supply it with calcium metal constitutes an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

Article 173 of the Treaty

10. In order to mount a successful challenge to a regulation imposing an anti-dumping duty in a direct action before the Court, a private applicant must first satisfy the requirements as to standing laid down in the second paragraph of Article 173 of the Treaty. This provides:

'Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

Thus, according to Article 173, private applicants must overcome three hurdles in order to establish that they have standing to bring an action for the annulment of a regulation imposing an anti-dumping duty. They must first show that the contested measure, although labelled a regulation, is in substance a decision. They must then show that the measure is of direct concern to them. Finally, they must show that it is of individual concern to them.

11. The question of direct concern rarely causes much difficulty in anti-dumping cases. The Court's case-law establishes that a measure will be of direct concern to an applicant within the meaning of Article 173 if it is 'the direct cause of an effect' on the applicant: see the Opinion of Advocate General Warner in Case 100/74 *CAM* v *Commission* [1975] ECR 1393 at p. 1410, and the cases cited there. In other words, the measure in question must not depend for its effect on the exercise of a discretionary power by a third party, unless it is obvious that any such power is bound to be exercised in a particular way.

12. The effect of a regulation imposing an anti-dumping duty is to require the customs authorities of the Member States to collect the duty on all imports into the Community which fall within the scope of the regulation. The national authorities have no discretion in the matter: implementation by the Member States is 'purely automatic and, moreover, in pursuance not of intermediate national rules but of Community rules alone': see Case 113/77 *NTN Toyo Bearing Company* v *Council* (one of the First Ball Bearings cases) [1979] ECR 1185, paragraph 11. Regulations imposing anti-dumping duties will consequently nearly always be of direct concern to exporters and to importers of the product in question. In these proceedings, it has not been suggested that the contested regulation is not of direct concern to Extramet.

13. The question of individual concern is more problematic. The Court stated in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 that applicants were individually concerned by a measure when it affected them 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons . . . '. Although that test has been applied in many subsequent cases, the Court will need to decide in these proceedings to what extent it is appropriate in anti-dumping cases.

14. The distinction between regulations and decisions is in principle clear, but, as I shall explain, it gives rise to particular problems in the anti-dumping context. According to Article 189 of the Treaty, a regulation is of 'general application', whereas a decision is 'binding in its entirety upon those to whom it is addressed'. The fundamental characteristic of a regulation is thus that it is 'applicable to objectively determined situations' and involves 'legal consequences for

categories of persons viewed in a general and abstract manner': see Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409 at p. 415. Decisions, on the other hand, are characterised by the limited number of persons affected by them: see e.g. the *Plaumann* case, already cited.

15. These, then, are in general terms the criteria which must be satisfied by an applicant under the second paragraph of Article 173. I now propose to examine the way in which those criteria have been applied in actions for the annulment of anti-dumping regulations. The discussion will include reference to actions for the annulment of anti-subsidy regulations, since the essential features of such regulations are the same.

The admissibility of actions for the annulment of anti-dumping regulations

16. In its case-law, the Court has drawn a distinction between producers, exporters and complainants on the one hand and importers on the other.

(a) Producers and exporters

17. The Court stated in Joined Cases 239/82 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, paragraph 12, that 'measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations'. The Court observed that producers and exporters would rarely have available to them an alternative means of redress in the national courts, 'since it is possible to bring an action in the national courts only following the collection of an anti-dumping duty which is normally paid by an importer residing within the Community' (ibid, paragraph 13). As the Commission pointed out, to have declared the claims of the producers and exporters concerned in that case inadmissible might therefore have deprived them of access to any form of judicial review.

(b) Complainants

18. As far as complainants are concerned, the special position accorded to them by the basic regulation has proved significant. Under Article 5(1), any body 'acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint'. Complaints must contain 'evidence of the existence of dumping or subsidization and the injury resulting therefrom' (Article 5(2)). Following receipt of the complaint, the Commission may decide to commence an investigation. The complainant has the right to participate in any such investigation (Article 7). It may inspect information made available to the Commission by any other party to the investigation (Article 7(4)(a)).

19. There are various situations in which complainants and those they represent may be dissatisfied with the outcome of anti-dumping or anti-subsidy proceedings. In Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, the applicant, an association representing the Community oil processing

industry, sought the annulment of a Commission communication informing the applicant that an anti-subsidy proceeding would not be initiated in respect of the matters raised in a complaint previously lodged by the applicant. The Court observed that the basic regulation then in force (Regulation No 3017/79, Official Journal 1979 L 339, p. 1) recognized 'the existence of a legitimate interest on the part of Community producers in the adoption of anti-subsidy measures' and that it defined 'certain specific rights in their favour . . .' (paragraph 25). The Court declared that 'complainants must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognized specifically in the regulation . . .' (paragraph 28). It concluded that:

'The regulation acknowledges that undertakings and associations of undertakings injured by subsidization practices on the part of non-member countries have a legitimate interest in the initiation of protective action by the Community; it must therefore be acknowledged that they have a right of action within the framework of the legal status which the regulation confers upon them' (paragraph 31).

