JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

15 October 1998 *

In Case T-2/95,

Industrie des Poudres Sphériques, a company incorporated under French law, established in Annemasse (France), represented by Chantal Momège, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 7 Val Sainte-Croix,

applicant,

v

Council of the European Union, represented originally by Ramón Torrent and Jorge Monteiro, then by Mr Torrent and Yves Cretien, Legal Advisers, and subsequently by Mr Torrent and Antonio Tanca, of its Legal Service, acting as Agents, and Philip Bentley, Barrister of Lincoln's Inn, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: French.

supported by

Commission of the European Communities, represented by Nicholas Khan and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

Péchiney Électrométallurgie, a company incorporated under French law, established in Courbevoie (France),

and

Chambre Syndicale de l'Électrométallurgie et de l'Électrochimie, an association governed by French law, established in Paris,

represented originally by Jacques-Philippe Gunther and Hubert de Broca, of the Paris Bar, and subsequently by Mr Gunther alone, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

interveners,

APPLICATION for annulment of Council 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 (OJ 1994 L 270, p. 27) and, in the alternative, for a declaration that that regulation is unenforceable against the applicant,

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

composed of: J. Azizi, President, B. Vesterdorf, R. García-Valdecasas, R. M. Moura Ramos and M. Jaeger, Judges,

Registrars: B. Pastor, Principal Administrator, and A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 2 December 1997,

gives the following

Judgment

Facts of the case

A — *The Extramet case*

1 In July 1987 the Chambre Syndicale de l'Électrométallurgie et de l'Électrochimie (hereinafter 'the Chambre Syndicale'), an association governed by French law acting on behalf of Péchiney Électrométallurgie (hereinafter 'PEM'), a company incorporated under French law, 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.

2 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 (OJ 1984 L 201, p. 1).

3 By 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), the Commission imposed a provisional anti-dumping duty of 10.7% on the product in question.

4 After extending the validity of the provisional duty, the Council, by 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 and definitively collecting the provisional anti-dumping duty imposed on such imports (OJ 1989 L 271, p. 1), imposed duties of 21.8% and 22% on the product concerned.

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

6 The application was declared admissible by judgment of the Court of Justice of 16 May 1991 (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, hereinafter '*Extramet I*'). By judgment of 11 June 1992 (Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, hereinafter '*Extramet II*') the Court 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 (paragraphs 19 and 20).

7 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.

8 By judgment of 14 January 1993 the Cour d'Appel (Court of Appeal), Paris, upheld that decision, while finding that the evidence before it did not show that anti-competitive practices were attributable to PEM after 1984.

B — *The product*

9 Primary calcium metal is a chemical element, produced either from calcium oxide (lime) or from calcium chloride, in the form of chunks and chips.

10 It is produced in five countries, France (by PEM), China, Russia, Canada and the United States of America. Producers use two different production processes: the electrolytic process and the aluminothermic process.

11 The electrolytic process, used in China and Russia, consists of two stages: electrolysis of the calcium chloride, during which the calcium is deposited on a copper cathode, giving an alloy of copper and calcium, and distillation of the copper-calcium alloy, which allows the two metals to be separated.

12 The aluminothermic process consists of a single stage of reduction of calcium oxide with aluminium, with condensation of calcium vapour. This process, which

is comparatively flexible in operation, is used by all the Western producers because of its lower investment and operating costs.

13 In those two processes primary calcium metal is obtained, which is used without further processing by the lead, lead-calcium and ferro-alloy industries (40% of total consumption of calcium metal) and as a raw material for the production of calcium broken up into grains or granules, used by the steel industry (46% of total consumption) and for applications in high-temperature calcium treatments (about 11% of total consumption).

14 Primary calcium metal is broken up by two processes:

— mechanical cold pulverisation of the chunks or chips of primary calcium metal, used by PEM and the other Community processors to produce granulated calcium metal;

— the process involving a smelting furnace combined with equipment for granulation by atomisation of the liquid metal, all under pressure of an inert gas (argon); this is the process used by the applicant to produce powdered calcium metal in the form of granules of reactive metal.

C — *The applicant company, Industrie des Poudres Sphériques*

15 Industrie des Poudres Sphériques (hereinafter '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. It was set up in 1982, following the discovery in 1980 of a granulation process.

16 To obtain supplies of calcium metal it turned from the outset to the Community producer, initially Société Électrométallurgique du Planet and then, after that undertaking merged with PEM in 1985, PEM.

D — *Administrative procedure*

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

18 The Commission, considering that the investigation had 'resumed *de jure*', requested the applicant 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.

19 By letter of 14 August 1992 the applicant 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.

20 It confirmed the latter request by letter of 21 August 1992.

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

22 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 (OJ 1992 C 298, p. 3).

23 By letter of 18 November 1992 the Commission informed the applicant 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.

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

25 By letter of 29 July 1993 the Commission asked the applicant 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 the applicant replied that it had no new information on the point, as the position had hardly changed since its letter of 23 December 1992.

26 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 (OJ 1994 L 104, p. 5, hereinafter 'the provisional regulation'). 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.

27 On 31 May 1994 the applicant 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.

28 On 11 August 1994 the Commission informed the applicant of the principal 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.

29 On 19 October 1994 the Council, acting on a proposal from the Commission, adopted Regulation (EC) No 2557/94 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia (OJ 1994 L 270, p. 27, hereinafter 'the contested regulation'). 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.

Procedure before the Court

30 By application lodged at the Registry of the Court of First Instance on 9 January 1995, the applicant brought the present action.

31 On the same date it applied for the adoption of interim measures, seeking suspension of the operation of the contested regulation. The application was dismissed by order of the President of the Court of First Instance of 24 February 1995 (Case T-2/95 R *IPS* v *Council* [1995] ECR II-485).

32 By order of 28 April 1995 the President of the Fourth Chamber, Extended Composition, of the Court of First Instance granted the Commission leave to intervene in support of the form of order sought by the defendant.

33 By order of 28 November 1995 the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted PEM and the Chambre Syndicale leave to intervene in support of the form of order sought by the defendant, and granted a request for confidential treatment vis-à-vis those interveners of the information specified in paragraphs 9, 10, 14 and 15 of the order.

34 On 16 April 1996 PEM and the Chambre Syndicale submitted a statement in intervention. On 17 June 1996 the applicant submitted observations on the statement in intervention of PEM and the Chambre Syndicale.

35 By order of 20 November 1996 the President of the Fifth Chamber, Extended Composition, of the Court granted a further request for confidential treatment vis-à-vis those interveners of the information specified in paragraph 4 of the order.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure.

37 The parties presented oral argument and replied to the Court's questions at the hearing on 2 December 1997.

Forms of order sought by the parties

38 The applicant claims that the Court should:

— annul the contested regulation;

— in the alternative, declare it unenforceable against the applicant;

— order the Council to pay the costs.

39 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

40 The Commission, intervening, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

41 PEM and the Chambre Syndicale, intervening, contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs incurred as a result of their intervention.

Admissibility

Arguments of the parties

42 In its defence, the Council raises a plea of inadmissibility. It observes that it is settled case-law that in general an importer has no standing to seek annulment of a regulation imposing anti-dumping duties. While conceding that in certain cases the Court of Justice has held a regulation imposing an anti-dumping duty to be of individual concern to certain economic operators, who therefore had standing to bring an action for annulment, it expresses doubts as to the admissibility of the present application, since the applicant is seeking, in the alternative, a declaration that the contested regulation cannot be enforced against it. By making that alternative claim, the applicant acknowledges that individuals may rely on Article 173 of the EC Treaty only if the contested act is in the nature of a decision in relation to them.

43 A regulation imposing anti-dumping duties is not in the nature of a decision in relation to an importer, but could be so in relation to an exporter where the anti-dumping duty affects imports of his own product. In putting forward its alternative claim, the applicant assumes that the Council could have adopted a decision excluding it from the scope of the contested regulation.

44 Since that regulation could not create a derogation for the benefit of the applicant, it is not in the nature of a decision in relation to the applicant. To accept that the principal claim was admissible would amount to accepting, wrongly, the possibility of annulling a general measure at the request of an individual who was affected only in his objective capacity as an importer. The Community industry would thus be deprived of the re-establishment of fair competition with regard to all operators, because of a single importer.

45 The Commission submits that the factors constituting a situation peculiar to the applicant which differentiates it from all other economic operators, as defined in the *Extramet I* judgment, are not present in this case. It considers that the applicant has not shown that such a situation exists.

46 An independent importer's capacity to bring proceedings is not a right which is vested in a person or company, but a right which derives from a particular situation, as follows from *Extramet I*. It is thus not enough for the applicant merely to refer to that judgment. The fact that the application by the former company Extramet against Regulation No 2808/89 was held to be admissible in Case C-358/89 does not automatically mean that the application by Extramet's successor IPS is admissible in the present case.

47 The factor which distinguished the applicant's situation from that of independent importers who were applicants in other cases was that Extramet, according to the judgment in question (paragraph 17), '[encountered] difficulties ... in obtaining supplies from the sole Community producer [PEM], which, moreover, [was] its main competitor for the processed product'. That factor is missing in the present case. The decision of the French Conseil de la Concurrence of 31 March 1992 shows that no anticompetitive conduct could be attributed to PEM after 1984. The present situation appears much more as a refusal by the applicant to buy than a refusal by PEM to sell.

48 The applicant submits that the admissibility of the application cannot be challenged following the *Extramet I* judgment, which was, moreover, confirmed by the order of the President of the Court of First Instance of 24 February 1995.

Findings of the Court

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 observed (paragraph 13) that 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 certain traders who therefore have standing to bring an action for their annulment (paragraph 14). The Court considered that the applicant 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.

50 The Council's argument, based essentially on the contested measure's character as a regulation in relation to importers and the impossibility of creating a derogation in the nature of a decision in favour of an importer, must therefore be rejected.

51 The arguments put forward by the Commission in support of its plea of inadmissibility cannot be accepted either.

52 Contrary to the Commission's submission, the Court of Justice did not base the admissibility of the application in Case C-358/89 exclusively on the difficulties encountered by Extramet in obtaining supplies from the sole Community producer. In fact it based its decision on the following set of factors constituting a situation peculiar to Extramet which differentiated it, as regards the measure in question, from all other traders (paragraph 17 of *Extramet I*): 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.

53 In addition, 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.

54 Since the circumstances which justified finding the application admissible in Case C-358/89 (see paragraph 52 above) still prevail, the present application must be declared admissible.

Substance

I — *The claim for annulment of the contested regulation*

55 The applicant relies, in support of its application, on seven pleas in law, alleging, first, infringement of Articles 5 and 7(9) of Council Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation') and disre-

gard of the force of *res judicata* and the conditions for regularisation of an administrative act; second, infringement of Articles 7 and 8 of the basic regulation and breach of the right to a fair hearing; third, infringement of Articles 4(4) and 2(12) of the basic regulation and manifest error of assessment as regards like products; fourth, infringement of Article 4 of the basic regulation and manifest error of assessment of the injury to the Community industry; fifth, infringement of Article 12 of the basic regulation and manifest error of assessment; sixth, breach of Article 190 of the Treaty; and, seventh, misuse of powers.

First plea in law: infringement of Articles 5 and 7(9) of the basic regulation and disregard of res judicata and the conditions for regularisation of an administrative act

Arguments of the parties

56 According to the applicant, the *Extramet II* judgment precluded resumption of the proceeding declared unlawful, especially as the Commission intended to alter the investigation period. No provision would have prevented the Commission from opening, following a fresh complaint, a new procedure of investigation into the market in standard calcium metal relating to a more recent period. On the other hand, no provision authorised the Commission to resume the investigation as it did in the present case.

57 The applicant divides its first plea into three limbs. In the first place, the resumption of the investigation is not founded on any legal basis, since no provision for it is made in the basic regulation. In the second place, it interferes with the force of *res judicata* by having the effect, contrary to the principle of legal certainty, of regularising a proceeding annulled by the Court. In the third place, even assuming that the principle of regularisation is permissible in Community law, the conditions for a resumption of the investigation, in other words a regularisation, were not satisfied in the present case.

— First limb: infringement of Articles 5 and 7(9) of the basic regulation

58 The applicant submits, first, that the Commission's powers in conducting anti-dumping proceedings may be exercised only within the legal context strictly defined by the basic regulation and, second, that the Commission resumed the investigation in the absence of any legal basis. The basic regulation contains only provisions relating to the opening of an investigation and to its termination. As regards the opening of an investigation, the Commission never maintained that it had received a new complaint which justified opening a new proceeding. On the contrary, the notice published on 14 November 1992 expressly refers to the *Extramet II* judgment. The document submitted by PEM on 1 July 1992 was not a complaint but a submission in support of the 'resumption' of the proceeding.

59 Article 7(9)(a) of the basic regulation refers only to termination of an investigation. In the present case, the original investigation was terminated in accordance with that provision by the adoption of a definitive measure, Regulation No 2808/89, which was subsequently annulled by the *Extramet II* judgment.

60 Finally, the Commission may not rely on Article 14 of the basic regulation, which provides for review of the definitive anti-dumping duties in the event of a sufficient change of circumstances. That review procedure is possible only where definitive anti-dumping duties have been properly imposed.

61 The Council, on the basis of Article 176 of the Treaty, observes that the annulment of Regulation No 2808/89 entailed merely an obligation to reimburse the duties which had been levied under that regulation.

62 It points out that the investigation was resumed following the *Extramet II* judgment and PEM's note of 1 July 1992. In carrying out the investigation, the Commission wished to respect the rights of the Community producer which had lodged a complaint containing sufficient evidence and had updated it by means of a note in support of reopening the investigation together with a memorandum on injury. The Commission also intended to respect the rights of the other interested parties by giving them an opportunity to provide information on imports and sales of calcium metal in the Community and to submit observations.

63 In those circumstances, the Commission had legitimately resumed the investigation from the beginning, as it had not been terminated as a result of the annulment of Regulation No 2808/89. From the point of view of the interested parties, the resumption of the procedure took the form of a fresh investigation, on the basis of a complaint which had been updated by the note of 1 July 1992 and the memorandum annexed to it.

64 The Council observes, relying on Article 7(9)(a) of the basic regulation, that an investigation is concluded either by its termination or by definitive action. In the present case, there was no express act of termination. As to the first definitive action, as a result of its annulment by the Court of Justice that measure is deemed never to have existed. It was therefore legitimate to resume the investigation.

— Second limb: disregard of the force of *res judicata*

65 The applicant submits that, by resuming the investigation, the Commission disregarded the force of *res judicata* and misconstrued the scope of the *Extramet II* judgment.

66 By annulling Regulation No 2808/89, the Court of Justice did not only retroactively strike down the final stage of the anti-dumping proceeding, that is, the regulation fixing the definitive duty. It in fact annulled the entire proceeding conducted

by the Commission in the market in standard calcium metal for the period from 1 January to 31 December 1987, including the stages prior to the adoption of the definitive regulation. Since the annulment has general application, the investigation was not suspended but is deemed never to have existed. Consequently, if the Commission had wished to reopen the case, it should have initiated a fresh proceeding, following the necessary formal requirements. If dumping continued to take place after the adoption of the regulation annulled, which terminated the first investigation, the only procedurally correct solution would have been the opening of a new investigation on the basis of a new complaint.

