# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)
10 July 1997 *

In Case T-212/95,

**Asociación de Fabricantes de Cemento de España (Oficemen),** an association governed by the laws of Spain, established in Madrid, represented by Jaime Folguera Crespo and Edurne Navarro Varona, of the Barcelona Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume,

applicant,

supported by

**Kingdom of Spain,** represented initially by Gloria Calvo Díaz, subsequently by Luis Pérez De Ayala Becerril, Abogados del Estado, of the Community Legal Affairs Department, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

intervener,

v

**Commission of the European Communities,** represented initially by Nicholas Kahn and Francisco Enrique González-Diaz, subsequently by Nicholas Kahn and Fernando Castillo De la Torre, of its Legal Service, acting as Agents, with an

* Language of the case: Spanish.

address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, on the one hand, for annulment of the Commission's decision to terminate *de facto* in February 1994 the anti-dumping proceeding initiated in April 1992 at the request of Oficemen, thereby refusing the protective measures requested by that association, and, on the other hand, for a declaration that, by formally maintaining the said anti-dumping procedure open without adopting measures enabling it formally to be terminated, possibly through the imposition of protective measures, the Commission has failed to act,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 4 February 1997,

gives the following

## Judgment

### The legal background

1 At the material time, the rules applicable to dumping were set out in Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or

subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1; hereinafter, 'the basic Regulation').

2 Article 5(1) of the basic Regulation provides that any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.

3 Article 7(1) provides that where, after a complaint has been lodged and consultations have been held within the Advisory Committee, it is apparent that there is sufficient evidence to justify initiating an anti-dumping proceeding, the Commission shall immediately announce the initiation of a proceeding in the *Official Journal of the European Communities* and commence an investigation, covering both dumping or subsidization and injury resulting therefrom.

4 Article 7(9) provides:

'(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 undertakings ...'.

5 Article 9, on termination of proceedings where protective measures are unnecessary, provides:

'1. If ... protective measures are unnecessary, then, where no objection is raised within the Advisory Committee ... the proceeding shall be terminated. In all other

cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

2. The Commission shall inform any representatives of the country of origin or export and the parties known to be concerned and shall announce the termination in the *Official Journal of the European Communities*, setting forth its basic conclusions and a summary of the reasons therefor.'

**Background to the dispute**

6 Oficemen is an association governed by Spanish law which represents Spanish cement producers.

7 In January 1992, Oficemen made a complaint to the Commission under Article 5(1) of the basic Regulation on the ground that imports into Spain of certain Portland cement originating in Turkey, Romania and Tunisia constituted dumping, thereby causing material injury to the Spanish cement industry. In its complaint, it requested the Commission to adopt protective measures in respect of the imports in question.

8 The Commission subsequently decided to open an anti-dumping proceeding within the meaning of Article 7 of the basic Regulation. The initiation of the proceeding was announced in the Official Journal of 22 April 1992 (OJ 1992 C 100, p. 4).

9 In the context of that proceeding, the Commission opened an investigation, in the course of which Oficemen submitted supplementary observations and took part in a number of meetings with officials of the Commission.

10 By letter dated 15 October 1993, the Commission informed Oficemen that, in its opinion, the condition set out in Article 4 of the basic Regulation as to the existence of material injury was not fulfilled and that it therefore intended to propose that the anti-dumping proceeding be terminated, in accordance with Article 9 of the basic Regulation, without the imposition of protective measures.

11 By letter dated 13 January 1994, Oficemen informed the Member of the Commission, Sir Leon Brittan, of its concern about the turn taken by the anti-dumping proceeding and of its fear that the proceeding would be terminated without any protective measures being adopted, even though the Spanish cement industry had recorded a definite decline in profits during the period in question.

12 On 1 February 1994, Sir Leon Brittan replied that the Commission would shortly adopt a reasoned decision, but did not indicate which way the decision would go.

13 On 9 February 1994, the Commission sent the Advisory Committee a proposal that the anti-dumping proceeding be terminated without the imposition of protective measures, on the ground that the imports in question had not caused the Spanish cement industry material injury within the meaning of Article 4 of the basic Regulation.

14 As objections were raised about this proposal within the Advisory Committee, the Commission submitted a report to the Council on the results of the consultations, together with a proposal that the proceeding be terminated in accordance with Article 9(1) of the basic Regulation.

