OPINION OF ADVOCATE GENERAL COSMAS

delivered on 16 March 2000 *

Table of contents

I — Introduction I-8152

II — Relevant Community legislation I-8152

III — Facts I-8156

IV — Proceedings before the Court of First Instance I-8159

V — Proceedings before the Court of Justice I-8160

A — Admissibility of the pleading of PEM and the Chambre Syndicale I-8160

B — Forms of order sought I-8161

VI — Consideration of the ground of the cross-appeal: admissibility I-8161

A — Issues raised I-8161

B — Extramet I and the issue as to admissibility I-8162

VII — Consideration of the grounds of appeal I-8164

A — First ground of appeal I-8164

(1) First part of the first ground of appeal: the obligation to comply with a judgment of the Court of Justice annulling a measure I-8164

(a) Admissibility I-8164

(b) Substance I-8165

(2) Second part of the first ground of appeal: infringement of Article 7(1) and (9) and Article 14 of the basic regulation I-8167

B — Second ground of appeal: infringement of the fundamental principle of the right to a fair hearing and of Article 7(4) of the basic regulation I-8170

(1) First part of the second ground of appeal: late notification of the memorandum lodged by PEM on 1 July 1992 ..... I-8171

(a) Admissibility I-8171

(b) Substance I-8171

(2) Second part of the second ground of appeal: irregularities found concerning access to material in the file I-8173

VIII — Costs I-8174

IX — Conclusion I-8175

* Original language: Greek.

I — Introduction

1. In the present appeal, Industrie des Poudres Sphériques ('IPS') seeks the setting aside of the judgment of the Court of First Instance of 15 October 1998 in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*.[1] The Court is asked to consider the consequences of the judgments delivered by it in Case C-358/89 *Extramet*,[2] in which it, first, declared admissible an action brought by an importer against Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union[3] (the *Extramet I* judgment) and, second, annulled that regulation (the *Extramet II* judgment).

2. Following the annulment of Regulation No 2808/89, the Commission resumed the anti-dumping investigation in respect of that product and the Council adopted Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia ('the regulation at issue').[4] IPS, formerly called Extramet, brought an action challenging that regulation. The Court of First Instance, in the contested judgment, held the action admissible but dismissed it as unfounded.

3. Two main issues are raised in the present case: first of all, the admissibility of IPS's action, and then whether the resumption by the Commission of the anti-dumping investigation resulted in compliance with the *Extramet II* judgment and Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community[5] ('the basic regulation').

II — Relevant Community legislation

4. The basic regulation lays down rules for protection against dumped or subsidised imports from States which are not members of the European Economic Community, as it was called at the time when the regulation was adopted. It is apparent from its provisions that an anti-dumping proceeding comprises a series of stages, including

1 — [1995] ECR II-3939.

2 — Judgments in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501 ('*Extramet I*') and [1992] ECR I-3813 ('*Extramet II*').

3 — OJ 1989 L 271, p. 1.

4 — OJ 1994 L 270, p. 27.

5 — OJ 1988 L 209, p. 1. These issues are now governed by Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

the investigation stage. One or more investigations may take place in the same proceeding.

5. Article 7, in the version in force at the material time, contains provisions governing 'Initiation and subsequent investigation', as its heading indicates. Article 7(1) reads as follows:

'1. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately:

(a) announce the initiation of a proceeding in the *Official Journal of the European Communities*; such announcements shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;

(b) so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;

(c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidisation and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; the investigation of dumping or subsidisation shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding.'

6. Article 7(4) of the basic regulation provides:

'(a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission indicating the information required.

(b) Exporters and importers of the product subject to investigation and, in the case of subsidisation, the representatives of the country of origin, may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.

(c) (i) requests for information pursuant to (b) shall:

(aa) be addressed to the Commission in writing,

(bb) specify the particular issues on which information is sought,

(cc) be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty;

(ii) the information may be given either orally or in writing as considered appropriate by the Commission. It shall not prejudice any subsequent decision which may be taken by the Commission or the Council. Confidential information shall be treated in accordance with Article 8;

(iii) information shall normally be given no later than 15 days prior to the submission by the Commission of any proposal for final action pursuant to Article 12. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.'

7. Article 7(9) states:

'(a) An investigation shall be concluded either by its termination or by definitive action. Conclusion should normally take place within one year of the initiation of the proceeding.

(b) A proceeding shall be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings or by the expiry or repeal of such duties or by the termination of undertak-

ings in accordance with Articles 14 or 15.'

8. Article 8 of the basic regulation, which is headed 'Confidentiality', provides in paragraphs 1 to 4:

'1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorise its disclosure in generalised or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted and where the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such summary.'

9. In addition, Article 14, which is headed 'Review', provides:

'1. Regulations imposing anti-dumping or countervailing duties and decisions to accept undertakings shall be subject to review, in whole or in part, where warranted.

Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation. Such requests shall be addressed to the Commission which shall inform the Member States.

2. Where, after consultation, it becomes apparent that review is warranted, the investigation shall be reopened in accordance with Article 7, where the circumstances so require. Such reopening shall not *per se* affect the measures in operation.

3. Where warranted by the review, carried out either with or without re-opening of the investigation, the measures shall be amended, repealed or annulled by the Community institution competent for their introduction....'

III — Facts

10. The Court of First Instance made the following findings of fact in the contested judgment (paragraphs 15 to 29).

11. IPS, formerly Extramet Industrie, is an undertaking based in Annemasse (France) which specialises in the production of calcium metal broken up into granules of reactive metal. [6]

12. Primary calcium metal is produced in five countries, France (by Péchiney Électrométallurgique ('PEM'), a company incorporated under French law), China, Russia, Canada and the United States of America. [7]

13. To obtain supplies of calcium metal IPS turned from the outset to the Community producer, initially Société Électrométallurgique du Planet and then, after that undertaking merged with PEM in 1985, PEM. However, it also imported primary calcium metal from the People's Republic of China and the Soviet Union.