67 In the applicant's view, if the Commission could make good its unlawful acts as they occur, proceedings might last for years with no legal certainty for undertakings.

68 The Council observes that the Commission allowed all the interested parties to make use of their rights under the same conditions as if a new proceeding had been initiated. It stresses that a notice was published in the *Official Journal of the European Communities*, questionnaires were sent to the parties concerned and a new reference period was used. The Commission carried out verification visits to the parties who took part in the investigation, the parties concerned were able to consult the non-confidential case-file, and the Commission gave a hearing to those parties who asked to be heard.

69 The new definitive duties imposed from 22 October 1994, the day following the date of publication in the Official Journal of the contested regulation, were founded on a fresh investigation relating to a period subsequent to the date of the regulation which was annulled. That was a case not of regularisation but of the rectification of dumping practices which had continued after the adoption of the regulation that was annulled.

70 The Council observes, in the alternative, that the applicant's entire argument is based on the alleged misclassification of 'resumption' of the investigation, whereas what happened, according to the Commission, was the 'initiation' of a new investigation. Moreover, the applicant has not shown how classification as the 'initiation' of an investigation would have changed its course, from the applicant's point of view (Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26, and Case C-49/88 *Al-Jubail Fertilizer and Saudi Arabian Fertilizer* v *Council* [1991] ECR I-3187, paragraphs 23 and 24).

71 PEM and the Chambre Syndicale submit that in administrative anti-dumping proceedings most of the acts which are to lead to a decision constituting the formal conclusion of the proceeding do not have legal effects and so may not be the subject of an action for annulment. That is the case in particular with the act initiating the proceeding. The acts in question, not being subject to an action for annulment, consequently cannot be annulled.

72 PEM and the Chambre Syndicale observe, in the alternative, that by virtue of the retroactive effect of judgments by which measures are annulled, the finding of unlawfulness relates back to the date on which the measure annulled took effect. In the present case, as the date when Regulation No 2808/89 took effect was 22 March 1989, the date of the entry into force of Regulation No 707/89 of 17 March 1989, any act prior to 22 March 1989 was not affected by the *Extramet II* judgment. That concerns in particular the Notice of initiation of the anti-dumping investigation of 26 January 1988. The judgment of the Court of Justice thus did not annul the proceeding initiated by that notice. Consequently, the Commission was able to resume the investigation within the framework of that proceeding (see, to that effect, Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 30).

73 The applicant submits that PEM completely misunderstands the consequences of the inadmissibility of actions brought against preparatory acts. The case-law has never prevented an undertaking from challenging the lawfulness of preparatory acts in actions for the annulment of the definitive decisions (see Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85

Ahlström and Others v *Commission* [1993] ECR I-1307 and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49). The applicant also contests PEM's assertion that the procedure prior to the act annulled continues to have effect on the ground that the annulment takes effect only from the date of adoption of the contested act. It considers that that interpretation amounts to accepting regularisations in any circumstances and depriving actions for annulment of their effect.

— Third limb: disregard of the conditions for regularisation of an administrative act

74 In the applicant's submission, the Commission disregarded the conditions in which an act that is void may be regularised. Even supposing that the principles of Community law do not preclude the possibility of regularisation, the conditions for it should have been satisfied. That was not so in the present case. First, this was not a field in which regularisation is permissible. Second, the conditions for regularisation were disregarded.

75 Regularisation was not possible in the present case because the Court of Justice annulled Regulation No 2808/89 not for formal and procedural reasons but on the ground of errors in the assessment of the injury to the Community industry. It was thus a case of annulment for substantive error of assessment of one of the basic conditions for the adoption of anti-dumping duties.

76 Procedural or formal errors can indeed be regularised. Regularisation following an infringement of substantive rules, on the other hand, can scarcely be permitted. In the present case the Court of Justice did not consider in its judgment the other pleas in law put forward by the applicant, although they related to the regulation's other substantive conditions, in particular the lack of similarity of the products. In

those circumstances no one, not even the Commission, is entitled to say what the Court's decision would have been on the other pleas.

77 The Commission further disregarded the conditions for regularisation, since it altered the investigation period, which ran from 1 July 1991 to 31 October 1992 following the resumption of the investigation, whereas it originally covered the period from 1 January to 31 December 1987.

78 The applicant considers that if the aim was to impose new duties by taking a different reference period, a new proceeding was necessary.

79 It contests the argument of the Council, PEM and the Chambre Syndicale that the procedural irregularity had no effect, so that it does not justify annulment. The fact that the Commission resumed the investigation instead of opening a new one did indeed affect the applicant's situation. It is not possible to take refuge in the fact that the Commission proceeded in the same way as if a new proceeding had been opened.

80 It is thus incorrect to submit that the procedural route of resuming the investigation did not adversely affect the applicant. The initiation of a new procedure would have been subject to the lodging of a complaint. A complaint could have been lodged only by PEM, the sole Community producer. PEM did not do so. At the material time the French Conseil de la Concurrence had just ruled on 31 March 1992 that PEM had abused a dominant position, and appeals against that decision were pending, in the context of which the applicant submitted that PEM had abused its dominant position by lodging an anti-dumping complaint.

81 Consequently, it would have been particularly ill-advised, when the first anti-dumping proceeding had just been concluded by a judgment of the Court of Justice annulling the definitive regulation, for PEM immediately to lodge a new complaint, thus providing the Paris Cour d'Appel with evidence in support of the applicant's arguments.

82 The Council observes that what is concerned is not the regularisation of the duties which were annulled but the imposition of new duties following the entry into force of the contested regulation. It does not accept the applicant's argument that the Court of Justice did not annul Regulation No 2808/89 for formal and procedural reasons. In its view, it is clear from paragraphs 20 and 21 of the *Extramet II* judgment that the error was one of form, not of substance. Even if there was a breach of a substantive rule, the Commission resumed the investigation from the outset, and was therefore able to impose new anti-dumping duties.

83 On this point, the Council notes that the Court did not annul the initiation of the proceeding or the opening of the investigation, but only the regulation adopted by the Council in the context of the proceeding.

84 PEM and the Chambre Syndicale submit that under Article 176 of the Treaty the institution concerned is obliged to remove the legal effects of the measure annulled. In the present case, that requirement was satisfied inasmuch as, following the judgment of the Court of Justice, the definitive and provisional anti-dumping duties which had been levied were reimbursed pursuant to Article 16 of the basic regulation.

85 PEM and the Chambre Syndicale submit, citing *Asteris and Others*, that the institution which adopted the act annulled may not content itself with eliminating the past consequences of the unlawful act. It must take account of the annulling judgment in its future conduct by ensuring that the unlawfulness found to exist by the Community judicature does not appear in the act which is to take the place of the

act annulled. In the present case, by examining in depth the question of the causal link between the existence of dumping and the injury, the competent institutions ensured that the Court's judgment was fully complied with.

86 A procedural irregularity is a ground for annulment only if in the absence of that irregularity the contested decision might have been different in content (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47, and Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375, paragraph 28). In the present case, the fact that the Commission continued the investigation in the framework of the proceeding initiated on 26 January 1988, instead of opening a new proceeding, had no effect on the content of the competent institutions' final decision, as the applicant was placed in the same or even a better position than if the Commission had initiated a new proceeding.

Findings of the Court

87 It is apparent from the basic regulation that an anti-dumping proceeding consists of several stages, one of which is the investigation. In the framework of one proceeding, there may be one or more investigations.

88 Under Article 7(9)(b) of the basic regulation, a proceeding is to be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings in accordance with Article 9 of the basic regulation, or by the expiry or repeal of such duties, or else by the termination of undertakings in accordance with Articles 14 or 15 of the basic regulation.

89 An investigation which has been opened is concluded only if definitive measures are adopted or if the investigation is terminated in accordance with Article 7(9)(a) of the basic regulation, without the proceeding thereby ceasing to exist.

90 While the proceeding continues to exist, claims for reimbursement may be made under Article 16 of the basic regulation, and the investigation may be reopened in order to review the definitive measures.

91 Contrary to the applicant's submission, the absence in the basic regulation of specific provisions on the legal consequences of a judgment annulling a measure cannot be interpreted as excluding any possibility for the institutions to resume both the investigation and the proceeding in the context of which the definitive measures annulled were adopted. Under Article 176 of the Treaty, it is for the institution concerned to draw the appropriate consequences of an annulling judgment. In those circumstances, the annulment of an act concluding an administrative proceeding which comprises several stages does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment (see, to that effect, *Asteris and Others*, paragraph 30, and Case C-331/88 *R* v *Minister for Agriculture, Fisheries and Food and Others, ex parte Fedesa and Others* [1990] ECR I-4023, paragraph 34; Case T-38/89 *Hochbaum* v *Commission* [1990] ECR II-43, paragraph 13, and Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, paragraph 79).

92 In the light of those principles, the argument that the annulment of a regulation imposing anti-dumping duties entails, as a necessary consequence, the annulment of the entire administrative procedure which has led up to it — the applicant's principal submission — is wrong in law.

93 To assess whether the applicant's plea is well founded, the consequences of the unlawfulness found by the Court of Justice in the *Extramet II* judgment must be determined. It must be recalled here that, in order to comply with the annulling

judgment and implement it fully, the institution is required to have regard, under Article 176 of the Treaty, not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis (*Asteris and Others*, paragraph 27).

94 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. The Court concluded therefrom that the institutions had not followed the proper procedure in determining the injury (paragraph 19). 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.

95 It follows 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. However, since the Commission decided to conduct a new investigation relating to a different reference period, the question arises whether the conditions deriving from the basic regulation were complied with in the present case.

96 It should be recalled, to begin with, that the institutions have a wide discretion when deciding the period to be taken into account for the purpose of determining injury in an anti-dumping proceeding (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).

97 It follows from Article 7(1) of the basic regulation that the existence of evidence to show that there is dumping causing injury to the Community industry is the necessary and sufficient material condition for Community action on dumping, in particular the opening of an investigation.

98 In the present case, there was no evidence to suggest to the Commission that dumping had ceased or that the Community industry was no longer suffering injury. On the contrary, the Commission had received a note from PEM in support of the reopening of the investigation and a memorandum on the assessment of the injury to the Community industry. In its memorandum of 1 July 1992, PEM updated the information in its complaint of July 1987 by providing a detailed analysis of the various factors justifying the imposition of anti-dumping measures, namely the normal value, export price, comparison of prices, dumping margin and injury, for the period from 1987 to December 1991, in other words the most recent period for which figures were available.

99 In those circumstances, 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.

100 The applicant's plea that by resuming the investigation the Commission had acted with no legal basis, disregarded the force of *res judicata*, misconstrued the scope of the Court's judgment and in any event infringed the conditions for regularisation of administrative acts is therefore unfounded.

101 Moreover, it should be observed that the change in the investigation period did not affect IPS's rights derived from the initiation of the proceeding in 1989. The Commission informed IPS of its intention to resume the investigation and, on 17 July 1992, invited it to submit observations on the question of injury. The Commission then communicated to IPS, on 14 October 1992, the memorandum on injury filed by PEM and, after consulting the advisory committee, announced that the proceeding would be continued in the notice published in the *Official Journal* on 14 November 1992, in which it specified the product and the countries concerned, summarised the information received, and stated that any relevant information should be communicated to it. It officially informed the exporters and importers known to be concerned and also fixed the time-limit within which interested parties could make their views known in writing and ask to be heard orally. Finally, it is clear from recitals 4 to 7 of the provisional regulation that the investigation concerned both dumping and injury and that the investigation covered the period from 1 July 1991 to 31 October 1992.

102 Consequently, the first plea in law must be rejected.

Second plea in law: infringement of Articles 7 and 8 of the basic regulation

103 The applicant divides the second plea into three limbs. The first alleges breach of the right to a fair hearing, in that the memorandum on injury filed by PEM on 1 July 1992 was not communicated to the applicant until 14 October 1992. The second limb alleges infringement of Article 7(4) of the basic regulation and failure to comply with Article 8 of that regulation, in that the Commission did not forward to the applicant certain documents produced by PEM. The third limb of the plea alleges infringement of Article 7(4) of the basic regulation and of the right to a fair hearing, in that the Commission refused to communicate to the applicant certain essential information which was necessary for it to be able usefully to submit observations.

First limb: Breach of the right to a fair hearing, in connection with the belated communication of the memorandum filed by PEM on 1 July 1992

— Arguments of the parties

104 The applicant observes that between 10 July 1992, the date on which it was informed that the investigation was being resumed, and 18 November 1992, the date on which that statement was confirmed to it following publication of a notice to that effect in the Official Journal, three months elapsed during which the Commission failed to respect its right to a fair hearing. It learnt indirectly, on 10 July 1992, of the existence of the memorandum on injury submitted by PEM on 1 July 1992. It was nevertheless invited to submit observations on the question of injury by 17 August 1992 without the memorandum being communicated to it. It was eventually sent that document only on 14 October 1992, that is, after submitting its own observations.

105 The question which arises is not whether the 'resumption' of an investigation requires the parties to be given an opportunity to state their case. According to the applicant, if the view put forward by the Council, PEM and the Chambre Syndicale that the investigation opened in 1989 had not been terminated was correct, it must logically have followed that the stage prior to the opening of the investigation no longer had any object. The parties were therefore in the second stage referred to in Article 7 of the basic regulation. In those circumstances the parties should, from the resumption of the investigation, have been given an opportunity to state their case.

106 The Council observes that by letter of 17 July 1992, two months before publication of the notice in the Official Journal, the Commission had invited the applicant to make any observations it had on the question of injury caused by imports of the product in question, and the applicant had replied by letter of 14 August 1992. It further notes that the applicant does not submit that it was unable to formulate its observations on PEM's memorandum of 1 July 1992. It recalls that the applicant submitted its observations by letter to the Commission on 23 December 1992.

107 The question whether the Commission should continue with an investigation is not one on which the parties must be given an opportunity to state their case, since the purpose of an investigation is to determine whether the conditions for adopting anti-dumping measures are fulfilled. It follows from the case-law (Case 60/81 *IBM* v *Commission* [1981] ECR 2639) that the resumption of an investigation is not an act against which an action may be brought, since it does not affect the positions of the parties concerned.

108 PEM and the Chambre Syndicale submit that it was by putting forward its own interpretation, in particular on the question of the causal link, that the applicant might have hoped to avoid the investigation being resumed. Despite the express invitation in the Commission's letter of 17 July 1992, the applicant always refused to comment on the question of injury before publication on 14 November 1992 of the notice announcing the resumption of the investigation. It thus waived the opportunity to oppose the resumption. The failure to communicate PEM's memorandum of 1 July 1992 thus could not constitute a breach of the applicant's right to a fair hearing.

— Findings of the Court

109 The Commission's letter of 17 July 1992 fell into two parts. First, it informed the applicant that, following the *Extramet II* judgment annulling the definitive regulation, No 2808/89, the investigation was resumed *de jure* and, second, it invited the applicant to submit its observations on the question of the injury suffered by the Community industry.

