Such measures do not cease to be regulations because it is possible to determine the number or even the identity of the persons to whom they apply 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 measures in relation to their purpose.

3. 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. Consequently, the participation of the various interested parties in the successive stages of the procedure leading to the adoption of regulations cannot lead to the conclusion that they in fact constitute individual administrative measures which may be contested by individuals under the second paragraph of Article 173 of the Treaty.

In Case 307/81

ALUSUISSE ITALIA SPA, 31 Via Vittor Pisani, Milan, represented by Giuseppe Celona and Gian Carlo Gabardini, Advocates having a right of audience before the superior courts of the Italian Republic, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe-II,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Franco Giuffrida, Adviser in the Legal Department of the Council, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad-Adenauer, Kirchberg,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Peter Gilsdorf and Antonio Marchini-Camia, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendants,

OBJECTION, at the present stage of the proceedings, of the inadmissibility of an action brought under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America

(Official Journal L 141, p. 29) and Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on o-Xylene (orthoxylene) originating in Puerto Rico and the United States of America (Official Journal L 270, p. 1) are void,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: S. Rozès
Registrar: M. Dauses, Legal Secretary

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. The applicant, Alusuisse Italia SpA [hereinafter referred to as "Alusuisse"], whose registered office is in Milan, produces phthalic anhydride for the manufacture of phthalic plasticizers and resins. The principal raw material needed for such production is orthoxylol (orthoxylene), which Alusuisse imports as an independent importer, that is to say, one which is not linked to a manufacturing or exporting undertaking, *inter alia* from the United States and Puerto Rico.

2. On 25 May 1981 the Commission adopted Regulation No 1411/81 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America (Official Journal L 141, p. 29). That regulation, which entered into force on 27 May 1981, the date of its publication in the Official Journal, was to be applicable, according to the second paragraph of Article 2 thereof, "for four months or until the adoption by the Council of definitive measures".

On 22 September 1981 the Council adopted Regulation No 2761/81 imposing a definitive anti-dumping duty on o-Xylene (orthoxylene) originating in Puerto Rico and the United States of America (Official Journal L 270, p. 1). That regulation entered into force on 25 September 1981, the date of its publication in the Official Journal.

The two regulations mentioned above, which were adopted on the basis of Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal L 339, p. 1), imposed anti-dumping duties, provisional in one case and definitive in the other, on orthoxylene falling under subheading 29.01 D I of the Common Customs Tariff and corresponding to Nimexe code 29.01-65 and which originated in Puerto Rico and the United States of America, with the exception, however, of orthoxylene exported by certain undertakings expressly named. The rate of duty was fixed in the two regulations at 14.47% of the customs value except for exports made by certain companies, which were also expressly named, for which a lower rate of duty was fixed. In addition, Council Regulation No 2761/81 determined the extent to which the amounts secured by way of provisional duty pursuant to Commission Regulation No 1411/81 fell to be definitively collected.

3. By an application received at the Court Registry on 3 December 1981 the applicant brought proceedings under the second paragraph of Article 173 of the Treaty seeking a declaration that Commission Regulation No 1411/81 and Council Regulation No 2761/81 were void.

The Council and the Commission raised an objection of inadmissibility under Article 91 of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, by order of 9 June 1982, to assign the case to the Third Chamber pursuant to Article 95 of the Rules of Procedure and to open the oral procedure concerning the objection of inadmissibility without any preparatory inquiry.

II — Conclusions of the parties

The *Council* contends that the Court should:

Declare the application inadmissible;
Order the applicant to pay the costs.

The *Commission* contends that the Court should:

Declare the application inadmissible in its entirety;
Order the applicant to pay the costs.

The *applicant* on the other hand claims that the Court should:

Primarily, dismiss the objections which have been raised;
In the alternative, reserve its decision on those objections for the final judgment;

With regard to the costs, make an award in favour of the applicant in the final judgment.

III — Submissions and arguments of the parties as to the admissibility of the application

1. The *Council* claims that the application is inadmissible in so far as it is intended to obtain a declaration that Regulation No 2761/81 is void.

According to the settled case-law of the Court, the following three conditions must be fulfilled for a natural or legal person other than a Member State or a Community institution to be able to contest a regulation pursuant to the second paragraph of Article 173 of the Treaty: The person concerned must be able to establish, first, that the measure, although in the form of a regulation, in fact constitutes a decision, at least, in so far as he is concerned, secondly, that the measure is of direct concern to him and, thirdly, that the measure is of individual concern to him. The first and third conditions are not fulfilled in the case of an independent importer such as the applicant.