14. In July 1987 the Chambre Syndicale de l'Électrométallurgie et de l'Électrochimie ('the Chambre Syndicale'), an association

6 — It was set up in 1982, following the discovery in 1980 of a granulation process.

7 — Primary calcium metal is a chemical product, derived either from calcium oxide (lime) or from calcium chloride, in the form of chunks and chips. It is used mainly in the metal industry.

governed by French law acting on behalf of PEM, lodged a complaint with the Commission, asking for anti-dumping measures to be adopted with respect to imports of calcium metal originating in the People's Republic of China and the Soviet Union.

15. On 26 January 1988 the Commission opened an anti-dumping proceeding pursuant to Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community, [8] which was in force at that time.

16. By Regulation (EEC) No 707/89, [9] the Commission imposed a provisional anti-dumping duty of 10.7% on the product concerned.

17. After extending the validity of the provisional duty, the Council, by Regulation No 2808/89, [10] imposed duties of 21.8 and 22.0% on the product concerned and made that anti-dumping duty definitive.

18. On 27 November 1989 IPS, whose company name was then Extramet Industrie SA, brought an action for annulment of that regulation.

19. The Court of Justice declared the application admissible by judgment of 16 May 1991 in *Extramet I.* [11] Then, by judgment of 11 June 1992 in *Extramet II*, [12] it annulled Regulation No 2808/89 on the grounds that the Community institutions had not actually considered whether the Community producer of the product referred to in the regulation in question, namely PEM, had, by its refusal to sell, itself contributed to the injury suffered, and had not established that the injury on which they based their conclusions did not derive from the factors mentioned by the applicant, and had therefore not followed the proper procedure in determining the injury.

20. By decision of 31 March 1992 the French Conseil de la Concurrence (Competition Council) found PEM liable for abuse of a dominant position between October 1982 and the end of 1984 by Société Électrométallurgique du Planet (SEMP), a company taken over by PEM in December 1985. By judgment of 14 January 1993 the Cour d'Appel (Court of Appeal), Paris, upheld that decision.

8 — OJ 1984 L 201, p. 1.

9 — Regulation (EEC) No 707/89 of 17 March 1989 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China or the Soviet Union (OJ 1989 L 78, p. 10).

10 — Cited above in footnote 3.

11 — Cited above in footnote 2.

12 — Cited above in footnote 2.

21. Following the *Extramet II* judgment, PEM sent to the Commission on 1 July 1992 a note arguing that the investigation should be reopened and a technical memorandum on the assessment of the injury to the Community industry.

22. The Commission, considering that the investigation had 'resumed *de jure*', requested IPS by letter of 17 July 1992 to make observations on the assessment of the injury to the Community industry. In that letter it stated that it had asked PEM to submit observations on the same point.

23. By letter of 14 August 1992 IPS contested the Commission's interpretation as to whether it was legally possible to resume the investigation. It asked for a decision, in due form and amenable to appeal, to be addressed to it.

24. IPS confirmed the latter request by letter of 21 August 1992.

25. On 14 October 1992 IPS received from the Commission the memorandum on injury which PEM had sent the Commission on 1 July 1992.

26. On 14 November 1992 the Commission published a notice concerning the anti-dumping proceeding relating to imports of calcium metal originating in China and Russia.

27. By letter of 18 November 1992 the Commission informed IPS of the publication of the notice and requested it to return certain questionnaires within 30 days. It stated that the new investigation period was from 1 July 1991 to 31 October 1992.

28. By letter of 23 December 1992 IPS submitted observations to the Commission on the memorandum on injury lodged by PEM on 1 July 1992.

29. By letter of 29 July 1993 the Commission asked IPS to inform it of any facts which might help it reach a decision, in particular on the question of damage. By letter of 12 August 1993 IPS replied that it had no new information on the point, as the position had hardly changed since its letter of 23 December 1992.

30. On 21 April 1994 the Commission adopted Regulation (EC) No 892/94 imposing a provisional anti-dumping duty on imports of calcium metal originating in

the People's Republic of China and Russia [13] ('the provisional regulation'). [14]

31. On 31 May 1994 IPS submitted observations on the provisional regulation, expressing numerous reservations with respect to it. The Commission replied to those observations by letter of 14 June 1994.

32. On 11 August 1994 the Commission informed IPS of the essential facts and considerations on the basis of which it was intended to propose the imposition of a definitive anti-dumping duty on imports of calcium metal originating in China and Russia.

33. On 19 October 1994 the Council, acting on a proposal from the Commission, adopted the regulation at issue, imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia. [15]

13 — OJ 1994 L 104, p. 5.

14 — The duty imposed was ECU 2 074 per tonne for calcium metal originating in China and ECU 2 120 per tonne for that originating in Russia.

15 — The duty was maintained at the same level as that fixed by the provisional regulation. The Council also confirmed the anti-dumping duties imposed by the provisional regulation.

IV — Proceedings before the Court of First Instance

34. On 9 January 1995 IPS brought an action before the Court of First Instance for annulment of the regulation at issue or, in the alternative, a declaration that the regulation was unenforceable against it, and an order that the Council pay the costs.

35. The Council contended that the Court should dismiss the action and order IPS to pay the costs.

36. Intervening, the Commission, PEM and the Chambre Syndicale contended that the Court should dismiss the action and order IPS to pay the costs.

37. In its application, IPS put forward the following seven pleas for annulment: (a) infringement of Articles 5 [16] and 7(9) of the basic regulation and disregard of the force of *res judicata* and the conditions for regularisation of an administrative act; (b) infringement of Articles 7 and 8 [17] of the basic regulation and breach of the right to a

16 — Article 5 concerns the procedure for lodging a written complaint in the case of dumped imports.

17 — Article 8 concerns the confidential treatment of information gathered pursuant to the basic regulation.

fair hearing; (c) infringement of Articles 4(4) [18] and 2(12) [19] of the basic regulation and manifest error of assessment as regards like products; (d) infringement of Article 4 of the basic regulation and manifest error of assessment of the injury to the Community industry; (e) infringement of Article 12 [20] of the basic regulation and manifest error of assessment; (f) breach of Article 190 of the EC Treaty (now Article 253 EC); and (g) misuse of powers.