20. Complainants may also be dissatisfied with the result of an investigation initiated by the Commission at their instigation. The Court was confronted with a situation of this nature in Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849. The applicant was the leading manufacturer of mechanical watches and watch movements in the Community and the only manufacturer of those products in the United Kingdom. It had lodged a complaint with the Commission that competing products from the Soviet Union were being dumped in the Community. That complaint was rejected by the Commission on the ground that it came from a single Community manufacturer. A second complaint was therefore lodged by an association representing manufacturers of mechanical watches in France and the United Kingdom, including the applicant. The Commission opened an investigation at the end of which it decided that an anti-dumping duty should be imposed on mechanical wrist-watches originating in the Soviet Union. The applicant was dissatisfied with this outcome because it considered the duty too low and because it considered that a duty should also have been imposed on watch movements. It therefore sought the annulment of the regulation imposing the duty.

21. The respondent institutions raised an objection of inadmissibility, but the Court held that the applicant had standing to bring the action. The Court looked at the part played by the applicant in the proceedings before the Commission and at its position on the relevant market. It noted that the complaint which led to the opening of the investigation owed its origin to the complaint originally made by the applicant and that the applicant's views were heard during the investigation. The Court found that 'the conduct of the investigation procedure was largely determined by Timex's objections and the anti-dumping duty was fixed in the light of the effect of the dumping on Timex' (paragraph 15). The contested regulation was thus 'based on the applicant's own situation'. Accordingly, the Court found the action admissible.

22. The case-law therefore suggests that annulment proceedings may be brought either by the complainant or by an undertaking which, even though it could not lodge the complaint itself, played a leading

role in the initiation of the complaint. Moreover, such proceedings may be brought either against a communication addressed to the applicant stating that no action is to be taken, or against a regulation imposing an anti-dumping duty. Although the point has not yet been expressly resolved, it would seem that a complainant trade association has the right to challenge such a regulation. If so, this would be of significance in relation to the test of standing under Article 173 since, strictly speaking, it is doubtful whether such an association would satisfy either the requirement of direct concern or the requirement of individual concern (see, as regards direct concern, Case 135/81 *Groupement des Agences de Voyages* v *Commission* [1982] ECR 3799; and, as regards individual concern, the Court's statement in Joined Cases 16/62 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471 at p. 479, that 'one cannot accept the principle that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category').

(c) Importers

23. The Court's approach to the admissibility of actions brought by importers has been more restrictive. It is true that, in one of the First Ball Bearings cases, the Court held an action brought by an importer admissible (see Case 118/77 *ISO* v *Council* [1979] ECR 1277). The reason for this, however, was that the contested provisions were not of general application but concerned only the situation of a small group of producers. The applicant was the exclusive importer in one Member State of the products of one member of that group. The Court concluded that the contested provisions amounted to a decision of direct and individual concern to the applicant.

24. By contrast, in Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, proceedings for the annulment of an anti-dumping regulation were brought by an independent importer, in other words by an importer which was not linked to a manufacturing or exporting undertaking. The Court observed that an action brought by a private party under Article 173 was inadmissible if directed against a true regulation, that is a measure having general application. The Court found that the contested regulations, which imposed provisional and definitive anti-dumping duties respectively on imports of orthoxylene originating in the United States of America and Puerto Rico, subject to exemptions for products exported by certain named undertakings, constituted, as far as independent importers were concerned, 'measures having general application . . . because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract' (paragraph 9).

25. The Court rejected the argument that, because importers of orthoxylene, such as the applicant, who were also users of the substance formed a closed category, the members of which were known when the regulations were adopted, the contested measures were in substance decisions concerning the applicant. Reiterating its decision in *Zuckerfabrik Watenstedt*, already cited, the Court stated that 'a measure does

not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose' (paragraph 11). The Court concluded that the applicant was affected by the contested regulations solely in its capacity as an importer of orthoxylene. In relation to such importers, those regulations constituted measures of general application.

26. The Court also rejected the applicant's argument that its participation in the procedure leading to the adoption of the contested regulations meant that they constituted individual administrative measures which it had standing to challenge under the second paragraph of Article 173. The Court stated that 'the distinction between a regulation and a decision may be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption' (paragraph 13). The Court added that importers could in any event challenge before the courts of the Member States measures taken by the national authorities in application of Community regulations imposing anti-dumping duties.

27. The Court's ruling in *Alusuisse* was followed in *Allied Corporation* v *Commission*, already cited, where, in contrast to the actions brought by the producers and exporters to which I have already referred, the Court held that an application brought by an independent importer, Demufert, was inadmissible. Like the applicant in *Alusuisse*, Demufert was 'concerned by the effects of the contested regulations only insofar as it comes objectively within the scope of the provisions of those regulations' (paragraph 15). Although Demufert acted as importing agent for one of the exporting producers, the retail prices charged by Demufert had not been used to establish the existence of the dumping, which was based on the export prices charged by the American producers (see the First Ball Bearings cases). The Court concluded that the application brought by Demufert was inadmissible, but pointed out that Demufert could challenge the validity of the contested regulations in proceedings before the competent national courts if it was required to pay the duties in question.