With regard to the first condition, Regulation No 2761/81 displays all the characteristics of an orthodox regulation. It is of general application and is intended to be applied impersonally to objective situations of law and of fact, that is to say, to all imports into the territory of the Member States of products on which it imposes an anti-dumping duty.

The imposition of an anti-dumping duty constitutes a legislative measure inasmuch as it affects the application of the Common Customs Tariff, which itself constitutes a legislative measure. For that reason the Council laid down the requirement in Article 13 (1) of the basic regulation, Regulation No 3017/79, that the imposition of that duty should be by regulation. The fact that the contested measure specifies certain details, such as the product in question or the name of the supplier, does not diminish the general application of the measure, and thus its status as a regulation.

The Council next examines the case-law of the Court of Justice on the distinction between a regulation and a decision, in particular the judgments of 17 June 1980 (Joined Cases 789 and 790/79 *Calpak* [1980] ECR 1949) and of 26 February 1981 (Case 64/80 *Giuffrida* [1981] ECR 693). In the light of that case-law it considers that the contested measure has not only the form but also the character of a regulation for the following three reasons: First, the measure applies to all undertakings importing orthoxylene originating in Puerto Rico and the United States, that is to say a generalized and abstract category of undertakings, which is in fact indeterminate and indeterminable. Secondly, the measure introduced is not intended to apply to a specific person or to a determinable number of cases. Finally, the anti-dumping duty was imposed on the basis of an objective situation defined in relation to the purpose pursued by the regulation in question, which is to introduce measures of commercial policy intended to protect the Community industry against dumped products imported from non-member countries.

With regard to the third condition, namely that the measure must be of individual concern to the applicant, the Council claims that according to the case-law of the Court of Justice, in particular the judgment of 16 March 1978 (Case 123/77 *UNICME* [1978] ECR 845), that condition cannot be considered to be fulfilled unless the applicant proves that the contested measure concerns him by reason of characteristics which are peculiar to him or of a situation of fact which dinstinguishes him from all other persons. The only characteristic to which the applicant can point is that it falls within the category of importers of orthoxylene.

In conclusion, the Council considers that Regulation No 2761/81 is of concern to the applicant solely because the latter belongs to a category objectively defined

by specific measures applying to the product which it imports, that is to say, because of its status as an importer of orthoxylene. Any natural or legal person may pursue that activity, so that it is not of such a nature as to distinguish the applicant from all other persons.

2. The *Commission* contends that the application against it is inadmissible for the following reasons:

With regard to Regulation No 1411/81, the application is inadmissible because it is out of time. That regulation was published in the Official Journal of 27 May 1981 and entered into force on the same day. In accordance with the third paragraph of Article 173 of the Treaty, in conjunction with Article 81 (1) of the Rules of Procedure, proceedings must be instituted within two months from the 15th day after publication, to which must be added an extension on account of distance of 10 days for Italy, so that in this case the proceedings should have been instituted at the latest on 21 August 1981.

According to the applicant, the fact that Regulation No 1411/81 is closely linked to Regulation No 2761/81 means that, in bringing an action against the latter, it was also entitled to contest the lawfulness of the former. The objection may be raised, however, that, even if that argument were accepted, it would not follow that the application is admissible under Article 173, as is clearly shown by Article 184 of the Treaty. Furthermore, the question may be raised as to what interest the applicant has in challenging the Commission regulation, since the provisional anti-dumping duties imposed by that regulation will require to be refunded if the applicant is successful in challenging the Council regulation.

With regard to Regulation No 2761/81, in so far as the application is against the Commission, the latter considers that there are no grounds for an action against it since the measure in question is a Council regulation, which means that it is the latter which is ultimately responsible for the imposition of the definitive anti-dumping duties. It follows that it is only the measure adopted by the Council which is capable of having legal effects for individuals and that any irregularities committed by the Commission in the course of the procedure leading to the adoption of the Council regulation, such as the proposal submitted by the Commission or investigations carried out by it, do not constitute measures which may be challenged under Article 173.

In any case, in so far as the application concerns Regulation No 2761/81 it is inadmissible because the conditions prescribed by the second paragraph of Article 173 of the Treaty are not fulfilled. The applicant must be classified as an independent importer and thus is not affected individually by that regulation. On this point the Commission supports the arguments set out by the Council.