38. So far as concerns the plea raised by the Council that the application was inadmissible, the Court of First Instance held that, since the circumstances which justified finding the action admissible in *Extramet I* still prevailed, IPS's application had to be declared admissible. However, it dismissed the application as unfounded.

V — Proceedings before the Court of Justice

39. IPS brought an appeal against the judgment of the Court of First Instance on 16 December 1998 and the Commission brought a cross-appeal.

18 — Article 4 concerns determination of injury. Article 4(4) provides, *inter alia*, that the effect of the dumped or subsidised imports is to be assessed in relation to the Community production of the like product where that is possible.

19 — This provision defines 'like product'.

20 — Article 12 concerns the taking of definitive action by the Council levying definitive anti-dumping (or countervailing) duty.

A — *Admissibility of the pleading of PEM and the Chambre Syndicale*

40. PEM and the Chambre Syndicale, which intervened before the Court of First Instance, explain in the response lodged by them that they decided not to lodge a fresh pleading and they refer to the statement in intervention which they put before the Court of First Instance, photocopied extracts of which they adduce.

41. Under Article 115(2) of the Rules of Procedure of the Court of Justice, a response is to contain (Article 115(2)(c)) the pleas in law and legal arguments relied on and (Article 115(2)(d)) the form of order sought by the respondent. That provision means that the pleas must be included in the pleading itself and a reference to another document or pleading cannot be substituted for them.

42. Thus, since the pleading lodged by PEM and the Chambre Syndicale does not contain pleas in law and legal arguments but refers to the statement in intervention which they put before the Court of First

Instance and the pleas set out therein, regard cannot be had to it. [21]

B — *Forms of order sought*

43. In its appeal, IPS claims that the Court should: (a) set aside the contested judgment and rule on the substance of the case; (b) declare the Commission's cross-appeal inadmissible or, in the alternative, unfounded; and (c) order the Council, the Commission and the interveners to pay the costs of the interlocutory proceedings and the proceedings on the merits before the Court of First Instance, and the costs of the present proceedings before the Court of Justice.

44. The Commission contends that the Court should: (a) set aside the judgment of the Court of First Instance in so far as it held that the application in Case T-2/95 was admissible; and (b) hold that application inadmissible. In the alternative, it contends that the Court should: (a) dismiss the appeal; and (b) in any event order IPS to pay the costs.

21 — The Court has held, in the case of actions brought against Member States for failure to fulfil obligations, that it is not sufficient to refer to complaints formulated in the course of the pre-litigation procedure if they are not included, at least in summary form, in the application; see Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraphs 26 to 30, and point 8 of the Opinion of Advocate General Tesauro in that case, and Case C-43/90 *Commission* v *Germany* [1992] ECR I-1909, paragraph 8. The Court of First Instance adopted a similar solution in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 (paragraphs 39 and 40), an action for annulment where the application referred globally to annexed documents detailing the applicants' pleas in law and arguments.

45. The Council contends that the Court of Justice should: (a) dismiss the appeal; and (b) order IPS to pay the costs.

46. PEM and the Chambre Syndicale contend for the forms of order sought by the Council and the Commission.

VI — Consideration of the ground of the cross-appeal: admissibility

A — *Issues raised*

47. In its cross-appeal, the Commission contends that the application brought before the Court of First Instance should have been declared inadmissible. In contrast to the facts of *Extramet I*, in the present case the appellant refused to obtain supplies of calcium metal from the Community producer, PEM — it did not encounter difficulties in obtaining supplies. Consequently, the part of the contested judgment concerning admissibility (paragraph 53) is wrong in law in its application of the *Extramet I* judgment and, furthermore, is founded on contradictory and inadequate reasoning.

48. Specifically, the Commission submits that the contradictory and inadequate rea-

soning in the contested judgment on the issue of admissibility means that the judgment should be set aside. It maintains that the Court of First Instance contradicts itself in stating in paragraph 219 that the institutions neither made an error of fact, nor infringed provisions [22] of the basic regulation, nor made a manifest error of assessment by considering that 'the calcium metal produced by PEM and calcium metal from China and Russia were like products within the meaning of Article 2(12) of the basic regulation'. According to the Commission, the contradiction is established in that the Court of First Instance found in paragraph 235 of the contested judgment: 'For the investigation period from 1 July 1991 to 31 October 1992, PEM cannot therefore be considered to have been the author of its own injury. During that period, the applicant on the one hand did not think it appropriate to resume commercial relations with PEM, and on the other, obtained supplies of calcium metal from China and Russia despite the imposition of anti-dumping duties.' Furthermore, it is clear from paragraphs 249 to 256 of the contested judgment that PEM proposed to IPS that it test PEM's own N calcium, which was logical since the calcium from China and Russia was also nuclear calcium; IPS's only difficulty was the price.

49. In short, the Commission considers that, apart from the question of the price of the product (nuclear calcium) which IPS sought to obtain from PEM, IPS was in fact able to obtain supplies from PEM, as other traders did. Given that nothing distinguishes IPS from the other traders, the application brought before the Court of First Instance should, on a correct interpretation of the *Extramet I* judgment, have been declared inadmissible.

50. IPS takes the view that the cross-appeal is inadmissible inasmuch as the Court of First Instance rejected the plea of admissibility after assessing the documents in the case.