28. The Court's decisions in *Alusuisse* and *Allied Corporation* have been followed in a number of subsequent cases. The Court has reiterated on several occasions that an importer of a product subject to an anti-dumping duty has standing to challenge the regulation imposing the duty where the export prices used to establish whether dumping is taking place are determined by reference to the importer's resale prices, a practice permitted under Article 2(8)(b) of the basic regulation where there is an association between exporter and importer: see e.g. the orders in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109; Case 301/86 *Frimodt Pedersen* v *Commission* [1987] ECR 3123; Case 205/87 *Nuova Ceam* v *Commission* [1987] ECR 4427. In the Electric Motors cases (Joined Cases C-304/86 and C-185/87 [1990] ECR I-2939, Joined Cases C-305/86 and C-160/87 [1990] ECR I-2945, Joined Cases C-320/86 and C-188/87 [1990] ECR I-3013, and Case C-157/87 [1990] ECR I-3021), the Court added that an importer which was associated with an exporter could also challenge a regulation imposing an

anti-dumping duty when it was not the existence of the dumping which had been established on the basis of the importer's resale prices but the anti-dumping duty itself. However, the Court has been steadfast in refusing to recognise the standing of independent importers, even where they are the sole importer in a Member State of the product subject to the duty (see e.g. the orders in *Sermes*, *Frimodt Pedersen* and *Nuova Ceam*, already cited, and the judgment in Case C-157/87, one of the Electric Motors cases).

29. It may be helpful if I reiterate the reasons the Court has given for reaching this conclusion:

(i) An independent importer is affected by a regulation imposing an anti-dumping duty solely because he imports a particular product. This criterion is inadequate to distinguish the importer from any other trader who is, or might one day be, in the same situation. It is immaterial that in practice it might be possible to determine the number or even the identity of the members of the class to which the importer belongs.

(ii) Participation in an investigation conducted by the Commission before an anti-dumping duty is imposed is not sufficient to confer standing on an independent importer, since the distinction between a regulation and a decision turns on 'the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption' (*Alusuisse*, paragraph 13).

(iii) Unlike producers and exporters, importers can bring proceedings in the courts of the Member States against the decision of the national authorities to collect the duty. The validity of the regulation imposing the duty may be contested in the course of those proceedings and the matter brought before this Court under Article 177 of the Treaty.

Extramet's position under the Court's existing case-law

30. As the Court's case-law stands at present, it is in my view clear that Extramet's application is inadmissible. There is no suggestion that there is an association between Extramet and any of the exporters concerned. Moreover, the tenth recital to the contested regulation states that 'Export prices were determined on the basis of prices actually paid or payable for the Chinese or Soviet product for export to the Community'. The fact that the category of importers may have been a limited one, the members of which were known to the Commission and to the Council, and the fact that Extramet was the only importer to have played a significant part in the proceedings are, as the law currently stands, irrelevant.

31. It may, however, be doubted whether this would be a satisfactory outcome in the present case. Extramet's position is a difficult one. It is the biggest Community importer of calcium metal from China and the Soviet Union and it is not disputed that the consequences for its business of the imposition of an anti-dumping duty on such imports are very grave. Moreover, according to Extramet, one of the effects of the imposition of the duty has been to strengthen the position of Péchiney, the

only Community producer of calcium metal and Extramet's principal competitor, which has refused to supply Extramet itself and which instigated the complaint that triggered the Commission's investigation. For reasons which I will set out below, it is doubtful whether proceedings in the national courts, even combined with a reference to this Court, would be satisfactory in a case of this kind. To refuse Extramet standing in these proceedings might therefore deprive it of any effective remedy.

The basis of the Court's existing case-law

32. A system of judicial review which prevented the substance of Extramet's complaints from being investigated would, in my view, be severely deficient and inconsistent with 'the spirit of the principles which lie behind Articles 164 and 173 of the Treaty', principles invoked by the Court in *Fediol*, already cited, at paragraph 29. I therefore propose to consider whether the Court's case-law on the admissibility of actions by independent importers is soundly based and whether the scheme of Article 173 is capable of accommodating claims by applicants in the position of Extramet.

33. In carrying out this exercise, I shall confine myself to the requirements of Article 173 of the Treaty, to which it is the Court's duty to give effect. I agree with the view expressed by Advocate General Warner in the First Ball Bearings cases (at pp. 1242-3) that the laws of the Member States and of third countries are of marginal, if any, relevance to the question of standing. Nor do I believe it is necessary, in order to reach a satisfactory conclusion, to make direct reference to the European Convention on Human Rights, on which Extramet places some reliance in these proceedings. The Convention and the laws of the Member States are, however, indirectly relevant in that they support the existence of a general principle of law, namely the right to an effective judicial remedy: see Case 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651; Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097. In my view, Article 173 should be interpreted so as to give effect to that principle.