110 As regards the first point, the applicant was able to contest the Commission's interpretation, in its letters of 14 and 21 August 1992. As the applicant acknowledged at the hearing in reply to a question from the Court, knowledge of the content of PEM's memorandum of 1 July 1992, which was of a highly technical nature, was not essential and lack of such knowledge did not prevent it from putting forward its point of view on the question whether the Commission was

entitled to resume the investigation. The transmission of PEM's memorandum on 14 October 1992 therefore did not constitute a breach of the applicant's procedural rights.

111 As regards the second point in the letter of 17 July 1992, the applicant was in a position, from 17 July 1992 at least, and in any event from 14 October 1992, the date on which it received PEM's memorandum of 1 July 1992, in other words, a month before the publication on 14 November 1992 of the notice relating to the anti-dumping proceeding, to put forward its point of view on whether the substantive conditions justifying resumption of the investigation were satisfied, which it did first on 23 December 1992 and then throughout the administrative procedure until consultation of the advisory committee.

112 Consequently, the applicant's procedural rights were not infringed by the transmission on 14 October 1992 of the memorandum filed by PEM on 1 July 1992.

113 Furthermore, it does not appear from the documents in the case that the applicant 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. In the absence of such a request made in accordance with Article 7(4)(a) of the basic regulation, the Commission had no obligation under that provision to bring the content of the letter to the attention of the applicant.

114 The first limb of the plea must therefore be rejected.

Second limb: infringement of Article 7(4) of the basic regulation, in that the Commission failed to forward to the applicant certain documents produced by PEM, and of Article 8 of the basic regulation

— Arguments of the parties

115 The applicant submits that the Commission incorrectly assessed the confidential nature of certain documents.

116 As a result of that error, it wrongly refused to communicate the following documents:

— a letter from PEM to the Commission of 19 August 1993, to which were annexed a letter of 19 August 1993 from PEM to its lawyer, Mr Rambaud, a report of the visit by PEM's representative, Mr Plasse, to the applicant's factory on 17 August 1993, countersigned by the chairman of the applicant company, and five letters exchanged between PEM and the applicant from 10 to 17 August 1993;

— a letter from PEM to the Commission of 11 August 1993, to which was annexed a letter from the applicant to PEM of 4 August 1993;

— a letter from PEM to the Commission of 5 August 1993, to which were annexed 13 letters exchanged between PEM and the applicant from 26 April to 4 August 1993;

— the memorandum on the technical work carried out at PEM's factory at La Roche de Rame annexed to the letter from PEM to the Commission of 5 August 1993.

117 All those documents were produced by PEM in the course of the investigation, without the applicant being informed thereof at any time and without the conditions laid down by Article 8(2) and (3) of the basic regulation being fulfilled. It was not until 29 September 1993 that it finally learnt that a number of confidential documents had been included in the case-file. It thereupon asked on several occasions for those documents to be communicated.

118 It stresses that, contrary to the rule set out in Article 8(2)(b) of the basic regulation, no non-confidential summary was annexed to those documents, in particular the letter from PEM to the Commission of 5 August 1993 on the technical work carried out at its La Roche de Rame factory, the PEM internal memoranda and the letter of 19 August 1993 from PEM to Mr Rambaud.

119 With respect in particular to the letter of 5 August 1993, its five introductory lines could not be regarded as a non-confidential summary within the meaning of the basic regulation, when the document concerned was a technical memorandum of 18 pages.

120 In any event, even supposing that the technical memorandum or certain parts of it were not capable of being summarised in a non-confidential manner, respect for the right to a fair hearing would have required a list of the annexes supplied by PEM to the Commission to be appended to that letter, with the comment 'confidential, not transmitted'.

121 Moreover, the communication of that technical memorandum to the applicant was the result of the latter's persistence, and did not comply with any of the criteria laid down, whether with respect to date, author, or extent.

122 First, it was only after numerous complaints both to the Commission and to PEM and its lawyer that the applicant eventually received the technical memorandum on 21 May 1994, the date of expiry of the time-limit for it to submit observations on the provisional regulation. The applicant then had to protest energetically to obtain from the Commission an additional period of a few days, which is why its statement was submitted on 27 May 1994.

123 As regards the identity of the sender, the applicant observes that although the obligation to communicate was on the Commission, it was eventually PEM which, despite its lawyer's refusal, agreed to send it the document. The Commission thus failed altogether to carry out its duty to make an objective assessment of whether or not the documents were confidential.

124 With respect, finally, to content, the applicant submits that three highly confidential items were not communicated to it: the plan of the factory's furnace, correspondence concerning cored wire and an invoice from a local workman.

125 The applicant considers that communication of the technical memorandum was essential in the context of the case, since it made it possible to assess whether PEM had made genuine attempts to supply it.

126 The Council observes that the applicant knew of the existence of the documents, since it produced a list of them in annex 53 to its application, a list which the Commission had communicated to it.

127 With access to the non-confidential file, the applicant had sufficient information on the content of the documents to be able to make use of its procedural rights. The technical memorandum of 5 August 1993 was communicated to the applicant on

21 May 1994, with the exception of three highly confidential items, namely the plan of the furnace at the La Roche de Rame factory, the correspondence on cored wire and an invoice from a local workman, which it was not possible to summarise in a non-confidential manner. Moreover, the applicant commented on the technical memorandum in its statement of 27 May 1994, in connection with its observations on the regulation imposing provisional duties.

128 In any case, the applicant does not contest the confidential nature of the documents as against exporters and the other importers.

129 PEM and the Chambre Syndicale endorse the Council's arguments.

— Findings of the Court

130 The applicant complains that the Commission, first, wrongly classified a number of documents as confidential, at least with respect to the applicant, second, failed to communicate to it certain items in the case-file, and, with respect to the conditions of access to the case-file, delayed in communicating to it certain documents from the confidential file and failed to forward to it a non-confidential version or summary of some of those documents.

131 Those three complaints relate essentially to the four documents, listed in the schedule of confidential documents which the Commission sent to the applicant, mentioned in paragraph 116 above.

132 The applicant does not claim that those documents were not confidential vis-à-vis third parties. It merely asserts that they were not confidential vis-à-vis itself.

133 With respect to the non-communication or belated communication of certain documents and the lack of a non-confidential version of the documents regarded as confidential, a distinction must be drawn between on the one hand those mentioned in the list sent by the Commission to the applicant of which the applicant was aware, and on the other, those mentioned in the lists sent to the applicant but of which it was not aware.

134 The applicant knew of the following documents: the report of Mr Plasse's visit to the applicant of 17 August 1993, the five letters exchanged between PEM and the applicant from 10 to 17 August 1993 which were annexed to PEM's letter to the Commission of 19 August 1993, the letter from the applicant to PEM of 4 August 1993 annexed to PEM's letter to the Commission on 11 August 1993, the 13 letters annexed to PEM's letter to the Commission of 5 August 1993, and the letter from the applicant to PEM of 19 November 1992.

135 As the Commission had classified them as confidential and communicated a list of them to the applicant, and in view of the fact that the applicant had at its disposal the originals or copies of the letters, the Commission was not obliged either to send copies of those documents or to prepare a non-confidential version, at least as regards the applicant. By providing a list of the letters between PEM and the applicant which PEM had produced to the Commission, the latter put the applicant in a position to put forward its views effectively and make full use of its procedural rights.

136 As regards the documents of which the applicant was not aware, namely the letter of 19 August 1993 from PEM to its lawyer Mr Rambaud, the covering letters from PEM to the Commission of 5, 11 and 19 August 1993 and PEM's letter of 5 August 1993 on the technical work which had been carried out at its La Roche de Rame factory, the Commission was required under Article 8(4) of the basic regula-

tion to ask PEM for a non-confidential version, unless it was not possible to produce a summary of that kind.

137 Nevertheless, the failure to communicate non-confidential summaries would have been capable of constituting a breach of procedural rights justifying annulment of the contested regulation only if the applicant did not have sufficient knowledge of the essential content of the document or documents in question and as a result was unable properly to express its point of view as to their validity or relevance.

138 That was not the case here.

139 With respect in particular 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 those documents were 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 the following three items: the letter from PEM to Mr Rambaud of 19 August 1993, the report of the visit by Mr Plasse to the applicant of 17 August 1993, and 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.

140 Furthermore, the Commission confirmed at the hearing, in reply to questions from the Court, 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.

141 As regards PEM's letter of 19 August 1993 to its lawyer, the applicant itself acknowledged at the hearing that it was manifestly confidential in the light of the judgment of the Court of Justice in Case 155/79 *AM&SEurope* v *Commission* [1982] ECR 1575 (paragraphs 21 to 23, 25 and 28) on the protection of communications between a client and his lawyer.

142 As to PEM's memorandum of 5 August 1993 on the technical work carried out at PEM's La Roche de Rame plant, that 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, in that respect, it is clear that the Commission did not comply with its obligations concerning access to the case-file. To begin with, it replied with considerable delay to the applicant's legitimate requests. Next, it did not provide a real non-confidential summary of the letter in question. Finally, it has not shown that it made the necessary efforts to obtain a non-confidential version of the document in question. In the end 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.

143 Nevertheless, despite all these irregularities, the applicant was able to submit its observations on the document in question in good time on 27 May 1994, that is, before the contested regulation was adopted. In those circumstances, the irregularities in question did not prevent the applicant from expressing its point of view on the validity or relevance of the document.

144 As regards the three confidential items in PEM's technical memorandum of 5 August 1993 which were neither communicated to the applicant nor summarised for its benefit, namely the plan of the furnace of PEM's factory, correspondence concerning cored wire and an invoice from a local workman, it must be observed that the applicant does not dispute their confidential nature, nor does it dispute the Commission's assertion that it was impossible to prepare a non-confidential summary. Finally, the applicant does not claim that it was not in a position to express its views with respect to the technical memorandum because of the failure to communicate the three confidential items.

145 In those circumstances, the second limb of the plea must be rejected.

Third limb: infringement of Article 7(4) of the basic regulation and breach of the right to a fair hearing, in that the Commission refused to communicate to the applicant information which was essential for it to be able effectively to make observations

— Arguments of the parties

146 The applicant submits that it was not in a position to discuss certain factors which were necessary to justify the imposition of the contested duties. Throughout the investigation it disputed a number of factors on the basis of which the Commission had imposed anti-dumping duties, in particular the choice of the United States as reference country and the under-use of PEM's production capacity, without ever having at its disposal the information on which the Commission based its decision. The applicant considers that that constituted a breach of its procedural rights even though it was able formally to express its point of view on the disputed points of the case-file.

147 The applicant had on several occasions asked the Commission to explain which documents it had taken as the basis for treating the United States as reference country, as there was nothing in the case-file. In that respect it criticises the Commission not for denying it access to the file but for failing to provide it with information justifying the choice of the United States as reference country. Such information was all the more important in that, by taking the American prices as the basis of calculation, the Commission had arrived at excessive margins and anti-dumping duties which could only strengthen the monopoly position of the Community producer. Even during the first investigation the applicant had challenged the choice of country and requested that the constructed value of calcium metal be used.

148 The applicant submits that the Commission could have either given it a list of the American producer's customers, so as to enable it to verify what type of product that producer was selling, or informed it of the volume of its sales of the unprocessed product compared to sales of cored wire. The latter information would not in itself have raised any problem of confidentiality and would have enabled the applicant to verify whether, as the Commission claimed, the American market could be chosen as the reference market.

149 The applicant further asserts that during the investigation it disputed the rate of utilisation of production capacity by PEM, which according to that undertaking had stabilised at slightly over 50%. On this point, it learnt during the investigation that in fact some customers had been unable to obtain supplies from PEM.

150 The applicant considers that the Council cannot criticise it for not producing figures to contradict the rate of 50% determined by the Commission. It was for the Commission to provide it with information enabling it to verify that it had carried out a correct assessment of the facts.

151 The Commission had provided no information at all on the alleged efforts and investments made by PEM in attempting to supply the applicant. The latter therefore does not see how the Commission was able itself to verify that PEM had produced sufficient evidence of its investment in equipment, in view of the technical nature of that information, which was thus outside its purview.

152 The Council submits that the correspondence between the applicant's lawyer and the Commission between 12 August 1993 and 22 August 1994 shows that the applicant did actually discuss the points mentioned by it.

153 It observes that the Commission has to communicate only the information requested by an interested party, and only if it is relevant to the defence of its interests and if the request can be granted without infringing the principle of confidentiality. In any event, the applicant did in fact have an opportunity to state its case on the matters relevant to the defence of its interests.

154 On the question of the reference country, PEM and the Chambre Syndicale note that Article 8 of the basic regulation, on confidentiality of information, applies also to information provided by the undertakings of the reference country. Information used for determination of the normal value is clearly of an essentially confidential nature.

— Findings of the Court

155 It must be ascertained whether the applicant was given sufficiently detailed information on the facts and considerations on the basis of which it was intended to propose that definitive measures should be imposed on imports of calcium metal originating in China and Russia.

156 The Commission's non-confidential file was consulted by the applicant on five occasions, namely on 27 April 1993, 4 October 1993, 17 May 1994, 8 July 1994 and 26 July 1994.

157 The Commission then, by letter of 11 August 1994 sent pursuant to Article 7(4)(b) and (c) of the basic regulation, communicated to the applicant's lawyer the principal facts and considerations on the basis of which it was intended to propose that definitive anti-dumping measures be imposed on imports of calcium metal originating in China and Russia.

158 As regards the choice of the United States as reference country, the Commission explained in detail, in recitals 12 to 18 of the provisional regulation, the reasons why it considered that the choice of the United States was appropriate and not unreasonable within the meaning of Article 2(5) of the basic regulation.

159 Recital 15 of the contested regulation states that the institutions considered the criticism by the applicant of the choice of reference country in terms of whether the sales of the United States producer used were representative and whether the products were similar.

160 In those circumstances, the applicant was given sufficient information by the Commission with respect to the criteria used to select the United States as reference country.

161 The only criticism which could be made of the Commission would be that it did not provide the applicant with the evidence to substantiate the view that the sales of calcium metal on the domestic market by the United States producer used for calculation of the normal value were representative.

162 However, the volume of sales by that producer on its domestic market constitutes confidential information, as is not contested by the applicant. The Commission was therefore not obliged to communicate it to the applicant.

163 Nor could the Commission have recourse to the other two methods of communication referred to by the applicant (see paragraph 148 above), since it had never suggested them before.

164 Moreover, communication to the applicant of the list of the United States producer's customers, in order to enable it to ascertain what kind of products are sold by it, would involve the communication of confidential information, as the applicant itself acknowledges.

165 In addition, the applicant has not shown that communication of the volume of sales of the unprocessed product by the American producer compared to sales of cored wire would not have informed it, indirectly, of that producer's volume of domestic sales of calcium metal.

166 Finally, it has not shown how the failure to disclose that information could have affected its opportunity to defend its interests or the outcome of the procedure, especially since, as the Council rightly points out, it never put forward an alternative proposal to the choice of the United States as reference country.