B — *Extramet I and the issue as to admissibility*

51. In Case C-358/89, as described in the contested judgment, Extramet's application was held admissible by *Extramet I*. As the Court of First Instance correctly states in paragraph 49, the sole criterion of admissibility applied by the Court of Justice in *Extramet I* was direct and individual concern to the applicant. The Court of First Instance recalls paragraphs 13 and 14 of *Extramet I* according to which 'although, in the light of the criteria set out in the second paragraph of Article 173 of the Treaty, regulations imposing anti-dumping duties are in fact, as regards their nature and their scope, of a legislative character, inasmuch as they apply to all the traders concerned, their provisions may none the less be of individual concern to certain traders. It follows that measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to

22 — Articles 4(1) and (4) and 2(12).

certain traders who therefore have standing to bring an action for their annulment'; it also recalls that the Court of Justice then held that Extramet had established the existence of a set of factors constituting a situation which was peculiar to it and differentiated it, as regards the measure in question, from all other economic operators.

52. The Court of First Instance then states (paragraph 52) that in *Extramet I* the Court of Justice did not base the admissibility of the application exclusively on the difficulties encountered by Extramet in obtaining supplies from the sole Community producer. In fact it based its decision on a series of factors constituting a situation peculiar to Extramet which differentiated it, as regards the measure in question, from all other traders. More specifically, the Court of First Instance found in the contested judgment that there was a set of specific circumstances which differentiated IPS: it was the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product; in addition, its business activities depended to a very large extent on those imports and were seriously affected by the contested regulation in view of the limited number of producers of the product concerned and of the difficulties which it encountered in obtaining supplies from the sole Community producer, which, moreover, was its main competitor for the processed product. The Court of First Instance found next (paragraph 53) that 'the Commission does not dispute that PEM is unable to supply standard quality primary calcium metal with the characteristics desired by the applicant, which clearly shows that the applicant in fact continues to encounter difficulties in obtaining supplies from PEM'. The Court of First Instance, the court adjudicating on the substance, concluded from the foregoing that the situation had not changed compared with *Extramet I*.

53. The finding of the Court of First Instance that IPS refused to take the product offered to it by PEM because it did not have the desired characteristics is one of the factors supporting the Court of First Instance's assessment that the application brought by IPS was admissible. Thus, the Court of First Instance was correct in holding (paragraph 54) that 'since the circumstances which justified finding the application admissible in Case C-358/89 ... still prevail, the present application must be declared admissible'.

54. As regards the Commission's other submissions relating to contradictory reasoning in the contested judgment, they cannot in my view lead to the setting aside of the judgment, because those complaints concern other sections.

55. Consequently, the plea of inadmissibility raised by the Commission must be rejected in its entirety.

VII — Consideration of the grounds of appeal

56. The appellant puts forward two grounds of appeal, which correspond to the first and second pleas in its application at first instance.

A — *First ground of appeal*

(1) First part of the first ground of appeal: the obligation to comply with a judgment of the Court of Justice annulling a measure

57. In the first part of the first ground of appeal, IPS centres its criticism on paragraphs 91, 95, 97 and 99 of the contested judgment. It submits that the finding that the Commission could commence a fresh investigation on the basis of a different reference period, that is to say changing the original reference period, meant, first, that the *Extramet I* judgment of the Court of Justice was not complied with, and second, that, through acceptance of the legality of that 'regularisation' procedure, as IPS describes compliance with the annulling judgment, the Court of First Instance infringed Article 174 of the EC Treaty (now, after amendment, Article 231 EC), Article 176 of the EC Treaty (now Article 233 EC) and Article 7(1) and (9) and Article 14 of the basic regulation. According to the appellant, the Court of First Instance erred in law in its interpretation of Article 176 of the EC Treaty, offending against the principles of proportionality and the protection of legitimate expectations.

(a) Admissibility

58. First, in the Commission's submission, this complaint is not clearly directed at paragraph 101 of the contested judgment and the reasons why paragraph 101 is flawed are not given. This failure by the appellant to challenge a paragraph which supports the rejection of the first ground of appeal by the Court of First Instance renders that ground inadmissible.

59. In its appeal, IPS refers to the reasoning of the Court of First Instance, as set out in paragraphs 87 to 102, without specifically mentioning paragraph 101; it criticises only the finding of the Court of First Instance (paragraph 98 of the appeal) that the 'change in the investigation period' did not affect its rights. That, in my view, is sufficient for IPS to be considered to have validly pleaded an error of law in paragraph 101 of the contested judgment since it specifies the paragraph by reference to its content, even though the paragraph is not referred to again by its number. Consequently, the Commission's arguments to the contrary must be rejected.

60. Second, with regard to paragraph 101 of the contested judgment, I consider that

IPS's argument (paragraph 24 of its reply) that the Court of First Instance distorted the facts, first, may be distinguished from IPS's plea of an infringement of law which is admissible and, second, is not itself admissible because it was not put forward in the appeal initiating the present proceedings. The appellant cannot expand its claims at that stage, as is moreover apparent from Article 118 of the Rules of Procedure of the Court of Justice, read in conjunction with Article 42(2) thereof.

61. Third, the appellant contends in the first part of the first ground of appeal that the Court of First Instance erred by failing to observe the principles of proportionality and the protection of legitimate expectations in applying Article 176 of the EC Treaty: the contested judgment contains an error of law because it was found that the Commission could change the reference period and the investigation did not have to be limited to the question of injury in the original period but could also relate to the new reference period, with the result that higher anti-dumping duties could be imposed.

62. In the present case, I consider that those arguments are inadmissible inasmuch as they are put forward for the first time in the appeal proceedings, similar arguments not having been put forward at first instance: their examination would result in the substance of the case being considered afresh, which falls outside the scope of appellate review.

(b) Substance

63. The appellant contends that the Court of First Instance was wrong to find that the Commission's actions complied fully with the *Extramet II* judgment of the Court of Justice. In its submission, the annulment was for substantive reasons and entailed the annulment of all the preparatory acts, including the investigation carried out, which led to the adoption of Regulation No 2557/94.