(a) *The requirement of a decision*

34. It is necessary at the outset to re-examine precisely what requirements must be satisfied to establish the admissibility of an action against a regulation under the second paragraph of Article 173. As I mentioned earlier, it appears from the text of that provision that those requirements are three-fold: the applicant must establish that the measure is in substance a decision which is of direct and individual concern to it. The Court stated in *Alusuisse* that an applicant had to satisfy all three requirements in order to establish standing: see paragraph 7.

35. Moreover, the Court reiterated in *Alusuisse* the well-established principle that 'the choice of form may not alter the nature of a measure' (ibid.) This means that, in determining whether a measure constitutes a regulation or a decision, the decisive criterion is its substance rather than the label the adopting institution has chosen to

give it. As I have explained, the fundamental distinction between a regulation and a decision is whether or not the measure is of general application.

36. However, the requirement laid down in the second paragraph of Article 173 that an applicant challenging a regulation must show that it constitutes in substance a decision raises a logical difficulty in the anti-dumping field. According to Article 13(1) of the basic regulation, 'Anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by Regulation'. The basic regulation's predecessors contained equivalent provisions. In adopting Article 13(1), the Council can only have meant a true regulation, in other words a measure which is in substance a regulation within the meaning of Article 189 of the Treaty. It can hardly be argued that it would have been appropriate for the imposition of anti-dumping duties by decision to have been authorized.

37. If an applicant in proceedings for the annulment of a measure imposing an anti-dumping duty establishes that the measure is in substance not a regulation but a decision, it would seem to follow that the measure is automatically void, for the Council and the Commission have no power to impose anti-dumping duties by decision. Were this conclusion to be drawn, however, it might be argued that the Court could not therefore examine the substance of the applicant's claim.

38. It must be conceded that this line of reasoning will not always lead to the conclusion that the contested measure is void in its entirety. Sometimes an action is only brought against, or is only held admissible in respect of, specific provisions of an anti-dumping measure. The Court acknowledged in *Producteurs de Fruits*, already cited, at p. 479 that:

'If a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that it any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173'.

Even in circumstances such as these, however, it might be said that the Court could not examine the substance of the challenge to the contested provisions which, not having the character of a regulation, would by definition be *ultra vires*.

39. One way of avoiding this difficulty would be to say that the term 'decision' is used in a special sense in Article 173 and that a regulation may therefore constitute a 'decision' for the purposes of that provision without prejudice to its nature as a regulation for the purposes of the basic regulation. This would involve ascribing to the word 'decision' in Article 173 a different sense from that given to it by Article 189. The Court has rightly not been prepared to do this. In *Producteurs de Fruits* it stated, at p. 478, that 'It is inconceivable that the term "decision" would be used in Article 173 in a different sense from the technical sense as defined in Article 189'.

40. Another possibility was put forward by Advocate General Warner in the First Ball Bearings cases (at p. 1246), namely that a regulation imposing an anti-dumping duty may be 'hybrid' in nature. According to this theory, a regulation may in respect of some people be 'a regulation and nothing but a regulation'. In respect of others, it may nonetheless be a decision of direct and individual concern to them.

41. This theory, which was cited with approval by Advocate General VerLoren van Themaat in *Allied Corporation* (see p. 1041), goes further than the well established principle that a measure which, taken as a whole, constitutes a true regulation may nonetheless contain individual provisions which amount in substance to decisions. It envisages that one and the same provision may, in respect of some people, constitute a genuine regulation whilst at the same time being in substance a decision in respect of others.

42. Although the hybridity theory, as it may be called, appears to avoid the problem of holding that a measure imposing an anti-dumping duty is automatically void if in substance it constitutes a decision, the theory raises logical problems of its own. In effect, it requires one to envisage a situation in which a measure of general application is at the same time confined in its application to a limited number of persons (see *Producteurs de Fruits*, p. 478). This difficulty seems to have been acknowledged in Case 45/81 *Moksel* v *Commission* [1982] ECR 1129, paragraph 18, where the Court stated that 'A single provision cannot at one and the same time have the character of a measure of general application and of an individual measure'.

43. In *Allied Corporation* Advocate General VerLoren van Themaat said (at p. 1041) that that statement did not apply in the dumping field, but the Court's case-law does not contain either an unequivocal endorsement or an express rejection of the hybridity theory. Perhaps the closest the Court has come to endorsing the theory is the *Alusuisse* case, where it stated that 'the regulations at issue constitute, as regards independent importers who, in contrast to exporters, are not expressly named in the regulations, measures having general application within the meaning of the second paragraph of Article 189 of the Treaty, because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract' (paragraph 9).

44. This statement might be taken as an endorsement of the hybridity theory, since it suggests that the contested measures were not of general application as far as the named exporters were concerned. In *Allied Corporation*, however, the Court simply stated (paragraph 11) that, although measures imposing anti-dumping duties were:

'as regards their nature and their scope, of a legislative character, in as much as they apply to all the traders concerned, taken as a whole, the provisions may nonetheless be of direct and individual concern to those producers and exporters who are charged with practising dumping'.