15 On 7 March 1994, the Council unanimously decided to reject the Commission proposal.

16 Following a suggestion by the Spanish authorities, the Commission contacted the Turkish and Romanian authorities with a view to finding a solution acceptable to all parties concerned. Those contacts did not produce any concrete result. As Tunisia's market share was considered insignificant, the Commission did not contact the authorities of that country.

17 Having received no information from the Commission concerning the status of the proceeding since 1 February 1994, Oficemen sent a letter to the Commission on 25 July 1995 which included the following passage:

'In any event, more than three years have elapsed since the proceeding started and the Commission has still not adopted any decision. As required by Article 7(9)(a) of the [basic] Regulation, the Commission ought to have adopted a decision within one year of initiating the proceeding.

For that reason, Oficemen formally requests the Commission to act and to adopt a decision terminating the current proceeding and granting the protective measures requested. It goes without saying that Oficemen intends to avail itself of the judicial remedies open to it in the event that the Commission does not adopt a decision within two months.'

18 On 21 September 1995, the Commission replied by letter containing the following passage:

'[t]he Commission did not fail to take a decision in this case as the investigation was terminated by a decision based on the results of the case.

... In February 1994, it decided, in accordance with Article 9 of the [basic] Regulation, to terminate the proceeding after finding that protective measures were unnecessary on the ground, as stated in its decision, that the imports of the goods in question had not caused material injury to the whole or virtually the whole of the Spanish industry concerned within the meaning of Article 4 of the [basic] Regulation ... The Council did not, however, agree that the file should be closed.

Since the Council gave its decision, the Commission, having Oficemen's interests in mind, has continued to monitor the development of imports into Spain ... It continued to do so even though the twelve-month period covered by the investigation ended on 31 March 1992 and, after that date, the information relating to imports did not appear to bear out new allegations of injury. On the contrary, it confirmed the validity of the decision of the Commission, which is therefore not at present in a position to modify its initial findings, as set out in its presentation made to the Council in February 1994.

The Commission is obviously prepared to consider the possibility of initiating a new anti-dumping proceeding if there is any up-to-date information capable of bearing out the allegations that there has been dumping resulting in injury. Any new complaint would be considered in the light of the Community provisions currently in force, that is to say, in accordance with [Council] Regulation (EC) No 3283/94 [of 22 December 1994 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1)].'

19 In a letter dated 29 September 1995, Oficemen, referring to the Commission's letter of 21 September 1995, stated that it was not aware of the existence of the

decision by which the Commission had allegedly terminated the proceeding. It therefore requested the Commission to forward that decision to it.

20 On 18 October 1995, the Commission replied by a letter which included the following passage:

'Since the Council did not endorse the Commission's decision to close the file on the case, the proceeding remains open in accordance with Article 9 of the [basic] Regulation. The decision in question was moreover never published.'

**Procedure before the Court and forms of order sought by the parties**

21 Oficemen brought these proceedings by application lodged at the Registry of the Court of First Instance on 23 November 1995.

22 By order of the President of the Third Chamber (Extended Composition) of the Court of 14 June 1996, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the applicant.

23 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

24 The parties presented oral argument and answered questions put by the Court at the hearing held in open court on 4 February 1997.

25 Oficemen claims that the Court should:

— annul, pursuant to Articles 173 and 174 of the EC Treaty, the Commission's decision of February 1994, by which it gave definitive effect to its proposal that no protective measures should be taken against imports of cement originating in Turkey, Romania and Tunisia;

— declare, pursuant to Article 175 of the Treaty, that the Commission has infringed Article 7(9)(a) of the basic Regulation by failing to adopt a decision enabling the anti-dumping proceeding formally to be terminated within a reasonable period;

— order the Commission to pay the costs.

26 The Kingdom of Spain claims that the Court of First Instance should:

— grant the form of order sought by the applicant;

— order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the claim for annulment as inadmissible or, failing that, as unfounded.

— dismiss the claim for a declaration of failure to act as inadmissible or, failing that, as unfounded and, in the alternative, hold that that claim has become devoid of purpose;

— order the applicant to pay the costs.

**Events arising after proceedings were commenced**

28 On 3 May 1996, the Commission sent to the Advisory Committee a new proposal that the anti-dumping proceeding be terminated without the imposition of protective measures.

29 As objections had been raised within the Advisory Committee about this proposal, the Commission sent a report on 31 January 1997 to the Council on the results of the consultation, together with its new proposal that the proceeding be terminated in accordance with Article 9(1) of the basic Regulation.