It adds that a measure imposing an anti-dumping duty may be of a hybrid nature inasmuch as it may constitute a regulation so far as independent importers are concerned whilst it may take on the character of a decision with regard to the producers or exporters directly and individually concerned.

Finally, the Commission states that independent importers such as the applicant are not deprived of legal protection since they may challenge the anti-dumping duty in specific cases before the national courts and raise in

the course of such proceedings the question of any irregularity in the Community regulation, on which point the Court may then be requested to give a ruling under Article 177 of the Treaty.

3. *Alusuisse* advances the following arguments in favour of the admissibility of its application:

The contested regulations are of direct and individual concern to it. That follows from the very principles governing anti-dumping measures and in particular from the procedure for their adoption. The anti-dumping regulations in fact constitute decisions involving, in economic terms, three parties: The producer charged, the user who benefits and the competing producer who is injured. The anti-dumping procedure has regard for that circumstance in so far as, on the one hand, investigations are normally instituted at the request of the persons concerned and, on the other, in addition to the complainants and the representatives of the exporting country, the exporters and importers known to the Commission to be concerned participate in the procedure. That principle is embodied in particular in Article 7 of Regulation No 3017/79, which refers in this connection to "interested parties" and to "parties directly concerned".

It follows that anti-dumping measures do not constitute legislative measures of general application addressed to an indeterminate number of persons but display, with regard to the parties entitled to participate in the procedure, such as exporters or importers who are known to be concerned, all the characteristics of an administrative measure. It must be borne in mind in that connection that a set of abstract and general rules for a specific sector or for a certain category of persons may create, expressly or by implication, a particular disadvantage for a person. In that case, although the measure retains the nature of a regulation, it is equivalent, in certain elements or in certain respects, to a decision with regard to the person whom it affects directly and individually. That is confirmed by the case-law of the Court, in particular by the judgment of 13 May 1971 (Joined Cases 41 to 44/70 *International Fruit Company* [1971] ECR 411). In that judgment the Court enunciated the concept of a "closed category", stating that a provision of a regulation applying to such a category was not "a provision of general application within the meaning of the second paragraph of Article 189 of the Treaty, but must be regarded as a conglomeration of individual decisions taken . . . under the guise of a regulation . . ."

Alusuisse emphasizes in this context that it is one of the principal importers of orthoxylol in the Community and that it obtains supplies in particular in the United States. It is thus in the position of an importer known to be concerned, the more so since it is dependent for its principal production on such imports.

With regard to the alleged delay in contesting Regulation No 1411/81, Alusuisse contends that, pursuant to a principle recognized in administrative law and also applicable within the Community legal order, a measure which does not terminate the procedure must, unless it produces a direct adverse effect on the interests protected, be contested together with the definitive measure. In

this case the Council regulation establishing the definitive duty incorporates the provisional measure of the Commission so that any defects in the latter must be challenged within the framework of the proceedings instituted against the definitive measure.

III — Oral procedure

At the sitting on 8 July 1982 oral argument was presented for Alusuisse by Giuseppe Celona and Gian Carlo Gabardini, Advocates having a right of audience before the superior courts, for the Council of the European Communities by its Adviser, Franco Giuffrida, and for the Commission of the European Communities by its Legal Adviser, Antonio Marchini-Camia.

The Advocate General delivered her opinion at the sitting on 16 September 1982.

Decision

1 By application lodged at the Court Registry on 3 December 1981 Alusuisse Italia SpA, Milan, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America (Official Journal L 141, p. 29) and Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on o-Xylene (orthoxylene) originating in Puerto Rico and the United States of America (Official Journal L 270, p. 1) were void.

2 Those regulations imposed, provisionally in one case and definitively in the other, an anti-dumping duty on orthoxylene falling under subheading 29.01 D I of the Common Customs Tariff and corresponding to Nimexe code 29.01-65, and which originated in the two abovementioned countries, with the exception, however, of orthoxylene exported by certain undertakings expressly named. The Commission regulation, which was applicable for four months or until the adoption by the Council of definitive measures, made the release for free circulation of that product subject to the provision of a security equivalent to the amount of the provisional duty. The Council regulation, on the other hand, specified *inter alia* the extent to which the amounts secured by way of provisional duty were to be definitively collected.

3 The applicant produces phthalic anhydride intended for the manufacture of phthalic plasticizers and resins. The principal raw material necessary for such production is orthoxylol (orthoxylene), which the applicant imports as an independent importer, that is to say one which is not linked to a manufacturing or exporting undertaking, *inter alia* from the United States and from Puerto Rico.