The Court did not consider separately the question whether the contested regulations constituted decisions in substance, but confined itself to the issues of direct and individual concern. The Court adopted a similar approach in the 'Electric Motors' and 'Plain Paper Photocopiers' cases (Joined Cases C-133/87 and C-150/87 *Nashua* [1990] ECR I-719 and Case C-156/87 *Gestetner* [1990] ECR I-781), where it did not discuss whether the contested regulations were in substance decisions.

45. In *Timex*, the Court adopted a slightly different approach. There, having concluded that the contested regulation was 'based on the applicant's own situation', it stated: 'It follows that the contested regulation constitutes a decision which is of direct and individual concern to Timex . . . ' (paragraph 16). However, the Court did not explain why it considered that the contested regulation was in substance a decision and the formulation used in *Timex* does not appear in the later cases to which I have referred.

46. These cases provide some support for the hybridity theory in so far as they acknowledge that certain applicants might have standing to challenge measures which, looked at in absolute terms, are legislative in character. Nonetheless, if the need to establish that a contested measure was in substance a decision was separate from the need to establish direct and individual concern, one would expect the Court to explain, in cases where actions for the annulment of regulations are held admissible, why it regards each requirement as satisfied. The fact that, in most such cases, the Court does not mention the true character of the contested measure suggests that, when an applicant has established that a regulation is of direct and individual concern to it, the Court does not require it to establish in addition that the measure is in substance a decision. Although in some cases the Court has found a regulation to involve a decision, for practical purposes this requirement now seems to be subsumed in that of individual concern.

47. Only in cases where the Court decides that the application is inadmissible does it base its finding on the conclusion that the measure in question is in substance a regulation: see *Sermes*, *Frimodt Pedersen*, *Nuova Ceam*, already cited. Even here, there is evidence of an evolution in the Court's approach: in Case C-157/87, one of the Electric Motors cases, the Court held that an application by an exclusive importer was inadmissible on the sole ground that the applicant was not individually concerned: see paragraph 12.

48. This approach is not confined to the anti-dumping field. The Court's judgment in *Producteurs de Fruits* suggests that a true regulation cannot be of individual concern to anybody, with the result that, once individual concern is established, the contested measure must in substance be a decision. Similarly, in Case 100/74 *CAM* v *Commission* [1975] ECR 1393, the Court found that the contested measure, in appearance a regulation, affected a 'fixed number of traders identified by reason of the individual course of action which they pursued or are regarded as having pursued during a particular period' (paragraph 18). In upholding the admissibility of the applicant's claim, the Court stated:

'Such a measure, even if it is one of a number of provisions having a legislative function, individually concerns the persons to whom it applies in that it affects their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually just as in the case of the person addressed' (paragraph 19).

The judgment contains no discussion of the question of direct concern or of whether the contested measure was in substance a decision.

49. More recently, in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477 an action for the annulment of two regulations, the Court stated:

'With regard to the admissibility of the application for annulment, it must be determined whether the contested measures are of direct and individual concern to the applicant within the meaning of the second paragraph of Article 173 of the Treaty'.

The Court found that the applicant was both directly and individually concerned by some of the provisions of the contested measures, with the result that, in respect of those provisions, the application was admissible. The question whether those provisions amounted in substance to decisions was not discussed in the judgment.

50. The objection to this approach is that it might be thought incompatible with the terms of the second paragraph of Article 173, which suggest that the requirement for a decision is different from the requirement of individual concern. However, where it is necessary to ensure, in accordance with Article 164 of the Treaty, that the law is observed, the Court has shown that it does not regard itself as constrained by the strict terms of Article 173. This is evident from the cases in which the *légitimation passive* and *active* of the European Parliament in annulment proceedings was upheld, notwithstanding the absence of any reference to the European Parliament in that provision (see Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339; Case C-70/88 *Parliament* v *Council* ('Chernobyl') [1990] ECR I-2041 respectively).

51. Article 173 should in my opinion be construed liberally in the light of the way the Community has developed. This view is supported by the judgment in *Les Verts*, where the Court explained its decision to allow annulment proceedings to be brought against binding acts of the Parliament, notwithstanding the absence in Article 173 of any reference to the Parliament, on the ground that, at the time Article 173 was drafted, the Parliament had no power to adopt such acts. I consider that a similar approach is necessary in the context of measures having the special characteristics of anti-dumping regulations. The scheme of the basic regulation can only be accommodated within the framework of Article 173 if that provision is interpreted flexibly in the light of its underlying objectives.

52. It is clearly desirable in the interests of the proper administration of the procedure laid down in the basic regulation that those who are particularly affected by regulations imposing anti-dumping duties should have standing to challenge such regulations before the Court. In my view, such regulations may be challenged by anyone who is directly and individually concerned by them. Whether the reason for this is that, once individual concern has been established, the contested measure is automatically to be considered a decision, or simply that it is

not necessary to show that the contested measure is a decision once individual concern has been demonstrated, does not really matter. What is important is to avoid an interpretation of the second paragraph of Article 173 which is so strict that the Court is prevented from fulfilling its duty under Article 164.