64. It is settled case-law that where the Court annuls Community acts on the ground of a formal or procedural defect (such as failure to state adequate reasons, to consult the relevant institutions or to hear interested parties), compliance with the judgment will not necessarily require the institution concerned to start the entire procedure afresh.[23] That is so both where

23 — See point 35 of the Opinion of Advocate General Jacobs in Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993.

the defect is purely formal or procedural [24] and where the measure is invalid on the grounds of substantive illegality. [25]

65. In the contested judgment (paragraph 94), the Court of First Instance pointed out, first, that in *Extramet II* the Court of Justice annulled Regulation No 2808/89 on the ground that the Community institutions had not actually considered whether the Community producer, PEM, had itself contributed, by its refusal to sell, to the injury suffered, and had not established that the injury on which they based their conclusions did not derive from the factors alleged by Extramet and, second, that the Court of Justice concluded that the institutions had not followed the proper procedure in determining the injury. The Court of First Instance held that the preliminary measures preparatory to the investigation, in particular the initiation of the proceeding under Article 7(1) of the basic regulation, were not therefore affected by the unlawfulness found by the Court of Justice. The Court of First Instance then held (paragraph 95) that the Commission *could* lawfully *resume the proceeding* on the basis of all the acts in the proceeding which were not affected by the annulment, namely PEM's complaint of July 1987, the consultation of the advisory committee and the decision to initiate the proceeding, in order to conduct an investigation into the same reference period as that taken into account in Regulation No 2808/89 (annulled by the *Extramet II* judgment), that investigation being limited to whether PEM had not itself contributed, by its refusal to sell, to the injury suffered by the Community industry.

66. On the basis of the foregoing case-law, I consider that in the present case too, irrespective of whether the annulment was on formal or substantive grounds, it was open to the Commission to use elements of the earlier proceeding and the investigation in respect of the original reference period, without violating its obligation to comply

24 — The Court of Justice acknowledges (see, for example, Case C-415/96 *Spain* v *Commission* (cited above in footnote 23), paragraph 32) that 'annulment of a Community measure does not necessarily affect the preparatory acts'. For example, in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023 (paragraphs 33 and 34 and points 56 and 57 of the Opinion of Advocate General Mischo), a directive had been annulled on account of a procedural defect concerning the manner in which it was finally adopted and was replaced by a similar, duly adopted, directive. The Court rejected the argument that the Council should have started the entire procedure afresh and requested a new proposal from the Commission and a new opinion from the European Parliament, holding that the annulment of the directive did not affect the preparatory acts. It is the ground for the annulment which is important: if the defect is purely formal or procedural, the Commission may duly remove the defect without repeating the entire procedure and adopt a fresh measure which replaces the original measure in whole or in part, in so far as is necessary. In Case C-415/96 *Spain* v *Commission*, the Kingdom of Spain brought an action for annulment of articles of a Commission decision relating to the grant of State aid which was adopted to comply with the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, by which the Court of Justice had granted in part an application for annulment of the decision adopted originally. While the Court, in its judgment in Case C-415/96, did not consider whether the ground for annulment concerned substance or procedure, it pointed out that, by the operative part of the judgment in Joined Cases C-278/92, C-279/92 and C-280/92, it had annulled articles of the decision at issue in that case because of insufficient reasoning. It also found (paragraph 34): 'Since the analysis carried out by the Commission was ... incomplete, thus entailing the illegality of [the decision] ..., the procedure for replacing that decision could be resumed at that point by means of a fresh analysis of the investigation measures, the reliability of which have not in fact been challenged in this case. Implementation of the judgment in *Spain* v *Commission* did not therefore require the Commission to go through the whole procedure provided for in Article 93 of the Treaty.'

25 — It may be noted that, at point 31 of his Opinion in Case C-415/96 *Spain* v *Commission*, Advocate General Jacobs, responding to a submission by the Commission that, where a declaration of nullity is based on a substantive illegality, Article 176 precludes the institution concerned from simply replacing the act annulled by another identical act, stated, in my view correctly, that 'even where there has been a finding of substantive illegality, there will be circumstances where the institution concerned may properly adopt an act replacing the annulled provisions, provided of course that the illegality is cured in the fresh act'.

with the annulling judgment of the Court of Justice. The defect vitiating the annulled Council regulation did not affect a series of procedural acts preceding its adoption, in particular the defect did not affect the validity of the complaint, of the consultations which followed or of the announcement that the original proceeding and investigation were to be initiated.

67. In the present case, as is stated in the contested judgment, the defect consisted in the fact that the Community institutions failed, first, to consider whether the Community producer of the product to which the annulled regulation related, namely PEM, had not, by its refusal to sell to IPS, itself contributed to the injury suffered, and second, to establish whether the injury caused did not derive from factors mentioned by Extramet, and had therefore not followed the proper procedure in determining the injury. That defect arose after the carrying out of the preparatory acts constituted by the initiation of the proceeding and the decision to conduct the original investigation, and for that reason I consider that they were not affected by the annulment. [26]

26 — It may be noted that in the judgment in Case C-415/96 *Spain* v *Commission* (cited above in footnote 23), at paragraph 18, reference is made to a letter that the Commission addressed to the Kingdom of Spain, in which it stated: 'In accordance with the judgment of the Court of Justice of 14 September 1994 (in Case C-278/92), annulling a number of articles of the Commission's Decision of 25 March 1992, the Commission is preparing a new draft of its definitive decision in the procedure initiated pursuant to Article 93(2) of the EC Treaty ... which, in accordance with that judgment, *is still open*. The draft will be submitted soon to the College of Commissioners for adoption' (emphasis added). The Court did not disapprove of that approach to implementing the decision adopted in Joined Cases C-278/92, C-279/92 and C-280/92.

68. Moreover, according to Article 7(1)(c) of the basic regulation the investigation covers both the dumping (or subsidisation) and the injury resulting therefrom. In other words, it comprises two different aspects which are affected by an annulling judgment of the Court of Justice only if that is made absolutely clear by the operative part and grounds of that judgment. [27]

69. Consequently, the Court of First Instance was right to hold that the Commission could resume the proceeding on the basis of all the procedural acts which were not affected by the annulling judgment of the Court of Justice and the appellant's arguments to the contrary must be rejected as unfounded.