4 Since the Council and the Commission raised an objection of inadmissibility under Article 91 (1) of the Rules of Procedure, the Court decided to adjudicate on the question of the admissibility of the application for a declaration that the measures were void, without examining the substantive issues of the case.

5 The objection raised by the Council is that Council Regulation No 2761/81 is a regulation of general application which is not of individual concern to the applicant and that, under the second paragraph of Article 173 of the Treaty, the latter is not entitled to seek a declaration that a regulation is void. The Commission for its part challenges the admissibility of the application in so far as it is directed against Commission Regulation No 1411/81 on the ground that the time-limit laid down by the third paragraph of Article 173 was not met and supports the arguments of the Council with regard to the admissibility of the action brought against the Council regulation.

6 It is common ground that Commission Regulation No 1411/81 has essentially the same objective as Council Regulation No 2761/81, since the two measures impose an anti-dumping duty on the same product coming from the same non-member countries. It follows from this that if the application, in so far as it is directed against the definitive measure of the Council, is inadmissible by reason of its legislative nature as regards the applicant, the same result applies to the provisional measure of the Commission. Consequently, it is necessary to consider whether this application for a declaration that the two regulations are void is admissible under the second paragraph of Article 173 of the Treaty.

7 The second paragraph of Article 173 of the Treaty makes the admissibility of proceedings instituted by an individual for a declaration that a measure is void dependent on fulfilment of the condition that the contested measure, although in the form of a regulation, in fact constitutes a decision which is of direct and individual concern to him. The objective of that provision is in particular to prevent the community institutions, merely by choosing the

form of a regulation, from being able to exclude an application by an individual against a decision of direct and individual concern to him and thus to make clear that the choice of form may not alter the nature of a measure.

8 Nevertheless an action brought by an individual is not admissible in so far as it is directed against a regulation having general application within the meaning of the second paragraph of Article 189 of the Treaty, the test for distinguishing between a regulation and a decision, according to the settled case-law of the Court, being whether or not the measure in question has general application. It is therefore necessary to appraise the nature of the contested measures and in particular the legal effects which they are intended to produce or in fact produce.

9 In that connection it should be borne in mind that the regulations at issue have as their object the imposition of an anti-dumping duty on all imports of orthoxylene originating in the United States of America and Puerto Rico, subject to certain exemptions laid down for products exported by undertakings expressly named. Consequently, such measures 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.

10 The applicant claims in that connection that, although the contested measures were adopted in the form of regulations, they in fact constitute decisions concerning it since importers of orthoxylene who are also users of that substance form a closed category of traders of a limited number whose identity was known at the date when the regulations were adopted.

11 That argument must be rejected. As the Court has already stated, 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. That applies to independent importers of orthoxylene. Under the regulations the anti-dumping duty is imposed on persons importing the product from the countries in question solely by reference to the objective criterion that they are importers of that product. Consequently, the regulations at issue constitute, as regard such importers, measures having general application within the meaning of the second paragraph of Article 189 of the Treaty and not decisions of direct and individual concern to them.

12 In favour of the admissibility of its application the applicant also argues that the particular features of the procedure leading to the adoption of the anti-dumping regulations, in particular the participation of the various interested parties in the successive stages of that procedure, lead to the conclusion that the measures in question constitute individual administrative measures which may be contested by individuals under the second paragraph of Article 173 of the Treaty.

13 That argument must also be rejected since 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. That solution is furthermore in conformity with the system of remedies provided for by Community law since importers may contest before the national courts individual measures taken by the national authorities in application of the Community regulations.

14 For all those reasons, it must be concluded that the contested measures are regulations and not decisions within the meaning of the second paragraph of Article 173 of the Treaty, so that the application must be dismissed as inadmissible.

Costs

Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs.**

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 16 SEPTEMBER 1982 [1]

Mr President,
Members of the Court,

Alusuisse Italia SpA [hereinafter referred to as "Alusuisse"] has brought an action before the Court under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Regulation (EEC) No 1411/81 of 25 May 1981 imposing a provisional anti-dumping duty on orthoxylene (o-Xylene) originating in Puerto Rico and the United States of America and Council Regulation (EEC) No 2761/81 of 22 September 1981 imposing a definitive anti-dumping duty on the same product are void.

1. The facts are as follows:

(a) The applicant manufactures at its plant in the vicinity of Scanzorosciate, Bergamo, phtalic anhydride, an intermediate product employed in the

1 — Translated from the French.