53. However, the Court should in my view make clear what is already implicit in the prevailing trend of its case-law, namely that the requirement of a decision does not exist independently of the requirement of individual concern. Moreover, it should not adopt too strict an interpretation of the latter requirement in anti-dumping cases, for this would also preclude the exercise of an effective power of review. This is an issue which I consider in more detail in the next section of my Opinion.

(b) Direct and individual concern

54. In the present case, there is no doubt that Extramet is directly concerned by the contested regulation: once it was adopted, the duty was automatically imposed and collected (see the First Ball Bearings cases). The only outstanding issue is therefore whether Extramet is individually concerned by that regulation.

55. The Council, supported by Péchiney and by the Chambre Syndicale, argues that that question demands a negative answer. Extramet is affected by the contested regulation, they say, solely in its capacity as an importer of calcium metal. This criterion is not enough to set Extramet apart from anyone else who happens to carry on the same activity or who might do so in the future (see *Alusuisse* and *Allied Corporation*). Extramet claims that it would be inequitable for it to be treated differently from exporters and complainants, when it participated directly in each stage of the procedure and is clearly identified both in the provisional regulation and in the contested regulation.

56. The Court has in the past rejected the suggestion that participation in the preliminary investigation might give an importer standing to challenge a regulation imposing an anti-dumping duty. The Court has asserted that the distinction between a regulation and a decision depends on a measure's nature and legal effect, rather than on the procedure which led to its adoption.

57. In so far as the earlier case-law on this point suggests that applicants in anti-dumping cases must establish that the measure being challenged is in substance a decision, it is inconsistent with the Court's more recent judgments, which do not treat the requirement of a decision as independent of the requirement of individual concern. In so far as it suggests that the procedure leading to the adoption of an anti-dumping regulation cannot affect the question of standing, it cannot be reconciled with the case-law on the standing of complainants. In *Timex*, an action brought by a complainant was held admissible because of the rights accorded to complainants by the basic regulation and the role played by the applicant in the preliminary investigation. The Court was not deterred by the fact that the effect of the contested regulation on the complainant was no different from its effect on other undertakings who happened to be carrying on the same commercial activity or who might do so in the future. It is not easy to

see any justification for distinguishing in this respect between the position of complainants and that of importers.

That ruling was followed in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045.

58. In other contexts too the Court has accepted that participation in a procedure culminating in a quasi-judicial determination of a party's rights might be enough to establish a person's standing to challenge that determination. Thus, in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, the Court held that an undertaking which had made a complaint to the Commission pursuant to Article 3(2)(b) of Regulation No 17 (Official Journal English Special Edition 1959-62, p. 87) that the conduct of another undertaking was contrary to Articles 85 or 86 of the Treaty had standing to challenge a Commission decision addressed to the second undertaking accepting that the contested practice was compatible with the Treaty. The Court stated:

59. Similarly, in Case 75/84 *Metro* v *Commission* [1986] ECR 3021, the Court held that the applicant had standing to challenge a Commission decision addressed to another undertaking granting an exemption under Article 85(3) of the Treaty to a selective distribution system operated by that undertaking and to which the applicant had been refused admission. Although the contested decision had not been adopted as the result of a complaint lodged by the applicant, the applicant had submitted observations pursuant to Article 19(3) of Regulation No 17 prior to the adoption of the decision. In particular, account had been taken of those observations by the Commission. The applicant's claim was therefore held admissible.

'It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests.

60. The Court took a similar approach in the context of State aid in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391. There the applicant, a French company, sought the annulment of a Commission decision addressed to the Netherlands Government. The contested decision terminated a procedure which had been initiated under Article 93(2) of the Treaty, pursuant to a complaint submitted on behalf of the applicant, in respect of the preferential tariff system enjoyed by certain users of natural gas in the Netherlands.

In those circumstances the applicant must be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the contested decision and the application is accordingly admissible' (paragraph 13).

61. The Court reiterated, citing the first *Metro* case, *Fediol* and *Demo-Studio Schmidt*, that:

'where a regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings [under the second paragraph of Article 173] in order to protect their legitimate interests' (paragraph 23).

The Court noted that, in *Timex*, it had pointed out that it was necessary in this respect to look at the part played by the applicant in the administrative procedure leading to the adoption of the contested measure. Relevant factors included the fact that the applicant had instigated a complaint which led to the opening of the investigation, that its views had been heard during that investigation and that the conduct of the procedure had been largely determined by what it had said.

62. The Court concluded that the same considerations applied 'to undertakings which had played a comparable role in the procedure referred to in Article 93 of the EEC Treaty provided, however, that their position on the market is significantly affected by the aid which is the subject of the contested decision' (paragraph 25). The Court found that, on the facts, those conditions were satisfied. The action was therefore declared admissible. A similar decision was reached, in relation to one of the applicants, in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 22-24.