(2) Second part of the first ground of appeal: infringement of Article 7(1) and (9) and Article 14 of the basic regulation

70. In the second part of the first ground of appeal, IPS contends that the Court of First Instance infringed Article 7(1) and (9) and Article 14 of the basic regulation in seeking to justify the legality of the method adopted by the Commission for resuming the investigation, finding that, by reason of the annulment, the proceeding was open and

27 — See, for example, Case C-415/96 *Spain* v *Commission* (cited above in footnote 23), paragraph 31, and Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 27.

that the Community institutions had a wide discretion when they reviewed dumping. Such practices on the part of the Commission offend against the principle of legal certainty and are inconsistent with the idea of a Community governed by the rule of law.

71. Specifically, according to the appellant, the Commission opened a fresh investigation relating to a new reference period without legal basis because neither the initiation of a new proceeding nor a review was involved, and the finding of the Court of First Instance (paragraph 99) that the initial procedure had not been annulled by the *Extramet II* judgment was misconceived. In the appellant's submission, the initiation of an investigation on the basis of Article 7(1) of the basic regulation must be simultaneous with the initiation of the proceeding, for which a complaint is required, as provided by Article 5 of that regulation. Therefore, the Court of First Instance infringed Article 7(1) by finding that the Commission could begin a fresh investigation four years after the initiation of the proceeding.

72. First of all, it is to be recalled that the Court of First Instance found in paragraph 99 of the contested judgment that, as the initial procedure had not been annulled by the *Extramet II* judgment and dumping was still in progress, the Commission did not exceed its discretion by deciding to continue the proceeding which had been started in 1989 and by conducting a fresh investigation on the basis of a different reference period. It found in paragraph 101 that the change in the investigation period did not affect IPS's rights derived from the initiation of the proceeding in 1989.

73. Also, it is stated in the contested judgment (paragraphs 94 and 95) that the Court of Justice did not hold in *Extramet II* that the investigation which had been conducted was not affected, but annulled the regulation adopted by the Council and the preceding investigation only in relation to the determination of injury suffered by the Community industry.

74. Accordingly, two possibilities were open to the Commission: either it could confine itself to the original investigation, which concerned a particular reference period, covering solely the issue of assessment of injury, or it could conduct a fresh investigation, in which case it would also have to set a new reference period. For reasons of procedural economy it could still carry out a further investigation on the basis of a new reference period, subject to observing, for that fresh investigation, all the procedural rules which would fully safeguard IPS's rights to a fair hearing.

75. The above solution, adopted by the Commission and described in the contested judgment, is also justified by the logic of the procedure laid down for the adoption of anti-dumping measures. As the Court has found,[28] anti-dumping proceedings

28 — Case C-170/89 *BEUC* v *Commission* [1991] ECR I-5709, paragraph 25.

'are intended, first, to ensure that imports into the Community are not the subject of dumping causing injury to Community industry and, secondly, to enable the institutions to adopt the necessary measures within a reasonable period if required by the interests of the Community'. Those proceedings are governed by the principle that the institutions have a wide discretion when deciding the period to be taken into account for the purpose of determining injury. [29] As Advocate General Tesauro states in his Opinion in *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon*, [30] 'the existence of considerable injury must necessarily be ascertained by reference to the moment in time when any decision introducing protective measures is adopted'.

76. Furthermore, it follows from the rationale of the basic regulation that those measures are not intended to make good the injury, that is to say they are not enacted as compensation for the injury suffered by the Community industry, but are a means of forestalling future injury by the imposition of an obligation to pay duties on import of the products in question. That rationale 'requires the injury to be actually occurring and it is therefore necessary for it to be established in regard to the period immediately preceding the initiation of the proceeding and, in the present case, in regard to the period immediately preceding the notice concerning the continuation of the proceeding'. [31]

77. As the Commission points out (paragraphs 31 and 32 of its response), in the context of anti-dumping the defect which has caused a regulation to be annulled cannot result in the replacement of that regulation by a new regulation with retroactive effect. That is so because the annulment takes effect *ab initio* and importers can seek the refund of sums paid. A new regulation could not impose those duties afresh because their imposition would have retroactive effect, which is prohibited by Article 13(4)(a) of the basic regulation. [32] Thus, the only possibility is to adopt a new regulation imposing duties in respect of the future from its entry into force, that is to say *ex nunc*, not *ex tunc*. For those reasons, infringement of the principle of legal certainty, which the appellant invokes, is not an issue.

78. An argument supporting the correctness of paragraph 99 of the contested judgment, where it is stated that the

29 — See, in that regard, Case C-121/86 *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Council* [1989] ECR 3919, paragraph 20, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 86.

30 — Points 10 and 11.

31 — See point 11 of the Opinion of Advocate General Tesauro in *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon*, cited above in footnote 29.

32 — This was prohibited in principle by Article 11 of the 1979 Anti-Dumping Code — contained in the Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade (GATT) which was then in force — which was approved by Council Decision 80/271/EEC of 10 December 1979 (OJ 1980 L 71, p. 1). As is, moreover, indicated by the second recital in the preamble to the basic regulation, Article 13 was among the provisions adopted in order for the Community to comply with those obligations.

Commission acted within the discretion available to it in also examining a new reference period, may be drawn from Article 7(1)(g) of the basic regulation, according to which the investigation period is 'normally' to cover a period of not less than six months immediately prior to the initiation of the proceeding. [33] In other words, the Community legislature wishes the results of the investigation to be based on the most recent information. [34] In complying with the annulling judgment of the Court of Justice, the Commission must observe the provisions of the basic regulation laying down the manner in which it is to act.

79. Finally, it clearly follows from Article 7(1) of the basic regulation that the investigation forms part of the proceeding and not the reverse. Thus, the investigation is a preparatory act for the final measure adopted by the Commission. Under Article 7(9), an investigation is concluded either by its termination or by definitive action. Since the *Extramet II* judgment annulled the definitive action (Regulation No 2808/89) by which the previous investigation was concluded, in accordance with the foregoing neither the investigation nor, *a fortiori*, the proceeding was completed but remained open. The term 'new investigation' or 'fresh investigation' in paragraphs 95 and 99 of the contested judgment must therefore be understood as referring to the investigation which the Commission lawfully decided upon on the basis of a new reference period within the framework of the original proceeding, as follows from the very text of the contested judgment.