30 The Council did not decide otherwise within one month of receiving that proposal. As a result, the proposal became definitive by virtue of Article 9(1) of the basic Regulation.

31 Commission Decision 97/169/EC of 30 January 1997 terminating the anti-dumping proceeding concerning imports into Spain of certain Portland cement originating in Rumania, Tunisia and Turkey was published in the Official Journal of 7 March 1997 (OJ 1997 L 67, p. 27).

32 By letter of 21 March 1997, addressed to the Registrar of the Court the Commission informed the Court that that decision had been published in the Official Journal. It stated that, since the claim for a declaration that the Commission had failed to act no longer had any purpose, it was no longer necessary to proceed to judgment on that claim.

33 At the invitation of the Registrar, Oficemen and the Kingdom of Spain lodged their observations on that letter on 28 and 24 April 1997 respectively.

## Admissibility of the application for annulment

*Arguments of the parties*

34 The Commission considers that the claim for annulment is inadmissible. It refers to Article 9(1) of the basic Regulation and argues that a Commission proposal that an anti-dumping proceeding be terminated without the imposition of protective measures is merely a preliminary act, subject to subsequent approval either by the Advisory Committee, if that committee agrees with the proposal, or by the Council, if the Advisory Committee does not agree with the proposal. Moreover, if the Council decides not to accept the Commission's proposal, the proceeding remains open.

35 It would follow that in a case such as this, where the Council opposed a Commission proposal to terminate an anti-dumping proceeding without the imposition of protective measures, it is simply not possible for the Commission to terminate the proceeding. Moreover, since such a proposal is a preparatory act it cannot be regarded as being a decision against which an action will lie (Case 60/81 *IBM* v *Commission* [1981] ECR 2639; Case T-64/89 *Automec* v *Commission* [1990] ECR II-367).

36 Oficemen argues that its claim for annulment relates to the Commission's decision which, by refusing the protective measures requested, terminated *de facto* the anti-dumping proceeding initiated in April 1992 at the request of Oficemen. The existence of that decision and its content are evidenced both by the Commission's letter of 21 September 1995 and the inertia shown by the defendant since February 1994.

37 As regards the letter of 21 September 1995, Oficemen points out that the Commission states therein that, in February 1994 'it decided ... to terminate the proceeding', and that information subsequently obtained 'confirms the validity of the Commission's decision'. It observes, moreover, that in that letter, the Commission states that it is 'prepared to consider the possibility of initiating a new anti-dumping proceeding'.

38 As far as the latter statement by the Commission is concerned, Oficemen notes that the basic Regulation does not make any provision for simultaneously initiating a second anti-dumping proceeding. The Commission could hardly, therefore, have proposed initiating a new proceeding if it had not considered that the first had been terminated.

39 In response to Oficemen's arguments, the Commission contends that it has cited out of context the paragraph of its letter of 21 September 1995 in which the Commission 'decided to terminate the proceeding'. Furthermore, the applicant has failed to take account of the content of the letter of 18 October 1995, which shows

clearly that the Commission's decision of February 1994 did not terminate the proceeding. The wording of those letters does not, therefore, point to the existence of a Commission decision terminating the proceeding.

40 The paragraph of the letter of 21 September 1995 according to which the Commission was 'prepared to consider the possibility of initiating a new anti-dumping proceeding' does not indicate that the (first) anti-dumping proceeding had been terminated. In fact, there is nothing in the basic Regulation to prevent a new complaint being lodged in respect of a reference period different from that under investigation in the context of an anti-dumping proceeding initiated following an (initial) complaint.

41 The Kingdom of Spain observes that, according to case-law, an action for annulment may be brought against both internal instructions of an institution and acts which, although in theory being one stage in a procedure, serve to terminate it *de facto* before the time when a definitive decision should have been taken (*IBM* v *Commission*, cited above, Case C-366/88 *France* v *Commission* [1990] ECR I-3571 and Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-289).

42 Furthermore, since the choice of form cannot change the nature of an act of an institution, the fact that an act has an unusual form does not prevent an action for annulment being brought, to the extent that the act did in fact have legal effects *vis-à-vis* third parties (Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 58).

43 The Commission's letter of 21 September 1995 had characteristics such that it was possible, in accordance with the case-law cited above, to identify an act which, although purporting in its form to constitute part of the formalities of a proceeding, amounts in fact, by virtue of its intrinsic content, to an act terminating *de facto* the investigation. Given that the Commission failed to submit any new proposal to the Council indicating its definitive intention, that act may be treated as an act conclusively terminating the proceeding.