63. The Court accepted that the applicants in the *Metro* cases, in *Demo-Studio Schmidt* and in *Cofaz* were individually concerned by the contested measures even though the effect of those measures on the applicants was no different from their effect on other undertakings actually or potentially carrying on similar businesses. The admissibility of the applicants' claims was not based on the particular nature of the effect produced on them by the contested measures. In the *Metro* cases and in *Demo-Studio Schmidt*, the actions were held admissible solely because of the part played by the applicants in the procedure leading to the adoption of those measures. The same is true of *Timex*. The fact that the applicant in that case happened to have complained to the Commission about the practices which were subsequently investigated could not in itself establish that it was affected by the contested measure in any more immediate way than its competitors. Again, the admissibility of its claim was solely attributable to its role in the preliminary investigation. Similarly, the Court does not allow all exporters to bring annulment proceedings, but only those exporters who 'were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations' (*Allied Corporation*, paragraph 12). Exporters in this category will not necessarily be affected by anti-dumping regulations any differently from other exporters who were not so identified or concerned.

64. As far as importers of products subject to an anti-dumping duty are concerned, the Court has accepted that such importers have standing to challenge the regulation by which the duty was imposed where their resale prices were taken into account for the purpose of constructing the export price of the product concerned or of calculating the duty. This is particularly likely to have occurred where the importer was associated with an exporter.

65. However, the fact that the Commission has taken account of an importer's resale prices does not in itself establish that that importer is affected more immediately than, or in a qualitatively different way from, other importers whose resale prices have not been taken into account. In practice, the effect on the first category of importers may even be less acute than the effect on the second category, because the Commission will have taken account of the specific circumstances of members of the first category. The fact that an importer's resale prices have been used by the Commission to establish the existence of dumping or to calculate the duty may therefore be seen simply as a particular form of involvement in the procedure leading to the imposition of the duty. It should not in my view confer greater rights on such importers than those enjoyed by importers who have been involved in the procedure in other ways.

66. These considerations suggest that there is no logical basis for distinguishing rigidly in this respect between producers, exporters, complainants and importers. The Court should in my view accept that similar criteria should be applied in determining the admissibility of actions brought by undertakings in each of these categories. There is a particularly strong case for acknowledging the admissibility of an action brought by any undertaking whose participation in the proceedings before the Commission can be regarded as having affected their outcome.

67. As far as Extramet is concerned, it is clear from the preamble to the contested regulation that Extramet made full use of the rights conferred on it as an interested party by the basic regulation. Although, unlike the provisional regulation, the contested regulation does not expressly mention Extramet, much of the latter regulation's preamble is concerned with refuting claims made by an unnamed importer, which it is not disputed is none other than Extramet. It is also clear, to paraphrase the language of the Court in *Cofaz*, that Extramet's position on the relevant market has been significantly affected by the contested regulation.

68. I consider that an undertaking should in principle have standing to challenge an anti-dumping regulation where it is identified, even if only implicitly, by the regulation or where it played an important part in the procedure leading to the adoption of the regulation, at least where its position on the relevant market has been significantly affected. There is, however, one final issue I must consider before reaching a conclusion about the admissibility of Extramet's claim, namely the question of remedies before the national courts.

(c) Remedies before the national courts

69. In order to refute the argument that to refuse standing to independent importers would deny them access to any form of judicial review, the Court pointed out in *Alusuisse* and *Allied Corporation* that the applicant importer was free to challenge the collection of the duty in the courts of a Member State, before which the validity of the regulation imposing the duty could be challenged and a reference made to this Court under Article 177. The question therefore arises whether the existence of

such a remedy should exclude the possibility of recourse under the second paragraph of Article 173.

70. Access to the national courts is not, of course, confined to independent importers but is also available to importers who presently enjoy standing under the Court's case-law. It is clearly not therefore a decisive factor. Moreover, as Advocate General Reischl pointed out in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333 at p. 3367, Article 173 contains no suggestion that the availability of the action for annulment depends on the absence of an alternative means of redress in the national courts of the Member States. If it did, the result would be far from satisfactory, for the existence and scope of any domestic remedy will depend on national law.

71. In any event, as an alternative to a direct action before this Court, proceedings before the national courts present serious disadvantages to an importer in the anti-dumping context. National courts, without special expertise in the subject and without the benefit of the participation of the Council and Commission, are not the most appropriate forum for dealing with challenges to anti-dumping regulations. Their decisions are likely to lack the uniform character which could be achieved by a decision of this Court, or of a specialised Community tribunal such as the Court of First Instance if it were to be given jurisdiction in this field. Even with the use of Article 177, the decision of this Court is available only on the specific points which are referred to it. It is true that this Court has the advantage, in deciding such cases, of obtaining the views of the Community institutions and of the Member States if they choose to take part, but the final disposition of the case rests with the national court.