80. In view of the foregoing, I consider that the arguments put forward by the appellant in the second part of the first ground of appeal are likewise unfounded and the first ground of appeal is thus to be rejected in its entirety.

B — *Second ground of appeal: infringement of the fundamental principle of the right to a fair hearing and of Article 7(4) of the basic regulation*

81. According to the appellant, in finding that the numerous irregularities observed in the course of the proceeding did not prejudice its rights, the Court of First Instance infringed the fundamental principle of the right to a fair hearing and Articles 7(4) and 8(3) of the basic regulation. It submits that such a minimalistic view of the right to a fair hearing jeopardises observance of that principle. Furthermore, the method adopted by the Court of First Instance is contrary to the case-law of the Court of Justice in *Al-Jubail*. [35]

33 — Furthermore, the basic regulation provides (Article 14(2)) that the rule in Article 7 also applies *mutatis mutandis* where regulations imposing anti-dumping duties are reviewed and (Article 15) that anti-dumping duties lapse after five years from the date on which they entered into force unless they are modified or confirmed.

34 — See also point 11 of the Opinion of Advocate General Tesauro in *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon*, cited above in footnote 29.

35 — Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraphs 15 and 16.

(1) First part of the second ground of appeal: late notification of the memorandum lodged by PEM on 1 July 1992

82. In the first part of the second ground of appeal, the appellant contends that the Court of First Instance was wrong in holding (paragraphs 111, 112 and 113) that the right of the applicant (now the appellant) to a fair hearing was not infringed as a result of the memorandum on injury, lodged by PEM with the Commission on 1 July 1992, not being communicated to it until 14 October 1992. The Court of First Instance states, however, that IPS had not submitted a request for the document in question to be communicated to it.

(a) Admissibility

83. The Commission submits that the foregoing section of the appeal relating to infringement of the rights laid down in Article 7(4) of the basic regulation is inadmissible, because the application to the Court of First Instance referred to the memorandum (from PEM) under the first part of the second plea for annulment where reference is not made to Article 7 of the basic regulation but only to the general principle of the right to a fair hearing.

84. I do not agree with the Commission's line of argument. As is indicated in paragraphs 104 and 105 of the contested judgment, the argument before the Court of First Instance relating to communication of PEM's memorandum was included by IPS within the framework of reviewing the legality of the conduct of the investigation, which forms part of the whole procedure for the adoption of anti-dumping measures. Even though there was no direct express reference to Article 7, I do not think that that is sufficient for the relevant ground of appeal to be rejected as inadmissible. Besides, paragraph 105 of the contested judgment, where IPS's line of argument is referred to, expressly mentions Article 7 of the basic regulation.

(b) Substance

85. IPS complained in its application to the Court of First Instance that the Commission had infringed its right to a fair hearing by failing to communicate to it the memorandum lodged by PEM on 1 July 1992.

86. The Court of First Instance found that it did not appear from the material in the file that IPS had made a written request to the Commission for sight of PEM's letter of 1 July 1992, even though it was aware of its existence from 10 July 1992. [36] It concluded that, in the absence of such a request, the Commission had no obligation under Article 7(4)(a) of the basic regulation to bring the content of that letter to IPS's attention (paragraph 113).

36 — See also paragraph 104 of the contested judgment.

87. Article 7(4)(a) of the basic regulation provides that, after commencement of the investigation, the parties concerned may inspect all information made available to the Commission by *any party to an investigation* as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they are to address a *written request* to the Commission indicating the information required.

88. The Court of First Instance assessed the material in the file and held that, since IPS had not made such a request, the relevant plea put forward by it in its application was unfounded; it rejected the plea on that ground. In ruling in that way the Court applied the law correctly, and the arguments put forward to the contrary are unfounded and must be rejected.

89. In any case, irrespective of the foregoing, the plea advanced by IPS is also factually misconceived because the Court of First Instance finds in the contested judgment that the letter had in any event been communicated to IPS on 14 October 1992, that is to say one month before the publication on 14 November 1992 of the Commission notice concerning the anti-dumping proceeding.

90. Thus, contrary to the appellant's submissions, the principles formulated by the Court in *Al-Jubail* were not infringed in any event. [37]

37 — In *Al-Jubail* (cited above in footnote 35), the Court stated that 'when interpreting Article 7(4) of the basic regulation' (that is to say Article 7(4) of the previously applicable Council Regulation No 2176/84, cited above in footnote 8 — a provision similar in content to Article 7(4) of the basic regulation applicable in the present case) the requirements stemming from the right to a fair hearing 'must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them'. The Court added (paragraph 16) that 'with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems'. The Court concluded (paragraph 17) that 'in performing their duty to provide information, the Community institutions must act with all due diligence by seeking [as the Court had previously pointed out — see, for example, Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 29 and, in particular, paragraph 30] to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information. In any event, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury'. It is then stated in paragraph 18 that there was nothing in the documents before the Court to show that the Community institutions 'discharged their duty to place at the applicants' disposal all the information which would have enabled them effectively to defend their interests'. Thus, for example, it was apparent from the material before the Court that, in the proceeding, internal Council documents were used, the information in which was not brought to the attention of the applicants by other means (paragraph 19). Also, a letter, which the applicants claimed never to have received, was sent without using registered post. Those irregularities led the Court to annul a regulation imposing a definitive anti-dumping duty.

(2) Second part of the second ground of appeal: irregularities found concerning access to material in the file

91. The appellant submits, furthermore, that the contested judgment should be set aside because the numerous irregularities observed in relation to access to material in the file, which here concern documents other than PEM's letter of 1 July 1992, were found not to have prejudiced its rights (paragraphs 140, 142 and 143).