167 The complaint relating to the choice of the United States as reference country must therefore be rejected.

168 As regards the Commission's failure to communicate the information that would have enabled the applicant to ascertain whether the assessment of PEM's rate of utilisation of production capacity was correct, the provisional regulation gave the following details (recitals 29 to 31):

— as from 1989, the Community producer invested in new furnaces and slightly increased its production capacity (index 103 in 1990, 107 in 1991 and 111 in 1992, against 100 in 1989);

— production was stable: index 88 in 1990, 94 in 1991 and 101 in 1992, against 100 in 1989;

— the rate of capacity utilisation reflected the benefit derived from the imposition of anti-dumping duties in 1989; then it stabilised at a lower level, slightly above 50%.

169 In the contested regulation (recital 20), the Council states that it considered the doubts expressed by the applicant and the Commission's findings, and concluded that PEM's rate of capacity utilisation remained low, fluctuating between approximately 50% and 60% during the period under consideration.

170 It follows that the Commission explained the parameters it used to reach the conclusion that the rate of capacity utilisation of PEM during the investigation period, in other words the ratio of actual production to PEM's production capacity, fluctuated between 50% and 60%. It also appears to have re-examined the question when, after the adoption of the provisional regulation, the assertion was made, without any evidence, that some customers could not be supplied by PEM.

171 In those circumstances, the applicant's complaint that the Commission did not provide it with any information to enable it to ascertain whether the assessment of PEM's rate of capacity utilisation was well founded must be rejected.

172 As regards the documents on which the abovementioned calculations were based, the Commission was not obliged to give the applicant access to them under Article 8 of the basic regulation, since they were of a confidential nature, as the applicant does not contest, and a non-confidential summary of the information was not feasible.

173 Moreover, the applicant has not established how the failure to disclose those documents could have affected its opportunity to defend its interests or the outcome of the procedure, especially as it never produced any evidence to show that the Commission's calculations were incorrect.

174 The complaint alleging failure to communicate information on the efforts and investments made by PEM in an attempt to supply the applicant must also be rejected for the reasons set out in paragraphs 142 to 144 in connection with the second limb of the plea.

175 With respect to the question whether the applicant was in a position to express an opinion on the facts and considerations on the basis of which it was intended to propose that definitive measures should be imposed on imports of calcium metal originating in China and Russia, it must be recalled that the applicant asked to be heard, in accordance with Article 7(5) of the basic regulation. That hearing took place on 4 May 1993.

176 Furthermore, the applicant communicated its views to the Commission throughout the investigation, as may be seen from the chronology of the correspondence between the applicant's lawyer and the Commission, as summarised by the Council:

— letter of 31 May 1994 (Annex 40 to the application): the applicant communicates its non-confidential observations on the provisional regulation; in this document it contests the choice of the United States as reference country, the Community producer's rate of capacity utilisation of 50%, the purpose of the investment by PEM and the criterion of 96% purity adopted by the Commission; the Commission replied by letter of 14 June 1994;

— letter of 11 July 1994 (Annex 42 to the application): the applicant replies to the Commission's letter of 14 June 1994, confirming the criticisms expressed in its letter of 31 May 1994;

— letter of 22 August 1994 (Annex 62 to the application): the applicant comments on the letter of 11 August 1994 in which the Commission set out the principal facts and considerations on the basis of which it was intended to propose that definitive measures be imposed; the applicant's remarks relate *inter alia* to the

choice of reference country, the rate of capacity utilisation of PEM, the degree of purity of the calcium and the efforts made by PEM to supply a product in conformity therewith.

177 It is thus apparent that the applicant had ample opportunity to express its views on the choice of reference country, the determination of the rate of utilisation of production capacity in PEM's factory, and the information on the investments made by PEM with a view to supplying the applicant.

178 Consequently, the third limb of the plea must also be rejected.

179 The plea in law must therefore be rejected in its entirety.

Third plea in law: infringement of Articles 4(4) and 2(12) of the basic regulation and manifest error of assessment

— Arguments of the parties

180 The applicant submits that the Council and the Commission were wrong to conclude that calcium metal originating in China and Russia, on the one hand, and that produced by PEM, on the other, are interchangeable in their applications and are thus like products within the meaning of Article 2(12) of the basic regulation. The concept of likeness is equivalent to that of interchangeability. Whether the products in question are alike must therefore be assessed by reference to their physical and technical characteristics and their applications.

181 According to the applicant, standard calcium originating in China or Russia and that produced by PEM do not have the same physical characteristics. The former comes in the form of turnings (or chips) which are shiny and homogeneous, whereas the latter is calcium in irregular chunks, of fibrous and porous appearance and always has a dull surface.

182 The technical characteristics of the products are radically different. Chemical analyses of the aluminium and magnesium content show that the products are not the same. Community calcium has a much higher oxygen content than calcium of Chinese or Russian origin. It follows from the different oxygen contents that the oxidation level of PEM's calcium is four to five times higher.

183 It is because of its high oxidation compared to calcium from other world producers that PEM's calcium cannot be used by the applicant. The excess oxygen level causes lime to be deposited in the furnaces, which blocks the applicant's equipment. Moreover, PEM itself acknowledges that its calcium contains a much higher level of oxygen.

184 In the applicant's opinion, that characteristic of PEM's calcium is fundamental, all the more so because, in the case of an industrial product intended for the manufacture of a derived product as opposed to a product intended for the final consumer, it determines the conditions of use of the product and has a considerable effect on the production process and costs. The economic effect of the physical difference in oxygen content is considerable.

185 PEM's argument that the difference between the two products derives not from the calcium itself but from the specific process used by the applicant is unacceptable for reasons of both fact and law.

186 The fact that other users are able to use PEM's calcium metal proves only that the same product may be used for different purposes and under different conditions. Standard calcium metal can belong to different markets. It may be used by the lead and ferro-alloy industries or as a raw material for producing broken calcium. In the former case the differences in purity are immaterial, as is the oxygen level. By contrast, the oxygen level is fundamental in the latter case, which represents a substantial proportion of calcium applications.

187 Calcium metal is a raw material which is processed for use in the three sectors mentioned above, namely the lead industry (340 tonnes, 40% of calcium applications), the steel industry (570 tonnes, 46% of calcium applications) and high-temperature calcium treatments (100 tonnes, 11% of calcium applications). Standard calcium from PEM can be used without difficulty in the lead industry, but is unusable for all high-temperature treatments and for almost half of the products used for treating steel.

188 PEM's reasoning is flawed. According to the applicant, it is not possible to jump from calcium metal as a raw material to the end uses of the product derived from the raw material without taking account of use at the intermediate stage for the production of broken calcium metal. It is only by reference to that intermediate market that the conditions of use should be assessed, since the argument concerns imports of standard calcium metal, not broken calcium.

189 Having regard to those facts and to the substantial proportion of calcium applications involved in the treatment of steel, it cannot be concluded that the differences in use are unimportant or even marginal. On the contrary, in only one of the three applications — the lead industry — are standard calcium from PEM and standard calcium of Chinese or Russian origin similar. For the other two applications, PEM is obliged to have recourse to distilled calcium. The two products cannot therefore be regarded as like products by the Community authorities.

190 In conclusion, they are not interchangeable.

191 According to the Council, a trader such as the applicant which develops a new process for reducing a certain product to granules does not create two different products for the purposes of the basic regulation simply because its process, unlike the existing processes, is particularly sensitive to certain impurities. Differences of quality or use are not enough in themselves to distinguish two products. It must be examined whether the differences in quality or use are perceived by the market in general as distinguishing two products.

192 It is not impossible for the applicant to use PEM's product, but such use would involve it in additional expense.

193 The applicant may not rely on differences of cost in relation to its own use without taking into account the fact that the Chinese and Russian products are obtained by a process of electrolysis which, in a market economy, entails higher production costs.

194 According to the Council, the question of the identity of the chemical element or compound must not be confused with the question of the presence of impurities. A varying level of impurities does not necessarily affect the similarity of the products. The calcium metal produced by PEM is the same chemical element as the calcium metal produced by China and Russia. The level of variation of impurities did not appear to the institutions to have any effect on the use of PEM's standard product by processors other than the applicant.

195 Calcium metal imported from China or Russia can be substituted for calcium metal produced by PEM in all sectors because, for 86% of industrial consumers of calcium metal (the lead, ferro-alloy and steel industries), calcium obtained by the aluminothermic process and *a fortiori* calcium obtained by electrolysis satisfy their technical requirements. For 11% of industrial consumers (high-temperature calcium treatment), calcium produced by electrolysis is preferred, and PEM can supply it by distilling its standard product. For 3% of industrial consumers (the nuclear industry), a high-purity product is required, which PEM can also supply in the form of its nuclear-quality calcium.

196 PEM and the Chambre Syndicale submit, on the basis of the Commission's decision-making practice, that for products to be alike it suffices if Community products and products from non-member countries have basic physical and technical characteristics in common and have the same basic functions and potential uses which make them largely interchangeable, even if differences in characteristics, appearance or quality reduce the degree of interchangeability.

197 In the present case, Community calcium metal and calcium metal originating in China or Russia are like products.

198 Notwithstanding a slight variation in purity level, and correspondingly in the oxygen content, as a result of the production process used, Community calcium metal and Chinese or Russian calcium metal have physical and chemical characteristics which are sufficiently close to be regarded as like products.

199 The two products also have the same end users.

200 Finally, both production processes enable 'standard' primary calcium to be obtained, which is used principally either in solid lumps, in the lead and ferro-alloy industries, or in broken form.

201 For utilisation of calcium metal in solid lumps (representing 40% of requirements), Community calcium metal and Chinese or Russian calcium metal are completely interchangeable. For utilisation of calcium metal in broken form in high-temperature treatments, calcium of greater purity must be used. However, that calcium metal may come either from producers established in China and Russia using the electrolytic process, or from those using the aluminothermic process, including PEM. The latter process also enables calcium with a very high degree of purity to be obtained, the only difference being the price, since Chinese or Russian calcium has a high degree of purity and is less expensive because of dumping. Community calcium metal and imported calcium metal ultimately have the same basic functions and potential uses in respect of 86% of applications, and the greater purity of the calcium metal used, in up to 11% of applications, in high temperature treatments may be found in the case of both PEM and the producers established in China and Russia. Those products are therefore like products within the meaning of the basic regulation.

— Findings of the Court

202 Article 4(1) and (4) of the basic regulation provides:

'A determination of injury shall be made only if the dumped or subsidised imports are, through the effects of dumping or subsidisation, causing injury, i. e., causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry ...

...

The effect of the dumped or subsidised imports shall be assessed in relation to the Community production of the like product ...'

203 Article 2(12) of that regulation states:

'... "like product" means a product which is identical, i. e., alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration'.

204 The institutions enjoy a wide discretion in analysing complex economic situations (see, for instance, Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 66), and the determination of 'like products' falls within that context (Case T-170/94 *Shanghai Bicycle* v *Council* [1997] ECR II-1383, paragraph 63).

205 In those circumstances, it must be ascertained whether the institutions made an error of fact or law or a manifest error in the assessment of the facts which entailed an incorrect appraisal of the similarity of the products (see, to that effect, Case 188/95 *Fediol* v *Commission* [1988] ECR 4193, paragraph 6).

206 In the present case, the Council, in examining the question of the similarity of the products, took account of the physical and technical differences between PEM's product and that imported from China or Russia and of the effect of those differences on intermediate producers such as the applicant.

207 The Community institutions may consider that a Community product and a dumped product are like products despite the existence of physical or technical and other differences which restrict their potential use by the ultimate purchasers. On this point, the Court of Justice has held, with reference to anti-dumping duties on plain paper photocopiers originating in Japan (see, for instance, Case C-171/87 *Canon* v *Council* [1992] ECR I-1237, paragraphs 47, 48 and 52; Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraphs 35, 36 and 40; and Case C-179/87 *Sharp* v *Council* [1992] ECR I-1635, paragraphs 25, 26 and 30), that the Community institutions did not make a manifest error of assessment by regarding, for the purposes of assessing the injury suffered by the Community industry, as 'Community production of the like product', production of all photocopiers, in all segments merged together, with the exception of machines for which there was no Community production, despite the existence of technical differences between the various photocopiers.

208 In the contested regulation (recitals 11 and 12), the Council stated without being contradicted by the applicant that, as regards applications in the lead and ferro-alloy industries and in the steel industry, the standard quality calcium metal produced by PEM and that imported from China or Russia are completely interchangeable, and hence like products within the meaning of Article 2(12) of the basic regulation.

209 That likeness of products thus relates to 86% of the Community market in calcium metal, since the lead and ferro-alloy industries on the one hand and the steel industry on the other represent 40% and 46% of that market respectively.

210 As regards the steel industry, however, the applicant considers essentially that in assessing the similarity of the products account should be taken not of the ultimate purchasers but of the intermediate purchasers, that is, the undertakings which process calcium metal into broken calcium metal. The applicant, as an undertaking which processes calcium metal into broken calcium metal, cannot use the standard

quality calcium metal produced by PEM. That product and the product originating in China or Russia cannot therefore be regarded as like products.

211 That argument is unfounded.

212 Where the Community institutions — the Commission and the Council — conclude that the imports in question are being dumped, they must, pursuant to Article 4(4) of the basic regulation, determine the effect of those imports on like products in the Community.

213 The similarity of the basic products (raw materials), that is, their interchangeability, must be evaluated having regard in particular to the preferences of the end users, given that demand for the basic product on the part of processing undertakings depends on demand by end users.

214 It is not enough, on the other hand, to consider the preferences of processing undertakings, which may for technical or economic reasons prefer one basic product to another.

215 It must also be considered whether or not the products which incorporate the basic product are in competition with one another, in particular where, as in the present case, the value added by the processing of the basic product is relatively small in relation to the price of the end product.

216 In such a case, an increase in demand for the basic product — here calcium metal of Chinese or Russian origin — as a result of dumping may entail a fall in the price

of the processed product — the broken calcium produced by the applicant. That situation may in turn bring about a fall in demand for the other processed product, broken calcium from PEM, a fall which may in turn cause a decline in demand for the other basic product, the calcium metal produced by PEM.

217 Injury is then suffered by the producers of the latter basic product, the use of which does not create any particular problems for the end user.

218 Processing undertakings using PEM's basic product may be induced to cease buying that product, by definition more expensive than the basic product from China or Russia. They may then either have recourse to producers from those non-member countries or else, if they are vertically integrated like PEM, lower their prices by reducing their profitability and probably incurring losses, in other words, injury within the meaning of Article 4 of the basic regulation (see Case T-166/94 *Koyo Seiko* v *Council* [1995] ECR II-2129, paragraphs 32 to 42, especially paragraphs 35 and 36).

219 In those circumstances, the conclusion must be drawn that the institutions neither made an error of fact, nor infringed Articles 4(1) and (4) and 2(12) 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.