72. Proceedings in the national courts, with the additional stage of a reference under Article 177, are likely to involve substantial extra delays and costs. In addition, the national courts have no jurisdiction to declare the Community regulations invalid, since, according to Case 314/85 *Foto-Frost* [1987] ECR 4199, a ruling to that effect can be given only by this Court. The potential for delay inherent in proceedings brought before domestic courts, with the possibility of appeals within the national system, makes it likely that interim measures will be necessary in anti-dumping cases, but the national courts do not seem the appropriate forum for granting such measures. Although national courts have jurisdiction to suspend a national measure based on a Community regulation pending a ruling from this Court on the validity of the regulation (see Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415), the exercise of that jurisdiction is subject to a number of conditions and is to some extent dependent on the discretion of national courts. In any event, interim measures awarded by a national court would be confined to the Member State in question. This might make it necessary for importers to bring proceedings in more than one Member State and would prejudice the uniform application of Community law.

73. Moreover, a reference from a national court on the validity of a regulation does not always give the Court as full an opportunity to investigate the matter as a direct

action against the adopting institution. This drawback is clearly illustrated by Case C-323/88 *Sermes* [1990] ECR I-3027 in which the Court was asked for a preliminary ruling on the validity of a regulation imposing a definitive anti-dumping duty on certain electric motors. A direct action by the plaintiff in the main action had previously been declared inadmissible by the Court: see Case 276/86, already cited. The question referred in essence asked simply whether the contested regulation was valid, but the referring court gave no indication why it considered the validity of the regulation doubtful.

74. A reference of such generality would in most cases seriously hamper the Court in its task, for the Council, the Commission and the Member States, which are entitled to submit written observations, would be unaware of the issues they had to address. In the particular circumstances of the *Sermes* case, this problem was less acute, as the validity of the contested regulation was also the subject of a series of direct actions (already cited as the Electric Motors cases). In the normal case, however, and even if the issues were fully identified in the order for reference, proceedings under Article 177 might not provide an effective remedy in anti-dumping cases because of the nature of the procedure. Where complex issues of law and of fact are raised, only a full exchange of pleadings, as in a direct action, is likely to be adequate, if those issues are to be properly considered. Moreover, it is only in a direct action before the Court that all the parties concerned by the imposition of the duty, including the Community industry, will be able to participate.

Conclusion

75. I am accordingly of the opinion that the Court should recognize that a measure imposing an anti-dumping duty is of direct and individual concern to any undertaking which is able to establish either:

(a) that it is identified, explicitly or implicitly, by the measure in question; or

(b) that it participated in the preliminary investigations in a way which may be regarded as having affected their outcome, at least where its position on the market is significantly affected by the measure.

The Court should in my view clarify the case-law by expressly acknowledging that, at least in the anti-dumping field, it is not necessary for an applicant, in order to establish standing, to address the additional question of whether the contested measure constitutes in substance a regulation or a decision.

76. This approach accords with the purpose of Article 173, which is designed to enable persons to challenge measures having a particular impact on them, while limiting the right to challenge regulations so that there is no risk of their annulment being sought by an unlimited class of applicants. I am encouraged by the fact that it is consistent

with that put forward by Advocate General Mischo in the *Nashua* case (already cited), where he said, at paragraph 33 of his Opinion, that 'the determining factor with regard to the admissibility of applications in anti-dumping cases is not so much the applicant's status as a producer or exporter, or as a related importer, but rather the manner in which its actual situation was taken into account'. Although the Court upheld the admissibility of the application in that case, it was able to avoid defining the applicant as an exporter or as an importer because of its special relationship with the manufacturer of the product in question (see also the *Gestetner* case, already cited). It did not therefore consider the extent to which an importer in the strict sense would have had standing to challenge the contested measure. In the present case, that question cannot be avoided.

77. I therefore reach the conclusion that Extramet, which satisfies both the conditions suggested above, has standing to challenge the contested regulation under the second paragraph of Article 173.

78. Should the Court decide to follow its existing case-law and declare Extramet's application for the annulment of the contested regulation as a whole inadmissible, the same fate must in my view be reserved for its claim that the 24th recital is void. That recital reads as follows:

'One independent importer has also requested a special exemption in the event that a decision should be taken to impose definitive duties. The Council is unable to grant such a request from an independent importer, when it is clear that it is in the Community's interest that action should be taken to prevent the injurious effect of dumped Chinese and Soviet imports and since this objective would be rendered nugatory if such an exemption were to be made and which would also be difficult to defend on the grounds of equality of treatment of all importers'.

79. It is doubtful whether a recital can ever in itself be the subject of proceedings for annulment, since recitals do not produce any legal effects on private parties but merely explain the operative part of the measure of which they form part. As a result, the 24th recital of the contested regulation is not itself susceptible to review under Article 173. Extramet's challenge to that recital must therefore be regarded as a challenge to the contested regulation in so far as it refused the exemption sought. As such, it must in my view stand or fall with Extramet's challenge to the contested regulation as a whole.

80. Accordingly, I am of the opinion that the Court should:

(1) declare the application admissible;

(2) reserve the costs.