44 The intervener further submits that the Commission is endeavouring to block Oficemen's access to the two remedies available to it. When the Commission stated in its letter of 21 September 1995 that it 'did not fail to take a decision in this case as the investigation was terminated by a decision', it was seeking to avoid the risk of a ruling that it had failed to act within the meaning of Article 175 of the Treaty. Conversely, when it changed its mind in its letter of 18 October 1995 by declaring that the proceeding 'remains open', it was seeking to protect itself from an action for annulment under Article 173 of the Treaty by arguing that there was still no definitive act against which an action might lie.

*Findings of the Court*

45 Article 173 of the Treaty makes it possible for individuals, under certain conditions, to bring an action for annulment in order that the legality of acts of the institutions may be reviewed by the Community court.

46 Before evaluating the admissibility of the application for annulment, it is first necessary to consider whether there is an act against which an application for annulment may lie.

47 It is apparent from Article 9 of the basic Regulation (quoted at paragraph 5 of this judgment) that, as regards the termination of an anti-dumping proceeding without the imposition of protective measures, the Community legislature intended to establish a decision-making mechanism based on a power shared between the Commission, on the one hand, and the Advisory Committee and the Council, on the other.

48 Thus, when the Commission considers that an anti-dumping proceeding should be terminated without the imposition of protective measures, it must submit a proposal to this effect to the Advisory Committee. If no objection is raised on that committee, the Commission's proposal becomes definitive and the proceeding is terminated. The Commission then gives notice of the termination in the Official Journal.

49 In the event that one or more members of the Advisory Committee raise an objection to the proposal and if the Commission still considers it appropriate for the anti-dumping proceeding to be terminated without the imposition of protective measures, it must submit to the Council a report on the results of the consultation together with a proposal that the proceeding be terminated. If, within one month, the Council, acting by qualified majority, has not decided otherwise, the Commission's proposal becomes definitive and the proceeding is terminated. The Commission then announces the termination in the Official Journal.

50 If, however, a qualified majority of the Council disagrees with the Commission's proposal and rejects it, the proceeding may not be terminated. In such a situation, under the decision-making mechanism prescribed by Article 9 of the basic Regulation, the case is referred back to the Commission for re-examination in the light of the position adopted by the Council.

51 In its application in this case, Oficemen is seeking annulment of 'the Commission's decision of February 1994 by which it gave definitive effect to its proposal that no protective measures should be taken against imports of cement originating in Turkey, Romania and Tunisia'.

52 In so far as the applicant means by 'the Commission's decision of February 1994' the proposal to terminate the anti-dumping proceeding which the Commission made to the Advisory Committee and to the Council in February 1994, it should

be pointed out that, under the decision-making mechanism set out in Article 9 of the basic Regulation, as described above, such a proposal is an intermediate measure, which is intended to prepare the final decision to terminate the anti-dumping proceeding.

53 According to case-law, in cases of acts or decisions drawn up in a procedure involving several stages, and particularly at the end of an internal procedure, it is only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision (see, for example, Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraph 9; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

54 It follows that the contested act as thus defined cannot be regarded as an act against which an action will lie under Article 173 of the Treaty.

55 The claim for annulment must therefore be dismissed as inadmissible.

56 At the hearing, counsel for the applicant explained, in response to a question from the Court, that the act of which Oficemen is seeking annulment is the Commission's confirmation of its initial view that the anti-dumping proceeding should be terminated without the imposition of protective measures. This was an informal decision taken at an undetermined date after the matter was referred back to the Commission on 7 March 1994 and which was not communicated to the applicant, at least not before September 1995.

57 In that respect, it should be noted that, after these proceedings were brought, the Commission sent the Advisory Committee and the Council, on 3 May 1996 and 31 January 1997 respectively, a new proposal that the anti-dumping proceeding be terminated without the imposition of protective measures. As the Council did not decide otherwise within one month of receiving that proposal, the proposal became Decision 97/169 definitively terminating the anti-dumping proceeding.

58 In the light of those circumstances, the Court considers that it is unnecessary to rule on the question whether the 'informal decision' referred to by the applicant at the hearing could, in the context of the decision-making mechanism set out in Article 9 of the basic Regulation, constitute a challengeable act.