220 As regards applications in high temperature calcium treatments, it would appear necessary to use calcium metal whose degree of purity is greater than that of the standard quality broken calcium metal of the Community producer. However, those applications form only a small proportion (11%) of the total applications of the product in question in the Community. Consequently, the fact that it is not

possible to use PEM's standard quality broken calcium metal in this area cannot call into question the soundness of the institutions' analysis as to the similarity of the product in question.

221 The third plea in law must therefore be rejected.

Fourth plea in law: infringement of Article 4(1) of the basic regulation and manifest error of assessment

222 According to the applicant, PEM could not claim to have suffered injury within the meaning of Article 4 of the basic regulation because, first, it had made no attempt to supply the applicant, second, it could not claim that imports at dumping prices had obliged it to reduce its prices for broken calcium and, third, the greater part of the imports concerned derived from the fact that the applicant did not succeed in obtaining supplies from PEM.

223 The applicant does not deny the existence of injury on the part of the Community industry, but confines itself to contesting either the causal link between the dumped imports and the injury or the extent of the injury. Those challenges must be considered in turn.

1. Causal link

224 The applicant denies the existence of a causal link between the dumped imports and the injury to the Community industry. In support of its argument it asserts, first, that PEM made no effort to supply it with primary calcium metal of standard

quality and, second, that PEM was responsible for the fall in the price of primary calcium metal from which the injury to the Community industry derived.

(a) The complaint that PEM made no effort to supply the applicant with standard quality calcium metal

Arguments of the parties

225 With respect to the first point, the applicant observes that after attempting for two years to supply it with a product comparable to Chinese or Russian calcium metal PEM was still unable to do so, even though:

— it knew as soon as relations resumed the reason for the difficulties encountered by the applicant in using the standard quality calcium metal produced by it;

— it had stated that it was able to provide the applicant with a satisfactory product;

— the Canadian producers had taken only a few weeks to resolve similar technical difficulties;

— PEM claims to have spent considerable sums on research and investment with a view to supplying the applicant;

— Péchiney is a large group which has considerable research facilities.

226 That impossibility of supplying standard calcium is confirmed by the fact that PEM definitively abandoned its attempts to do so, since the last trials related to nuclear calcium.

227 In fact PEM made no attempt at all to supply the applicant. On the contrary, it deliberately decided not to supply it, as is shown not only by the chronology of relations between the applicant and PEM and the facts mentioned in the preceding paragraph, but also by the following factors:

— although it knew from December 1992 that its product was not suitable for the applicant's manufacturing process because of its high oxygen content, PEM wrote in August 1993 that its practice was to draw its (calcium) ingots from the furnace when hot (which contributes to oxidation of the calcium);

— PEM's memorandum of 5 August 1993 on the technical work carried out in its factory at La Roche de Rame, which described the investments made in order to improve its product, remained confidential for a long time;

— PEM was able, throughout the trials, to secure sensitive information from the applicant, enabling it to obtain anti-dumping duties fixed at a level at which its competitor was neutralised on the market (as shown by the steps taken by PEM immediately before the imposition of the definitive duties and by that undertaking's abuse of its dominant position, consisting principally of an abuse of process: see the seventh plea in law).

228 The applicant asked on several occasions during the investigation for an expert report to be ordered, to establish what adjustments had been made by PEM and whether they were likely to improve its product. That was always refused. The applicant therefore consulted an independent expert, Mr Laurent, who reported on 19 May 1995. According to his report, PEM was aware from the outset of the pernicious incidence of oxygen in its calcium. Moreover, it had available in its own factories all the appropriate means to remedy that problem without being obliged to have recourse to trials, which could be expected to be negative, at the applicant's

plant. Finally, it had complicated and delayed the most obvious findings, since a rigorous methodology, followed if necessary by independent experts, would have made it possible to avoid expensive trials and reach clear conclusions within a short time.

229 In the Council's opinion, the question whether it was impossible for PEM to supply the applicant comprises an element of fact and an element of law. The question of fact is to determine whether PEM was unable to supply the applicant, in which case the point of law is whether injury may nevertheless be established. The Council concedes that PEM was not able to supply a standard quality product meeting the applicant's requirements. However, the applicant cannot claim that its attitude, as disclosed by the documents in the case, was altogether constructive.

230 As to the alleged refusal by PEM to make the adjustments necessary in order to be able to supply the applicant, the Council submits that the documents in the case do not show that PEM did not take reasonable measures to that end.

Findings of the Court

231 The applicant's argument is that PEM made no attempt to supply it with calcium metal suitable for its needs. The overall relationship between the applicant and PEM must be examined to determine whether that argument is founded in fact.

232 Relations between Extramet, which later became IPS, and PEM were interrupted from 1985 to 1991, at least with respect to calcium.

233 The evidence in the case-file makes it possible to reconstruct the relationship between the applicant and PEM in the period from 1991 to 1994.

234 In July 1991 the applicant ordered 500 kg of calcium from PEM. The goods were delivered that month, accompanied by a sample of 50 kg of calcium metal in splintered form. The applicant itself admits that it refrained from pursuing commercial relations at that time, so as not to influence the procedure before the Conseil de la Concurrence, in view of the fact that PEM's lawyer had made use of that order to support its position. On 19 November 1992, five days after publication of the notice of 14 November 1992 concerning the anti-dumping proceeding, it wrote to PEM criticising the quality of the calcium supplied in July 1991.

235 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.

236 However, it has been held (Case T-161/94 *Sinochem Heilongjiang* v *Council* [1996] ECR II-695, paragraph 88) that consideration of data which postdates the investigation period may prove necessary if such data discloses new developments which make the planned imposition of an anti-dumping duty manifestly inappropriate.

237 The applicant's argument that developments after the end of the investigation period were such as to make the imposition of the duties at issue manifestly inappropriate must therefore be considered.

238 For this purpose only facts prior to 19 October 1994, the date of adoption of the contested regulation, may be taken into consideration. By contrast, later facts which might confirm or invalidate the institutions' analysis on the question of the causal link must be excluded.

239 On 21 December 1992 the manager of PEM's calcium operations met the chairman of the applicant company at the latter's head office.

240 During that meeting, they agreed on the following points:

— it was agreed that the oxygen content could be the cause of the problems encountered by the applicant;

— PEM would offer consignments of calcium metal to the applicant in order to carry out trials to attempt to reduce the oxygen content;

— it was also agreed that measuring the oxygen and taking samples were especially delicate procedures and that the results obtained hitherto were not reliable, those two aspects requiring special development to enable a continuing assessment of PEM's progress in terms of reducing the percentage of oxygen in the calcium.

241 The two undertakings proceeded to carry out several trials in 1993. By letter of 26 April 1993, a draft commercial agreement was proposed by PEM to the applicant, in the light of the results of the first trial.

242 By fax of 3 May 1993, set out in Annex 15 to PEM's statement in intervention, the applicant stated that the maximum oxygen content found in PEM's samples was 0.36%, not 0.4% and 0.5% as in the results of the initial analyses. It stressed that 0.36% was the maximum content acceptable to it. According to PEM, the minimum purity of calcium acceptable to the applicant at the time was 97% and the difficulty was to determine the proportion of oxygen in the calcium with great precision and with no chance of error.

243 By that same fax of 3 May 1993, the applicant recommended that the Centre Européen de Recherche en Métallurgie des Poudres (Cermep), Grenoble, the analytical laboratory it normally used, should be asked to perfect a method for analysing the oxygen in the calcium. On 4 June 1993 PEM and the applicant visited that laboratory. The method of analysis then proposed by the applicant was abandoned. Various methods of analysis were considered. PEM and the applicant eventually agreed on a method consisting in oxidising all the calcium in the sample of metal in order to determine the original lime and hence the oxygen content.

244 On 6 May 1993 an agreement was concluded for the delivery of five tonnes of splintered calcium (rather than calcium in chunks as in the case of the April 1993 trial). A second trial took place in June 1993 with the consignment of five tonnes of splinters. The trial with splintered calcium was a failure, as the deposit in the vessel was twice that of the previous trial.

245 By letter of 2 July 1993, PEM confirmed to the applicant that it intended to pursue commercial discussions with a view to concluding a supply contract, while expressing concern as to the method of checking the oxygen in the calcium. It also stated its intention of carrying out technical improvements in its factory in order substantially to reduce the amount of lime in its calcium. Those technical improvements consisted in equipping the furnaces in PEM's factory with a system of cooling under argon.

246 On 15 July 1993 Cermep communicated the results of its analyses to the applicant. The analyses showed that PEM's calcium had an oxygen content of the same order as that of Chinese or Russian calcium. After expressing doubts as to the reliability of the method used by Cermep, PEM suggested delivering a tonne of calcium cooled under argon, not in the open air, with a view to carrying out a fresh trial. In its letter to PEM of 11 August 1993, the applicant shared PEM's scepticism as to the analyses carried out by Cermep and stated that it was agreeable to send a sample to that laboratory for analysis.

247 From 13 to 16 September 1993 a third trial took place at the applicant's premises, using two tonnes of calcium which had been cooled under argon. That trial failed. Nevertheless, since the thermocouplers regulating the high and low zones of the furnace had been inverted by the applicant's personnel when emptying out the installations, PEM considered that the regulation of those installations might not correspond to what was required for accepting calcium of other than Chinese or Russian origin. While acknowledging that there had been a mistake, the applicant considered that the mistake had not had any effect on the result.

248 Meanwhile, following the conduct by the applicant of comparative analyses of standard calcium from PEM and that from the Canadian producer, which tended to show that the problem of the high oxidation of PEM's calcium derived from its lack of compactness, PEM had analyses carried out of those two types of calcium. Despite results which were contrary to those of the applicant's analyses, it experimented with increasing the compactness of its calcium ingots. It produced six tonnes of compact calcium metal, manufactured by means of double-cone condensation. In the end that product was not offered to the applicant, because its oxygen content subsequently proved to be 0.4% to 0.5%, that is, a percentage considerably higher than the tolerance level of the applicant's furnace.

249 A fourth trial took place on 15 and 16 November 1993 using five tonnes of calcium cooled under argon, with the applicant's agreement. As the trial again failed, PEM considered that more fruitful trials could be carried out at the applicant's factory using its nuclear calcium (N calcium) (report of visit to PEM's factory of 28 November 1993).

250 It therefore prepared for the applicant a consignment of five tonnes of N calcium with an average level of 0.22%, to confirm that there was a linear relation between the oxygen level and the rate of contamination of the applicant's furnace. The consignment was not accepted by the applicant until February 1995, on the occasion of trials carried out from 28 February to 3 March 1995, in other words after the adoption of the contested regulation.

251 At the same time, during the period from December 1993 to April 1994, PEM pursued its theoretical examination of all the possible sources of oxidation of the calcium (imperviousness of the furnaces, residual carbonates in the lime, oxygen introduced by secondary chemical reactions depending on the vacuum and temperature, effect on oxygen of the level of aluminium in the calcium). Although it did not dispute that those steps were taken, the applicant complained of not having been given precise information on the extent and results of those trials and analyses.

252 By letter of 21 July 1994, PEM made a further commercial proposal to the applicant: essentially, it was prepared to share the costs of a trial with five tonnes of calcium which had been ready from the end of 1993 and undertook, if the trial were successful, to supply the applicant with 100 to 150 tonnes a year for five years. In view of those amounts, it allowed the applicant price terms which were especially favourable for nuclear calcium (N). However, according to the applicant, those price terms were still well above those for standard calcium, so that it was excluded from the market.

253 In late March 1994 PEM, in an attempt to satisfy the applicant's requirements, committed FF 1.5 million to the following sectors: investment/furnaces, FF 0.5 million; oxygen control equipment, FF 0.1 million; unstructured research and development costs, FF 0.9 million. According to PEM, the item for research and development costs represented, in 1993, 8% of the annual item for 'analyses' of PEM's central research laboratory, while the other expenditure amounted to 25% of PEM's annual investment in its La Roche de Rame factory.

254 The applicant asserts moreover that, according to oral statements by PEM technicians, the research and development costs were treated as overheads and allocated to the various activities of the company. On this point, it suffices to note that the applicant does not dispute that the costs were actually incurred, but simply contests, without producing any evidence, their allocation to one or other budget heading.

255 In the light of the foregoing, it is established that the Community producer PEM made substantial efforts to adapt in order to meet the applicant's technical requirements.

256 Consequently, the institutions did not make any errors of fact or manifest errors of assessment of the facts with respect to PEM's willingness to supply the applicant. To consider that the efforts made by PEM did not demonstrate a willingness to supply the applicant and that the causal link was therefore broken by reason of the conduct of the European industry would be tantamount to making it impossible to impose anti-dumping duties on imports of dumped raw materials where the Community industry is unable to supply certain importers because of the special features of their production processes. That would be incompatible with the aim of the basic regulation, which is to protect the Community industry against unfair price practices of non-member countries.

257 That conclusion is not invalidated by the arguments put forward by the applicant.

258 The applicant submits to begin with that the investments carried out in PEM's factory corresponded to PEM's individual requirements. It must be stated, however, that those investments were also intended to meet the applicant's requirements. In that respect, according to the applicant itself, the fact that the calcium ingots were drawn from the furnace when hot contributed to the oxidation of the calcium. Even supposing that PEM might have been able to solve that problem sooner, the

fact remains that drawing of the ingots when cold was likely, as the applicant itself suggested, to solve the problem of oxidation of PEM's calcium metal.

259 The applicant also relies on the report dated 19 May 1995 by an expert instructed by it, Mr Laurent, which finds that there were inconsistencies and needless digressions in the methodology followed to solve the problem and a clear intention on the part of PEM to complicate and delay findings which were obvious, such as the source of the problem. However, that report was drawn up after the adoption of the contested regulation, so that the institutions could not take it into account. Moreover, it is not decisive, as its conclusions are contradicted by the report of Professor Winand, an expert instructed by PEM.

260 The applicant considers that the opinion of the latter expert, dated 18 December 1995, is based on an analysis of a single letter from PEM to the applicant, that of 20 May 1994, whereas Mr Laurent's opinion is based on an examination of all the documentation. In that respect, it suffices to state that the letter from PEM examined by Professor Winand sets out the essential aspects of the relationship between the two companies for the period from December 1992 to April 1994. In those circumstances, Professor Winand's report is no less creditworthy than that of Mr Laurent.

261 The applicant cannot criticise the Commission for not, in this context, having had recourse to an independent expert to verify that PEM had made efforts to supply it with a suitable product. First, the basic regulation did not require the institution to act in such a way before proposing definitive measures. Second, the facts in the case-file were verified by the Commission's officials and discussed between PEM and the applicant. Finally, the institutions must act within necessarily restricted time-limits for the adoption of definitive measures, and it is always for them ultimately to assess the facts adduced by the parties in an anti-dumping proceeding.

262 In those circumstances, the Commission did not exceed its discretion in the matter.

263 This complaint must therefore be rejected.

(b) The complaint that PEM was responsible for the falls in prices of broken calcium metal which caused the injury to the Community industry

Arguments of the parties

264 The applicant submits that, according to the information it gave the Commission by letter of 25 August 1994, it was PEM which on its own initiative reduced prices without being forced to do so, since the applicant's prices were always higher than PEM's, contrary to what is stated in recital 19 of the contested regulation. The surveys of PEM's prices communicated to the Directorate-General for Competition (DG IV) show, on the contrary, that PEM followed a policy of excluding the applicant from the market by systematically aligning its prices at 10% to 15% below those of the applicant, without at any time taking account of its actual costs.