92. On the question whether IPS's rights were affected because, as it submits, it did not have due access to material in the file, the Court of First Instance found (paragraph 139) that, with respect to PEM's letters to the Commission of 5, 11 and 19 August 1993, the applicant did not make a written request for communication in accordance with Article 7(4)(a) of the basic regulation. The Commission was therefore not obliged to transmit them. In its letter of 5 October 1993 the applicant stated that it had seen the list of the documents sent by PEM to the Commission and that some of them were already known to it, since they were letters between itself and PEM. It had therefore limited its request for access to the Commission's confidential file to, *inter alia*, the letter of 5 August 1993 from PEM to the Commission concerning the technical work carried out by PEM in its factory at La Roche de Rame. [38] As regards that last memorandum from PEM, the Court of First Instance acknowledged (paragraph 142) that it could properly be classified as a confidential document within the meaning of Article 8 of the basic regulation, since it contained confidential information on PEM's manufacturing processes. However, it found that the Commission had not complied with its obligations concerning access to the file: to begin with, it replied with considerable delay to the applicant's legitimate requests; next, it did not provide it with a non-confidential summary of the letter in question; and finally, it had not shown that it made the necessary efforts to obtain a non-confidential version of the document. In particular, it was at the request of the applicant, not the Commission, that PEM decided to transmit the document to the applicant, on 21 May 1994. The Court of First Instance nevertheless concluded (paragraph 143) with regard to the irregularities found that IPS was able to submit its observations on the document in good time on 27 May 1994, that is to say before the definitive regulation was adopted.

93. First of all, having regard to the content of Article 7(4) of the basic regulation, I consider that, in the absence of a written request by IPS pursuant to Article 7(4)(a), the Commission was not obliged under that

38 — At paragraph 140, the Court of First Instance states that the Commission confirmed at the hearing, in reply to questions put to it, that the letters of 5, 11 and 19 August 1993 from PEM to the Commission were mere covering letters enclosing the correspondence between the applicant and PEM. In those circumstances, even supposing that the Commission was obliged to communicate those documents despite the lack of an express written request to that effect, the failure to communicate them did not, in this case, involve a breach of the applicant's procedural rights.

provision to communicate to IPS the content of PEM's letters of 5, 11 and 19 August 1993, irrespective of whether or not they were confidential in nature. In other words, the appellant's right to a fair hearing was not thereby infringed, as the Court of First Instance correctly found in paragraph 139 of the contested judgment.

94. Next, in contrast to the facts in *Al-Jubail*,[39] here the undertaking concerned was ultimately able to take cognisance in good time of the content of PEM's letters of 5, 11 and 19 August 1993, whose existence and content it was aware of, as is indicated in paragraph 139 of the contested judgment.

95. Finally, as regards the failure to communicate a non-confidential summary of the document, classified as confidential within the meaning of Article 8 of the basic regulation, which was sent by PEM to the Commission on 5 August 1993 and was finally seen by IPS on 21 May 1994 after the Commission had adopted the provisional regulation,[40] I consider that that failure on the part of the Commission cannot be regarded as having infringed IPS's right to a fair hearing, since the document was ultimately communicated to it by PEM as much as five months before the Council adopted the regulation at issue on 19 October 1994. That period was sufficient to allow IPS to defend its interests effectively.[41]

96. Consequently, the second ground of appeal is also to be rejected in its entirety.

VIII — Costs

97. Under Article 69(2) of the Rules of Procedure of the Court of Justice, which, in accordance with Article 118, also applies to the appeal procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings; under the first subparagraph of Article 69(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

39 — Cited above in footnote 35.

40 — The provisional regulation (No 892/94) was adopted on 21 April 1994.

41 — It is to be noted here that, in Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet* v *Council* [1997] ECR II-2461, at paragraph 87, the Court of First Instance held that, where, in the course of the procedure leading to the adoption of a regulation imposing a definitive duty, steps are taken to remedy a defect vitiating the adoption of the corresponding regulation imposing a provisional duty, the illegality of the provisional regulation does not render the definitive regulation illegal. Only in so far as the defect has not been remedied, and in so far as the definitive regulation refers to the provisional regulation, will the illegality of the earlier regulation render the later one illegal. However appeals, which are still pending before the Court of Justice, have been brought against that judgment (Case C-76/98 P *Ajinomoto* v *Council* and Case C-77/98 P *NutraSweet* v *Council*; OJ 1998 C 166, p. 5 and p. 6 respectively).

98. Generally, rights of appeal are available to the party who has suffered harm because of the contested decision; as a rule, such harm is considered to be suffered by the unsuccessful party, that is to say the party whose application seeking judicial protection has been dismissed, in whole or in part, or who has been wholly or partly unsuccessful in defending such an application by the opposing party. Exceptionally, the successful party also has a legal interest in bringing an appeal, where a successful outcome is possible at less disadvantage. That occurs when the decision constitutes *res judicata* against him so far as concerns the part prejudicial to him, for example where the court rejects one of two bases for his action, appeal or other means of obtaining redress.

99. In the present case, I propose that IPS's appeal should be dismissed in its entirety; it is therefore to be ordered to pay the Council's costs, in accordance with the latter's application in that regard.

100. As to the Commission, I propose the dismissal of its cross-appeal but the grant of the claim put by it in the alternative that IPS's appeal should be dismissed; the Commission should therefore bear its own costs.

101. Finally, in so far as the Chambre Syndicale and PEM failed, as explained earlier, to lodge a valid pleading, they must bear their own costs.

IX — Conclusion

102. In view of the foregoing, I propose that the Court should:

— dismiss the appeal brought by Industrie des Poudres Sphériques (IPS);

— dismiss the Commission's cross-appeal;

— order IPS to bear its own costs and pay the Council's costs;

— order the Commission to bear its own costs; and

— order the Chambre Syndicale de l'Électrométallurgie et de l'Électrochimie and Péchiney Électrométallurgique to bear their own costs.