**The claim based on failure to act**

*Arguments of the parties*

59 Oficemen raises a single plea in which it alleges that the Commission did not define its position after it was called upon to act and did not take, within a reasonable time, any of the steps which the basic Regulation requires it to take when the Council rejects its proposal that the anti-dumping proceeding be terminated without the imposition of protective measures.

60 According to the applicant, in such a situation the Commission should reconsider its opinion, continue the investigation and present a new proposal enabling the anti-dumping proceeding to be terminated. It should not be able to avoid this obligation. If it could, the Commission would be able to paralyse the proceeding and deprive the parties concerned of any protection in that it would make it impossible for them to seek review of the legality of the conduct of the institutions.

61 The Kingdom of Spain adds that, according to the basic Regulation, when the Council rejects a proposal that an anti-dumping proceeding be terminated without the imposition of protective measures, the Commission is required to submit a new proposal to the Council.

62 It points out that the Council unanimously rejected the Commission's proposal that the proceeding be terminated. It claims that the fact that an anti-dumping proceeding was initiated in 1992 and the Commission has still not adopted in 1996 a decision enabling the Council to determine what measures it deems appropriate clearly shows that the complainant is reduced to waiting for the situation to develop of itself and that it is completely unable to exercise its rights. Such a situation is the complete opposite of the one in which an institution can plead that there is no obligation on it to act.

63 For its part, the Commission considers that the claim based on failure to act is unfounded, in that it has not stopped acting since the Council rejected its proposal that the anti-dumping proceeding should be terminated.

64 In its rejoinder, the defendant points out that, on 3 May 1996, it sent the Advisory Committee a second proposal that the anti-dumping proceeding be terminated without the imposition of protective measures. As a result, and in the alternative, it contends that, since that proposal was sent, the claim alleging failure to act has become unfounded in so far as, by the applicant's reasoning, the adoption of such a preparatory act should be regarded as the definition of a position within the meaning of Article 175 of the Treaty.

*Findings of the Court*

65 It appears, and it is not contested, that, at the time when this action was brought, the claim based on failure to act was admissible. It is necessary, however, to consider whether the defining of its position by the Commission in the course of the proceedings has deprived that claim of its original purpose.

66 On 3 May 1996, that is to say after the action was brought, the Commission sent the Advisory Committee a new proposal that the anti-dumping proceeding be terminated without the imposition of protective measures.

67 Consequently, before judgment has been given, the Commission has duly defined its position in response to Oficemen's call upon it to act, within the meaning of the second paragraph of Article 175 of the Treaty.

68 In those circumstances, the Court of First Instance can only find that the claim based on failure to act no longer has any purpose, with the result that there is no longer any need to adjudicate on that claim.

**Costs**

*Costs relating to the claim for annulment*

69 Under Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleading. However, under Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared, particularly where the circumstances are exceptional.

70 Here, the claim for annulment has been declared inadmissible. However, Oficemen had brought it in the light, particularly, of the content of the letter of 21 September 1995, which was capable of suggesting that the Commission itself had decided to terminate the anti-dumping proceeding.

71 In those circumstances, the Commission will be ordered to pay not only its own costs, but also one-half of the costs incurred by Oficemen in connection with its claim for annulment. Oficemen will bear the other half of those costs.

*Costs relating to the claim based on failure to act*

72 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

73 In this case, on the date on which it was called upon to act, that is to say 25 July 1995, more than 15 months had elapsed since the Council had referred the case back to the Commission, but the Commission had not yet acted.

74 Furthermore, it was only on 3 May 1996, that is to say more than five months after the action was brought, that the Commission acted by sending a new proposal that the proceeding be terminated to the Advisory Committee.

75 In those circumstances, the Commission will be ordered to pay not only its own costs, but also the costs incurred by Oficemen in connection with the claim for failure to act.

*Costs incurred by the Kingdom of Spain*

76 Under Article 87(4) of the Rules of Procedure Member States which have intervened in the proceedings are required to bear their own costs.

77 Consequently, the Kingdom of Spain must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

**1. Dismisses the claim for annulment as inadmissible;**

2. **Declares that it is unnecessary to proceed to judgment on the claim alleging failure to act;**

3. **Orders the Commission to bear its own costs, to pay half of the costs incurred by the applicant in connection with the claim for annulment and the whole of the costs incurred by the applicant in connection with the claim alleging failure to act;**

4. **Orders the applicant to bear half of the costs which it incurred in connection with the claim for annulment;**

5. **Orders the Kingdom of Spain to bear its own costs.**

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 10 July 1997.

H. Jung B. Vesterdorf

Registrar President