265 The Council submits that PEM's prices are not prices which PEM simply communicated, as the applicant did to DG IV, but accounting data verified by the Commission on the spot at PEM's premises. By contrast, the applicant refused to provide data on its resale prices and the Commission had to use the available information, namely the fact that PEM's prices had fallen by 17%. In so doing, the Commission acted on the basis of Article 7(7)(b) of the basic regulation.

266 With respect to the argument that it did not communicate its resale prices, the applicant submits that those figures were available, since they had been in the possession of DG IV from the lodging of the complaint on 12 July 1994, and that they are also in the possession of the Council, having been annexed to the application for annulment. The applicant has seen nothing to show that those figures are incorrect.

267 As regards the applicant's letter of 25 August 1994 to DG IV, which the applicant relies upon to support its assertion that PEM was the first to reduce its prices, the Council observes that the letter was addressed to DG IV, with no copy for the Directorate-General for External Economic Relations (DG I).

Findings of the Court

268 Article 7(7)(b) of the basic regulation provides:

'In cases in which any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. Where the Commission finds that any interested party or third country has supplied it with false or misleading information, it may disregard any such information and disallow any claim to which this refers.'

269 In support of its allegation that it was PEM which was the first to reduce its prices and is therefore the author of its own injury, the applicant refers to its letter of 25 August 1994 to DG IV, annexed to which was a table summarising the prices charged by the applicant on the market in broken calcium.

270 As the Council rightly observes, however, it did not transmit that table to DG I, the directorate general solely responsible for investigations in anti-dumping proceedings.

271 In those circumstances, the Commission was unable to obtain that information from the applicant, since it always refused to provide data on its sales on the market in broken calcium. The applicant cannot therefore rely on such data in its action against the contested regulation.

272 Furthermore, the table in question was supplied to DG IV without any supporting documentation. By contrast, the prices charged by PEM on the market in broken calcium are accounting data verified by the Commission on the spot, at PEM's premises. In those circumstances, faced with the applicant's refusal to provide data on its resale prices, the Commission was entitled, in the light of the available information and pursuant to Article 7(7)(b) of the basic regulation, to conclude that PEM's prices had fallen by 17% as a result of dumping by the Russian and Chinese producers.

273 This complaint must therefore be rejected.

2. Extent of the injury

Arguments of the parties

274 The applicant submits that the greater part of the imports in question derived from the fact that it was unsuccessful in obtaining supplies from PEM. It states that from 1989 to 1993 it imported between 62% and 97% of imports of the products

in question from China and Russia to the Community, or 70% on average, and 65.7% during the investigation period, not 50% as the Council asserts in the contested regulation. In those circumstances PEM cannot point to any injury resulting from those imports, since it is unable to produce calcium with the same uses. Any injury suffered by PEM could at most relate to the 30% imported by other users in the Community.

275 The Council observes that the injury must be determined having regard not only to sales of imported calcium metal but also to sales of calcium processed into granules. If it were otherwise, the absurd conclusion would be that fair competition cannot be restored in a case where the dumped product is always processed before being sold.

276 Even on the assumption that PEM is incapable of supplying the applicant with a product in conformity, the imports effected by the applicant still cause PEM injury, since the imported product is sold in the form of granules in competition with the calcium in granules sold by PEM. The dumping prices for imports have an effect on the resale prices of (spherical) granules of calcium, and hence cause injury to PEM, which also sells (non-spherical) granules of calcium on the Community market. The applicant is thus wrong to assert that the injury can relate only to imports by other users in the Community.

277 As to the applicant's assertion that it imported between 62% and 97% of the products imported from China and Russia, not 50% as stated in the contested regulation, the Council submits that even if those figures were correct, which they are not, the injury would be even greater, since a larger quantity would be sold in the form of (spherical) granules of calcium on the market.

278 As regards the injury to PEM on the market in calcium in granulated form, the Council considers that the applicant has not shown that it made a manifest error in the assessment of the injury suffered by the Community industry.

Findings of the Court

279 The applicant's argument raises a point of fact, namely that of the precise volume of the applicant's imports, and a point of law, namely the soundness of the applicant's argument that its imports should not come into consideration in determining the injury because it was impossible for PEM to supply it with standard quality calcium metal. Since the point of fact is material for the outcome of the case only if the legal point raised by the applicant is correct, the latter should be examined first.

280 On this point, as is stated in recital 19 of the contested regulation, a correct analysis of the effect of the dumped imports must take into account not only sales of imported calcium metal which has not been processed but also sales of calcium metal processed into granules. Were it otherwise, it would not be possible, for example, to restore fair competition in a case where a dumped product was processed before being sold.

281 The imports effected by the applicant are such as to cause injury to PEM, since the imported product is processed and then sold in powder form in competition with the calcium in granules sold by PEM. As the Court held in paragraphs 212 to 219 above, the dumping prices for imports have effects on the resale prices of the (spherical) calcium powders produced by the applicant, and thereby cause injury to PEM, which sells (non-spherical) calcium granules on the Community market, using primary calcium metal of Community origin. The applicant is therefore

wrong to assert that the injury could not be connected with its imports into the Community.

282 In those circumstances, the question of the accuracy of the figures for imports of calcium metal from China and Russia is not material for the outcome of the case. Even supposing that the applicant's figures are correct, the quantity imported by it would have been larger and the injury at least as great, since that imported quantity would have been sold in the form of (spherical) calcium powders on the Community market.

283 It follows that this complaint must also be rejected.

284 The fourth plea in law must therefore be rejected in its entirety.

Fifth plea in law: infringement of Article 12 of the basic regulation and manifest error of assessment

A — Introduction

Arguments of the parties

285 The applicant submits that the Council wrongly concluded that definitive measures should be imposed in the Community interest. That interest in fact did not require the imposition of anti-dumping duties which were liable to create or

strengthen a dominant position by PEM on the European market in primary calcium metal and broken calcium metal, while virtually eliminating the applicant from the European market in broken calcium metal.

286 That creation or strengthening of PEM's dominant position on the calcium metal market is alleged to derive from the following factors:

— the impossibility of importing Chinese or Russian calcium metal, having regard in particular to the amount of the duties imposed and their specific, not *ad valorem* character;

— the impossibility of obtaining supplies from the North American producers;

— the prohibitive cost of the nuclear quality calcium metal produced by PEM.

287 In those circumstances the balance of interests in the Community required the Council, according to the applicant, to ascertain whether the positive effects of the measures would outweigh their negative effects. In comparison with the effective strengthening of PEM's dominant position on the calcium metal market and the equally effective elimination of its principal competitor on the market in broken calcium, namely the applicant, the positive effects stated in the contested regulation would have been very small.

288 The Council considers, on the basis of the criteria stated in the contested regulation, that definitive anti-dumping measures had to be imposed in the Community interest.

289 It submits that a dominant position on the part of the Community producer has not been shown to exist, and that the applicant's argument thus has no factual basis.

290 PEM and the Chambre Syndicale agree with the Council. They submit that the absence of measures would be very serious for the Community because it would directly jeopardise the survival of the only Community producer. It would in all probability induce PEM to buy calcium metal in China and Russia and so put an end to all Community production of that metal. In the short term, that would mean a serious industrial site problem for PEM, which would be obliged to close its factory at La Roche de Rame. That would have adverse consequences for an entire French region. In the long term, the absence of anti-dumping duties would leave the field clear for producers in China and Russia to impose their prices on the Community market in calcium metal. That would entail the risk of an organised shortage coupled with price rises, as was the case with molybdenum, tungsten and antimony in 1993 to 1994. In the even longer term, it would offer producers in China and Russia the market in broken calcium metal, on which they are already present, with dependence by Community processors and users of that product as the inevitable consequence.

Findings of the Court

291 Under Article 12(1) of the basic regulation, a definitive anti-dumping duty may be imposed only 'where the facts as finally established show that there is dumping ... and injury caused thereby, and the interests of the Community call for Community intervention'.

292 According to the case-law, the question whether the interests of the Community call for intervention involves appraisal of complex economic situations and judicial review of such an appraisal must be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error of assessment of those facts or a misuse of powers (*Sharp* v *Council*, paragraph 58).

293 It must therefore be examined first whether the institutions made an error of fact or a manifest error in assessing the facts in the analysis on the basis of which they considered that the imposition of anti-dumping duties did not create or strengthen a dominant position on the part of PEM on the calcium metal market.

B — PEM's position on the calcium metal market before the imposition of the duties at issue

294 The Court considers that the first question which arises is whether PEM held a dominant position before the duties at issue were imposed.

295 On this point, it should be noted that, as the Commission stated without being contradicted by the applicant, it follows from the provisional regulation (recitals 26 and 32) that the market shares of the undertakings operating in the market in primary calcium metal in the Community were as follows in the years 1989 to 1992:

Year	China and Russia	PEM	Others
1989	35.3%	50.2%	14.5%
1990	40.7%	44.0%	15.3%
1991	48.8%	34.7%	16.5%
1992	52.8%	31.7%	15.5%

296 Those figures show that in the period from 1989 to 1992 PEM lost 18.5% of the Community market, imports from China and Russia having increased by 17.5% of the market and those from other sources by 1%. During that period, PEM was

thus unable to act independently of its competitors, since it lost a substantial part of its share of the Community market, despite the imposition of anti-dumping duties on Chinese and Russian imports in 1989.

297 In those circumstances and in the absence of other evidence, it cannot be said that the Council made an error of fact or an error of assessment in considering that PEM did not have a dominant position on the calcium metal market in the Community before the anti-dumping duties at issue were imposed.

C — PEM's position on the markets in primary calcium metal and broken calcium metal following the imposition of the duties at issue

298 The Court considers that the question also arises whether, as a result of the imposition of the anti-dumping duties at issue, PEM was enabled to acquire a dominant position not only on the market in primary calcium metal but also on the secondary markets in broken calcium.

299 The contested regulation (recitals 30 and 31) rules out the risk of a sharp decrease in effective competition on the Community market, on the basis of the following factors:

— the possibility for intermediate users to continue purchasing Chinese or Russian calcium metal at fair prices,

— the possibility of purchasing calcium metal from North American producers;

— the possibility of reviewing the situation six months, or at the latest one year, after the imposition of the duties at issue.

1. PEM's position on the market in primary calcium metal

(a) The possibility for intermediate users to obtain supplies of calcium metal imported from China or Russia

Arguments of the parties

300 The applicant submits that the imposition of a 'specific' anti-dumping duty rather than an '*ad valorem*' duty can only strengthen PEM's dominant position, since no Chinese or Russian calcium metal will be imported into the Community any more. Following the imposition of the duties at issue, moreover, imports of Russian calcium plummeted by 84% (from 56.5 tonnes a month for the first four months of 1994 to 8.9 tonnes a month for the next eight months). For China the fall in imports was 98% (from 29 tonnes a month to 0.6 tonnes a month).

301 The Council states that it imposed the duties in the form of specific duties in order to minimise the risk of duty being evaded by manipulation of the price. Following the adoption of Regulation No 2808/89, producers established in China and Russia had reduced their export prices in order to absorb the duties imposed by that regulation. With specific duties, if exporters reduce their prices the amount of duty charged is not reduced. The duties were not fixed by reference to a threshold import price, which would have had the effect of guaranteeing a minimum price for calcium in the Community.

302 The Council considers the assertion that imports of Chinese or Russian calcium metal will cease to be pure speculation, especially as, according to import statistics, 71 tonnes of Russian calcium were put into free circulation in the period from May to December 1994. Moreover, temporary imports are not affected by the duties.

Taking temporary imports into account, 298 tonnes were imported from Russia and 209 tonnes from China in the period from May to December 1994, of which 427 tonnes (219 tonnes +208 tonnes) were imported into France.

303 Despite the imposition of anti-dumping duties, the applicant remains free to continue obtaining supplies from China and Russia. As a result of calculating the normal value on the basis of the domestic prices charged by the American producer, the alternative sources of supply in China and Russia have, by the imposition of the duties, been converted in a sense into sources from a country with a market economy.

Findings of the Court

304 The applicant's argument on the consequences of the imposition of specific duties cannot be accepted. As the Council rightly observes, the imposition of a specific duty, as opposed to fixing the duty by reference to a threshold import price, makes it possible to minimise the risk of duties being evaded by manipulations of prices, since the amount of duty levied is not reduced if exporters reduce their prices. That method of proceeding enables a minimum price to be guaranteed for calcium in the Community, while allowing imports at fair prices, that is, prices which enable a Community producer to realise an adequate profit margin.

305 In those circumstances, the Council was entitled to consider that the imposition of a specific duty did not in itself have the effect of preventing imports from China and Russia.

306 As to the question whether the institutions made an error of fact or a manifest error in assessing the facts with respect to the possibility of continuing to obtain supplies from China and Russia, regard may not be had to what actually happened after the anti-dumping duties were imposed. The only point to be examined is whether the institutions could, having regard to the evidence available to them at the time of adoption of the contested regulation, consider that after the imposition of anti-dumping duties China and Russia would continue to be a source of supply for European users.

307 The only argument against such a forecast is based on the increase in import prices after the imposition of the duties at issue. That is not, however, capable of calling into question the Council's original forecast. It is common ground that the level of the duties was calculated on the basis of the average production cost of the Community producer plus a profit margin of 5%, which means that the processing undertakings competing with PEM, including the applicant, ought to have been able to continue obtaining supplies from China and Russia without thereby suffering a competitive disadvantage on the market in the processed products, unless of course their production costs were substantially higher than PEM's. Since the applicant did not inform the Commission of its production costs during the administrative procedure prior to the adoption of the duties at issue, the Community institutions cannot be criticised for not taking that factor into account when assessing the Community interest.

308 Besides, a failure to impose anti-dumping duties on the sole ground that the consequence of imposing those duties would be the elimination of the competing undertakings with the highest production costs would not be compatible with the maintenance of undistorted competition in the common market. Since the essential aim of establishing a system ensuring that competition in the common market is not distorted, provided for in Article 3(g) of the Treaty, is to enable a correct allocation of economic resources, the elimination of economically viable undertakings in order to ensure the survival of an undertaking with higher production costs cannot be justified.

309 The institutions consequently did not make an error of fact or a manifest error of assessment by considering that intermediate Community users of calcium metal would be able to continue obtaining supplies from China and Russia.

310 This complaint must therefore be rejected.

(b) The possibility for IPS to obtain supplies from the North American producers

Arguments of the parties

311 The applicant submits essentially that the North American suppliers could not constitute alternative sources of supply in view of the difficulties it had encountered in obtaining supplies from them.

312 The American producer manufactures essentially for its own use and itself imports substantial quantities of Chinese or Russian calcium. It also manufactures cored wire — a product which contains calcium with no other additive — and exports part of that production to Europe. Cored wire and calcium in chunks are classified under the same customs code, which has the effect of abnormally increasing the figures for the latter product. Moreover, there are three other producers of cored wire in the United States which use calcium powders and re-export finished products to Europe under the same customs code as calcium metal. It is therefore not possible in practice to analyse the statistics for products imported into Europe

from the United States. Moreover, the availability of calcium in chunks from the United States has not changed. According to the applicant, the order it placed in December 1994 was not fulfilled until December 1995.

313 As to the Canadian producer, it follows a strategy of concentrating on its leading product, magnesium. In addition, contrary to the Council's assertion, no increase can be seen as compared with the years preceding the imposition of the anti-dumping duties. The applicant imported 47 of the 126 tonnes imported from Canada in 1994, to meet its requirement of 700 tonnes. The remainder of the imports from Canada, 79 tonnes, is comparable with the 61 tonnes mentioned by the Council for 1992. That producer then suspended deliveries. In 1995 it made no offer, despite several requests by the applicant. In 1996 it offered 100 tonnes, but without specifying a price. It is therefore pursuing a strategy which consists of supplying only when that suits its own convenience and giving preference to the magnesium trade over the calcium trade. All those factors were duly substantiated to DG IV on several occasions.

314 In those circumstances, users and processors of primary calcium metal are completely dependent on the European producer.

315 The Council observes that the Eurostat statistics show a distinct increase in imports from the United States. In 1994 a quantity of 76 tonnes was imported into free circulation, as against 18 tonnes in 1993, 49 tonnes in 1992 and 60 tonnes in 1991. Those statistics also show a clear increase in imports from Canada. In 1994 a quantity of 126 tonnes of calcium metal was imported into free circulation, as against 61 tonnes in 1992, 30 tonnes in 1991 and 49 tonnes in 1988. Those figures cast doubt on the applicant's assertions that the American producer manufactures essentially for its own use and that the Canadian producer is currently pursuing a strategy of concentrating on magnesium. The United States and Canada thus constitute two further sources of supply.

Findings of the Court

316 The Council considered (recital 30 of the contested regulation) that the Community processors, including the applicant, could continue to obtain supplies from the United States and Canada.

317 As the Court held in paragraph 306 above, in order to ascertain whether the institutions made an error of fact or a manifest error in assessing the facts in this respect, account may not be taken of what happened after the anti-dumping duties were imposed. Account must be taken only of the evidence available to the institutions at the time of adoption of the contested regulation.

318 In support of its complaint, the applicant essentially puts forward a single argument, namely that after the imposition of the anti-dumping duties it encountered difficulties in obtaining supplies from the North American producers. In that respect, the first point to note is that during the administrative procedure prior to the adoption of the contested regulation the applicant did not mention difficulties relating either to the quality of the North American products, or to the prices charged by the North American producers, or to their production capacities; second, in any event, the figures for imports of calcium metal from the United States and Canada after the imposition of the first anti-dumping duties in 1989 but before the contested regulation show, for example, as the applicant itself acknowledges in Annex 18 to its observations on PEM's statement in intervention, that the amount imported in 1990 (78 tonnes) increased in 1991 (90 tonnes) and 1992 (110 tonnes), before falling in 1993 (67 tonnes) because of exports dumped by Russian and Chinese producers which in 1993 were not yet subject to anti-dumping duties.

319 In those circumstances, the institutions were entitled to consider that the same process of increasing imports would occur once the imposition of specific anti-dumping duties had restored fair competition in the Community.

320 This complaint must therefore be rejected.

(c) The possibility of reviewing the state of the market six months, or at the latest one year, after the imposition of the duties at issue

Arguments of the applicant

321 The applicant doubts the purpose of the possibility, referred to in the contested regulation (recital 31), of reviewing the situation six months after its entry into force if conditions of competition so require, or otherwise one year after the imposition of the duties at issue. Since market conditions have, according to the applicant, changed entirely since the adoption of the provisional duties, it cannot see in what circumstances a review could have taken place.

Findings of the Court

322 By means of the recital providing for the review in question, the Council created an instrument allowing the duties at issue to be altered or even abolished if necessary, if maintaining them might entail a substantial deterioration of competitive conditions in the Community. Far from serving no purpose, the provision made for review confirms that the Community institutions took account of fears of a possible deterioration of competitive conditions in the Community after the imposition of the duties at issue and that, in balancing the interests concerned, they duly took into consideration the aims of Community competition policy.

323 It follows that this complaint must be rejected.

(d) Conclusion

324 In those circumstances, the conclusion must be that the institutions did not exceed their discretion by considering that the imposition of the anti-dumping duties at issue was not liable to create or strengthen a dominant position on the part of PEM on the Community market in primary calcium metal.

2. PEM's position on the market in broken calcium metal

Arguments of the parties

325 The applicant submits that PEM is its biggest competitor on the market in broken calcium metal. Since the contested duties were imposed, the applicant has lost 76% of its share of the Community market. The imposition of those duties therefore allowed PEM to occupy the same dominant position as on the market in primary calcium, with the European market being considered the relevant geographical market in view of the barriers to entry created by the imposition of the duties.

326 The Council observes that it is not unusual for an importer to lose market shares as a result of the imposition of anti-dumping duties. As to the assertion that the applicant has 'virtually been eliminated from the market' and its repeated allegation that PEM has a dominant position, the Council refers to its earlier observations, adding that a significant part of the applicant's activity consists of the processing into granules of calcium imported under temporary import arrangements (without paying duties), an operation which PEM cannot carry out with its own calcium. According to Eurostat statistics, that part of the applicant's activity was not curtailed by the imposition of the duties, but even increased.

Findings of the Court

327 The applicant has not established that, having regard to the possibilities of obtaining supplies from outside the Community referred to in the contested regulation, the Council could have anticipated, in the light of the information available at the time, that a dominant position on the part of PEM might be created on the market in broken calcium following the imposition of anti-dumping duties.

328 The applicant merely asserts, without producing any supporting evidence, that it lost 76% of its share of the market in broken calcium after the adoption of the regulation. Nor has it produced any evidence to show that it was the imposition of the anti-dumping duties at issue, rather than its inability to produce at competitive prices, which caused the alleged loss of that market share.

329 In those circumstances, the institutions did not exceed their discretion by considering that the imposition of the anti-dumping duties at issue was not liable to create or strengthen a dominant position on the part of PEM on the Community market in broken calcium metal.

330 This complaint must therefore be rejected.

D — Consideration of the interests of intermediate users, including the applicant, and end users and of PEM's conduct in the examination of the Community interest in imposing the duties at issue

331 The applicant submits that the institutions should have balanced the interests involved, ascertaining whether the positive consequences of the anti-dumping measures outweighed the negative consequences, namely the alleged dominant position acquired by PEM. In that respect it criticises the arguments put forward by the Council in the contested regulation to justify the Community interest in imposing

the anti-dumping duties in question, concerning (a) the possibility of the applicant making sales abroad with the benefit of the inward processing procedure, (b) the consideration of the consequences of the dumped imports for PEM, (c) the effect of the anti-dumping duty on the end users and intermediate users, (d) the impact of the duties imposed by the contested regulation on PEM's turnover compared to the applicant's, and (e) the failure to take into consideration the under-use of PEM's production capacity and PEM's responsibility for the falls in prices.

332 Although it has already been found that the imposition of the anti-dumping duties was not liable to create or strengthen a dominant position on the part of PEM on the Community markets in primary and broken calcium metal (see points 324 and 329 above), the applicant's criticisms of those arguments must be considered.

1. Possibility of the applicant making sales abroad with the benefit of the inward processing procedure

333 The contested regulation (recital 30) mentions the possibility of the applicant selling outside the Community with the benefit of the inward processing procedure. On this point, the applicant submits that it has always been present on foreign markets, but that PEM has as well. That argument may not therefore be used for the benefit of one party and not the other.

334 In that respect, it suffices to note that the inward processing procedure by definition applies only to imports of calcium metal and not to Community production. The fact that PEM is present on the export markets does not therefore call into question the finding by the Council in the contested regulation that Community intermediate users could continue not only to buy Chinese or Russian calcium metal at fair prices with a view to processing and selling it in the Community, but also to buy the calcium at dumping prices without the imposition of anti-dumping

duties with a view to processing it under customs control and selling it on external markets. That substantial part of the applicant's activity will remain unaffected after the imposition of the duties at issue. Since the position of the applicant, considered as an importer of Chinese or Russian calcium metal, and that of PEM, considered as a Community producer of calcium metal, differ from the point of view of the opportunities for using the inward processing procedure, the Community institutions were right to take that difference into consideration in assessing the Community interest in imposing the duties at issue.

335 This complaint must therefore be rejected.

2. Consideration of the consequences of the dumped imports for PEM

336 In the contested regulation (recital 28), the Council considered that the anti-dumping duties were likely to prevent the closure of PEM's factory. The applicant submits that it is itself established in the same region of France, employs a workforce comparable to that of PEM's calcium section, has never formed part of a nationalised group, and is struggling with all its strength by developing new products in the endeavour to survive.

337 On this point, it should be noted that the applicant merely points to the existence of certain features common to its plant and PEM's, and to the fact that it does not form part of a nationalised group, but without thereby showing that those factors were overlooked by the institutions. On the contrary, in recital 30 of the contested regulation, the Council considers the impact of the duties at issue on several categories of users, including the applicant.

338 This complaint must therefore be rejected.

3. Effect of the anti-dumping duty on end users and intermediate users

339 As regards the effect of the anti-dumping duty on end users and intermediate users (recital 30 of the contested regulation), the applicant confines itself to criticising the Council for completely ignoring the existence of the intermediate producers, one of whom has virtually been eliminated from the European market and the other has strengthened its position to such an extent that it alone now dictates calcium prices on the European market, for both calcium metal and calcium in granules.

340 In addition, the applicant submits that the Council could not, without further explanation, merely state that the imposition of the duties would have only a minimal effect on end users, on the ground that the cost of a tonne of lead would increase by only 0.3% and the cost of a tonne of steel before rolling by less than 0.2%. It submits that PEM's net profit in 1993 was 0.31% of its turnover. In those circumstances, if a reduction of 0.3% had been applied to all the selling prices of PEM's products, PEM would have been 'in the red' in 1993.

341 As regards intermediate users, it suffices to note that their interests were taken into consideration by the Council, as explained in paragraphs 304 to 310, 316 to 320 and 333 to 335 above with respect to the possibility open to them of obtaining supplies of calcium metal from outside the Community and making use of the inward processing procedure.

342 As to the fall of 0.3% in the selling prices of PEM's products, the applicant has not shown how this could call into question the Council's assessment that imposing the duties at issue would have only a minimal effect on end users since, in its opinion, the cost of a tonne of lead would increase by only 0.3% and that of a tonne of steel before rolling by less than 0.2%.

343 It follows that this complaint must be rejected.

4. Impact of the duties imposed by the contested regulation on the turnover of PEM compared to that of the applicant

344 The applicant is unclear as to the basis on which the Council decided that it was in the Community interest to protect one Community producer to the detriment of another. Calcium metal represents 0.05% of PEM's turnover, whereas calcium in granules represents 85% of the applicant's turnover.

345 However, the Court considers, in the first place, that dumping may not be justified on the ground that only the Community producer is able to subsidise its production by means of the profits made on other products and, second, that the aim of the anti-dumping legislation is to maintain fair conditions of competition for the various sectors of production where they suffer injury as a result of dumped imports.

346 This complaint must therefore be rejected.

5. Failure to take into consideration the under-use of PEM's production capacity and PEM's responsibility for the falls in prices

347 According to the applicant, recital 28 of the contested regulation, which refers to 'the already precarious situation of the Community industry' and the 'detrimental' effects on competition if the industry were forced to cease production, cannot justify the imposition of the duties at issue, in view of the lack of alacrity and the inconsistent behaviour of PEM in its supposed attempts to supply the applicant, when the quantities requested by the latter would have amply covered the alleged under-use of the production capacity of PEM's plant.

348 Finally, it submits that it was PEM which initiated a price war policy, by systematically lowering prices in the 1980s by reference to the prices of products from China and Russia.

349 According to the applicant, it is therefore wrong, to say the least, to use such arguments to claim that the balance was in favour of adopting anti-dumping duties.

350 These complaints must be rejected for the reasons set out in connection with the fourth plea in law concerning the injury to the Community industry (see paragraphs 231 to 263 and 268 to 273 above).

351 It follows from all the foregoing that the fifth plea in law must be rejected in its entirety.

Sixth plea in law: infringement of Article 190 of the Treaty

Arguments of the parties

352 The applicant submits that the Council failed to fulfil its duty to state reasons with respect to the complaint lodged by it with the Commission on 12 July 1994 alleging an abuse of a dominant position by PEM. No reference was made to that complaint in the contested regulation. That omission is sufficient, having regard to the background to this case, to entail annulment of the regulation for failure to state reasons on an essential point. The Council should have explained its position on that complaint.

353 The applicant observes that its complaint was especially well documented and that it had submitted an expert report on the relationship between itself and PEM between 1992 and 1995. That report highlighted PEM's inconsistencies, the lack of a rigorous methodology, PEM's systematic advance announcements of false hopes of achieving results, and the hasty dispatch of commercial proposals with no guarantee of conformity or capacity to supply, doubtless to demonstrate to a third party that it was capable of satisfying the applicant.

354 Finally, DG IV had informed DG I of its doubts as to the adoption of anti-dumping measures because of the issues of competition raised in the case.

355 The Council submits that it took account of the factors relating to competition policy and was therefore not obliged to refer to the complaint of 12 July 1994 in the reasons for the contested regulation, especially as it provided for a review.

356 The Council submits that an examination of the complaint shows that the applicant did not rely on any factor which it had not already relied on in the anti-dumping investigation.

Findings of the Court

357 It is settled case-law that the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to inform the persons concerned of the justification for the measure adopted and thus to enable them to defend their rights and the Community judicature to exercise its powers of review. However, the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact and law dealt with in the regulations, provided that they fall within the general scheme of the body of measures of which they form part (Case 203/85 *Nicolet Instrument* v *Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049, paragraph 10; Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 31; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39; Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 16; and Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19; Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 67).

358 With respect more particularly to the statement of reasons for regulations imposing anti-dumping duties, the institutions are not in principle obliged to respond to complaints lodged pursuant to Article 3 of Regulation No 17 of the Council, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) by importers of the product which is the subject of the anti-dumping duties, on the basis of possible infringements of the Treaty rules on competition by the Community producers. It is sufficient for the reasoning of the institutions in the regulations to appear clearly and unequivocally.

359 In the present case, moreover, the key elements of the complaint of 12 July 1994 were known to the Community institutions, since they had been relied on in connection with the anti-dumping investigation, and were dealt with in the contested regulation.

360 In that complaint the applicant essentially does no more than refer to abuses on the part of PEM: first, its refusal to supply the applicant with standard quality calcium metal and, second, its lodging of the anti-dumping complaint and misuse of the anti-dumping procedure.

361 The alleged abuses by PEM, in making technical efforts with the aim of needlessly complicating the search for a solution to the applicant's technical problems and thereby delaying the provision of supplies of standard quality calcium metal, were examined by the Council in recitals 23 to 25 of the contested regulation.

362 There is thus no failure to state reasons in the contested regulation with respect to that part of the complaint.

363 As to the alleged misuse of the anti-dumping procedure by PEM, it is said to have consisted essentially in knowingly deceiving the Commission during the anti-dumping proceeding by leading it to believe that PEM was suffering injury, and in making use of the anti-dumping proceeding to find out its competitors' positions and costs on the markets concerned. On this point, it follows both from the account of the procedure in recitals 1 to 7 of the provisional regulation and recitals 2 to 5 of the contested regulation, and also from the structure of the latter regulation taken as a whole, that the Council did not regard either the lodging of the anti-dumping complaint or the course of the procedure before the institutions as designed to create or strengthen a dominant position on the calcium market.

364 The Commission stated in recitals 1 to 7 of the provisional regulation that it had verified the information provided by PEM and, as far as possible, the applicant, and had heard all the interested parties, including the applicant, throughout the procedure up to consultation of the advisory committee.

365 Finally, since the applicant did not claim either that the rules on confidentiality laid down by the basic regulation had been breached with respect to the information it had supplied during the administrative procedure, or that there had been a manifest error of assessment in determining the level of the duties at issue, the Council was not required expressly to state its views on this aspect of the complaint.

366 The contested regulation is therefore not vitiated by a failure to state reasons with respect to the second part of the complaint.

367 Consequently, the sixth plea in law must be rejected.

Seventh plea in law: misuse of powers

Arguments of the parties

368 The applicant claims that the Commission aided and abetted the use of an anti-dumping proceeding for anticompetitive purposes.

369 PEM is the only Community producer on the market in the raw material in question and thus represents the Community industry. It also operates on all the secondary markets, in particular the market in broken calcium, where the applicant is its principal competitor. Since the applicant entered that market, PEM has continually sought in every way to exclude it.

370 The applicant asserts that in its complaint of 12 July 1994 and in its observations in reply it showed how PEM made use of the anti-dumping procedure for the sole purpose of strengthening its dominant position and eliminating a rival.

371 In view of the precedent constituted by the *Extramet II* judgment, in which the Court of Justice criticised the institutions for not taking PEM's anticompetitive conduct into account when assessing the injury, the applicant hoped that in the new anti-dumping proceeding the Commission would act with greater circumspection and would be totally objective in considering its arguments. That did not happen; quite the contrary. The way in which the procedure developed from July 1992 was ample proof that PEM and the Commission were colluding and that the latter was party to that abuse of process.

372 In support of this plea, the applicant refers to the procedural irregularities complained of in its first and second pleas in law, namely the unlawful resumption of the investigation, the difficulties encountered in obtaining repayment of the duties which had been annulled, and the difficulties in gaining access to the case-file. It further points to mistakes by the Commission in assessing the actual circumstances, referred to in its third and fourth pleas in law, with respect in particular to the possibility of the applicant using the nuclear quality calcium metal produced by PEM, the efforts made by PEM to adapt its plant, the acceptance of PEM's technical arguments alone and the refusal to order an expert report on PEM's attempts to supply the applicant. It refers, finally, to the failure to take into consideration the complaint it had lodged on 12 July 1994 under Article 86 of the Treaty, as criticised in the sixth plea in law, and to the personal approaches made

by certain officials of DG I, at the same time as PEM, to certain influential members of the anti-dumping committee.

373 The Council observes that in its seventh plea in law the applicant summarises its other pleas and deduces therefrom that the Commission was party to an abuse of process on the part of PEM with the sole purpose of consolidating its alleged dominant position. The applicant is thus making serious accusations against the institutions, unsupported by evidence.

374 The Commission states that the applicant's insinuations are incapable of giving any substance to its plea.

375 It notes that under Article 12(1) of the basic regulation a proposal to impose definitive duties must be made to the Council 'after consultation' of the advisory committee and that under Article 6(1) of that regulation the advisory committee is chaired by the Commission. The applicant had moreover made observations to the committee. As to the reference to 'personal approaches', by which the applicant may be implying that the actions of Commission officials went beyond the normal exercise of their duties, the Commission emphasises that it cannot take a stance on vague insinuations which give no indication of the time of the alleged approaches, the identity of the persons referred to or the nature of the accusations.

Findings of the Court

376 It is settled case-law that a Community decision or measure is vitiated by a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been adopted in order to achieve purposes other than those for

which it was intended (Case C-323/88 *Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027, paragraph 33, and Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 66).

377 As the Council rightly points out, the applicant in its seventh plea merely produces a summary of its other pleas in law seeking annulment without contributing any new information beyond that already set out in connection with those pleas. Since the criticisms in those pleas have been rejected in the context of those pleas, they must likewise be rejected in the context of the present plea.

378 As to the applicant's assertion that certain officials of DG I made personal approaches at the same time as PEM to certain influential members of the anti-dumping committee, it is not accompanied by any details of the time of the alleged approaches, the identity of the persons referred to or the nature of the accusations. It does not show that the Commission aided and abetted the use of an anti-dumping proceeding for anticompetitive purposes and thereby committed a misuse of powers.

379 The seventh plea in law must therefore be rejected.

II — *The alternative claim for a declaration that the contested regulation is unenforceable against the applicant*

Arguments of the parties

380 The applicant claims, in the alternative, that the regulation should be declared unenforceable against it on the ground of manifest error of assessment, in that the Council imposed anti-dumping duties having general effect with respect to all imports of calcium metal originating in China and Russia.

381 It submits that it is unable to use PEM's standard calcium without incurring an increase in its production costs of over 70%, which means that the Community producer's calcium metal and calcium from China or Russia are not the same. Moreover, the Community producer cannot claim to have suffered injury by reason of the applicant's imports, which represent between 62% and 97% of imports from China and Russia between 1989 and 1993. Even if PEM can claim injury, such injury cannot in any event derive from the applicant's imports.

382 The applicant operates, as a processor, only on the market in finely divided calcium. PEM holds 48% of that market. Processors of calcium metal imported from China and Russia represent for their part less than 13% of the market. Besides, those processors can choose their suppliers. They are free to obtain supplies from PEM in order to avoid paying duty, which further strengthens PEM's position as a supplier. Hence it may not be concluded that the applicant has an anticompetitive advantage over those processors. On the other hand, the payment of duty places it at a competitive disadvantage compared to PEM, which is precisely the objective pursued by the latter.

383 The basic regulation contains no provision expressly prohibiting the exemption of a specified importer from payment of anti-dumping duties.

384 Moreover, having regard to the wide discretion which the Community institutions are acknowledged by the case-law to enjoy in implementing the anti-dumping rules, there is nothing to prevent the applicant from being the subject of special treatment.

385 In the Council's view, if the alternative claim were well founded, which it is not, the applicant would itself have an anticompetitive advantage over other processors of calcium metal imported from China and Russia, who would have to pay duty.

386 The claim is unfounded because the basic regulation does not allow the Council to exclude a specified importer from the scope of a regulation imposing anti-dumping duties. The only possible derogation is in the case where a supplier, that is, an exporter, gives an undertaking under Article 10 of the basic regulation.

387 While the basic regulation does not contain any provision prohibiting the exemption of a particular importer from the payment of anti-dumping duties, Article 8(2) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) provides that anti-dumping duties must be collected on a non-discriminatory basis. The wide discretion enjoyed by the institutions cannot dispense them from observance of that principle.

Findings of the Court

388 No provision of the basic regulation expressly prohibits the exemption of a specified importer from payment of anti-dumping duties. However, both Article 8(2) of the Agreement on Implementation of Article VI of GATT (OJ 1980 L 71, p. 90) and the general principles of Community law preclude anti-dumping duties from being levied in a discriminatory manner. The wide discretion enjoyed by the institutions cannot dispense them from observance of that principle.

389 Consequently, the applicant's argument cannot be accepted. Failure to impose anti-dumping duties on the applicant would have had a discriminatory effect against PEM and the other processors. If the applicant could import dumped products without being subject to anti-dumping duties, PEM's factory might sooner or later, as is stated in the contested regulation without being seriously challenged by the applicant, be compelled to cease production. That would be contrary to the objectives of the anti-dumping legislation and of the anti-dumping

duties at issue, and would also put PEM and the other processors at a competitive disadvantage, in that they, unlike the applicant, would not be able buy Chinese or Russian calcium metal at dumping prices in order to compete with the applicant on the market in broken calcium metal.

390 As regards the other two arguments relied on by the applicant, namely the impossibility of using PEM's standard calcium and the lack of injury to PEM (see paragraph 381 above), they cannot be accepted, for the reasons set out in connection with the third and fourth pleas in law, in the context of which the Court found that the institutions did not make an error of fact or of law or a manifest error of assessment in determining the like product or in examining the injury to the Community industry (see paragraphs 202 to 221, 231 to 263, 268 to 273 and 279 to 283 above).

391 The alternative claim must therefore be rejected.

392 In the light of all the foregoing, the application must be dismissed in its entirety.

Costs

393 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs of the Council, including those relating to the application for interim measures, as applied for in the form of order sought by the defendant.

394 The interveners PEM and the Chambre Syndicale have applied for the applicant to be ordered to pay the costs of their intervention.

395 In the circumstances of the case, the applicant must be ordered to bear the costs incurred by PEM.

396 The Chambre Syndicale intervened in the proceedings only in its capacity as an association defending the general interests of the Community industry, and not as a Community producer directly affected by the dumping practised by the Russian and Chinese producers. In those circumstances, there are no grounds for ordering the applicant to bear the costs of its intervention. The Chambre Syndicale must therefore bear its own costs.

397 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and those of the Council, including those of the application for the adoption of interim measures, and the costs of the intervener Péchiney Électrométallurgie;

3. Orders the Chambre Syndicale de l'Électrométallurgie et de l'Électrochimie and the Commission to bear their own costs.

Azizi Vesterdorf García-Valdecasas

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 15 October 1998.

H. Jung J. Azizi

Registrar President

Summary

Facts of the case ..... II - 3946

A — The Extramet case ..... II - 3946

B — The product ..... II - 3948

C — The applicant company, Industrie des Poudres Sphériques ..... II - 3949

D — Administrative procedure ..... II - 3950

Procedure before the Court ..... II - 3952

Forms of order sought by the parties ..... II - 3954

Admissibility ..... II - 3955

Arguments of the parties ..... II - 3955

Findings of the Court ..... II - 3957

Substance ..... II - 3958

I — The claim for annulment of the contested regulation ..... II - 3958

First plea in law: infringement of Articles 5 and 7(9) of the basic regulation and disregard of res judicata and the conditions for regularisation of an administrative act ..... II - 3959

Arguments of the parties ..... II - 3959

— First limb: infringement of Articles 5 and 7(9) of the basic regulation ..... II - 3960

— Second limb: disregard of the force of res judicata ..... II - 3961

— Third limb: disregard of the conditions for regularisation of an administrative act ..... II - 3964

Findings of the Court ..... II - 3967

Second plea in law: infringement of Articles 7 and 8 of the basic regulation ..... II - 3971

First limb: Breach of the right to a fair hearing, in connection with the belated communication of the memorandum filed by PEM on 1 July 1992 ..... II - 3972

— Arguments of the parties ..... II - 3972

— Findings of the Court ..... II - 3973

Second limb: infringement of Article 7(4) of the basic regulation, in that the Commission failed to forward to the applicant certain documents produced by PEM, and of Article 8 of the basic regulation ..... II - 3975

— Arguments of the parties ..... II - 3975

— Findings of the Court ..... II - 3978

Third limb: infringement of Article 7(4) of the basic regulation and breach of the right to a fair hearing, in that the Commission refused to communicate to the applicant information which was essential for it to be able effectively to make observations ..... II - 3982

— Arguments of the parties ..... II - 3982

— Findings of the Court ..... II - 3984

Third plea in law: infringement of Articles 4(4) and 2(12) of the basic regulation and manifest error of assessment ..... II - 3989

— Arguments of the parties ..... II - 3989

— Findings of the Court ..... II - 3994

Fourth plea in law: infringement of Article 4(1) of the basic regulation and manifest error of assessment ..... II - 3999

1. Causal link ..... II - 3999

(a) The complaint that PEM made no effort to supply the applicant with standard quality calcium metal ..... II - 4000

Arguments of the parties ..... II - 4000

Findings of the Court ..... II - 4002

(b) The complaint that PEM was responsible for the falls in prices of broken calcium metal which caused the injury to the Community industry ..... II - 4010

Arguments of the parties ..... II - 4010

Findings of the Court ..... II - 4011

2. Extent of the injury ..... II - 4012

Arguments of the parties ..... II - 4012

Findings of the Court ..... II - 4014

Fifth plea in law: infringement of Article 12 of the basic regulation and manifest error of assessment ..... II - 4015

A — Introduction ..... II - 4015

Arguments of the parties ..... II - 4015

Findings of the Court ..... II - 4017

B — PEM's position on the calcium metal market before the imposition of the duties at issue ..... II - 4018

C — PEM's position on the markets in primary calcium metal and broken calcium metal following the imposition of the duties at issue ..... II - 4019

1. PEM's position on the market in primary calcium metal ..... II - 4020

(a) The possibility for intermediate users to obtain supplies of calcium metal imported from China or Russia ..... II - 4020

Arguments of the parties ..... II - 4020

Findings of the Court ..... II - 4021

(b) The possibility for IPS to obtain supplies from the North American producers ..... II - 4023

Arguments of the parties ..... II - 4023

Findings of the Court ..... II - 4025

(c) The possibility of reviewing the state of the market six months, or at the latest one year, after the imposition of the duties at issue ..... II - 4026

Arguments of the applicant ..... II - 4026

Findings of the Court ..... II - 4026

(d) Conclusion ..... II - 4027

2. PEM's position on the market in broken calcium metal ..... II - 4027

Arguments of the parties ..... II - 4027

Findings of the Court ..... II - 4028

D — Consideration of the interests of intermediate users, including the applicant, and end users and of PEM's conduct in the examination of the Community interest in imposing the duties at issue ..... II - 4028

1. Possibility of the applicant making sales abroad with the benefit of the inward processing procedure ..... II - 4029

2. Consideration of the consequences of the dumped imports for PEM ..... II - 4030

3. Effect of the anti-dumping duty on end users and intermediate users ..... II - 4031

4. Impact of the duties imposed by the contested regulation on the turnover of PEM compared to that of the applicant ..... II - 4032

5. Failure to take into consideration the under-use of PEM's production capacity and PEM's responsibility for the falls in prices ..... II - 4033

Sixth plea in law: infringement of Article 190 of the Treaty ..... II - 4034

Arguments of the parties ..... II - 4034

Findings of the Court ..... II - 4035

Seventh plea in law: misuse of powers ..... II - 4037
Arguments of the parties ..... II - 4037
Findings of the Court ..... II - 4039

II — The alternative claim for a declaration that the contested regulation is unenforceable against the applicant ..... II - 4040
Arguments of the parties ..... II - 4040
Findings of the Court ..... II - 4042

Costs ..... II - 4043