

JUDGMENT OF THE COURT (Sixth Chamber)
11 June 1992 *

In Case C-358/89,

Extramet Industrie SA, a company governed by French law, established in Annesse, France, represented by Aloyse May, of the Luxembourg Bar, and Chantal Momège, of the Paris Bar, with an address for service in Luxembourg at the chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Council of the European Communities, represented by Yves Crétien and Erik Stein, Legal Advisers, acting as Agents, assisted by Arnaud Michel and Dominique Voillemot, of the Paris Bar, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Affairs Directorate, European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

- (1) **Commission of the European Communities**, represented by Eric L. White, of its Legal Service, acting as Agent, assisted by Claus-Michel Happe, a German civil servant seconded to the Commission under the agreement for exchanges with national civil servants, with an address for service in Luxembourg at the office of Roberto Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,
- (2) **Péchiney Electrométallurgie SA**, a company governed by French law, established in Paris,
- (3) **Chambre Syndicale de l'Electrométallurgie et de l'Electrochimie**, established in Paris,

* Language of the case: French.

both represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the chambers of Jacques Loesch, 8 Rue Zithe,

interveners,

APPLICATION for the annulment of Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports (OJ 1989 L 271, p. 1),

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn, G. F. Mancini, C. N. Kakouris and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 April 1992,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 27 November 1989, Extramet Industrie SA ('Extramet'), a company governed by French Law, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports (OJ 1989 L 271, p. 1) or, at the very least, of the 24th recital in the preamble to that regulation.
- 2 Extramet is the largest importer in the Community of calcium metal, essentially from the People's Republic of China and the Soviet Union. Imports of calcium metal constitute the principal source of supply of Extramet, which uses it to produce, by a redistillation process which it has developed and patented, granules of pure calcium which are used mainly in the metallurgical industry.
- 3 Following a complaint lodged by the Chambre Syndicale de l'Electrometallurgie et de l'Electrochimie ('the Chambre Syndicale'), on behalf of Péchiney Electrometallurgie SA ('Péchiney'), the sole producer of calcium metal in the Community, which processes pure calcium metal by its own distillation process, the Commission adopted 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).
- 4 After an extension of the period for which the anti-dumping duty was imposed, the Council introduced, by the contested regulation which entered into force on 21 September 1989, a definitive anti-dumping duty of 21.8% and 22% on imports of calcium metal originating in the People's Republic of China and the Soviet Union respectively and definitively collecting the provisional anti-dumping duty imposed on such imports.

- 5 According to the recitals in the preamble to that regulation, the Community producer, namely P  chiney, and an independent importer (which also processes the product), namely Extramet, had, after the introduction of the provisional anti-dumping duty, requested and been granted an opportunity to be heard by the Commission and had submitted written observations to it.
- 6 It is apparent from those recitals that the importer had claimed in particular that the Community producer suffered self-inflicted injury in refusing to supply calcium metal to it, prompting the importer to lodge a complaint with the competent French authorities alleging abuse of a dominant position.
- 7 It is also stated in recital 24 that the importer had requested a special exemption in the event that a decision should be taken to impose definitive anti-dumping duties and that the Council had been unable to grant that request.
- 8 By a separate document lodged at the Court Registry on 11 December 1989, Extramet applied for the adoption of interim measures, in particular suspension of the operation of Regulation No 2808/89 until the Court had given a decision on the substance. That application was dismissed by order of the President of the Court of 14 February 1990.
- 9 By orders of 17 January and 22 May 1990, the Court granted leave to the Commission, P  chiney and the Chambre Syndicale to intervene in support of the forms of order sought by the Commission.
- 10 By judgment of 16 May 1991, the Court dismissed an objection by the Council that Extramet's application was inadmissible.

- 11 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 12 In support of its application, Extramet puts forward four pleas in law, alleging that errors were made in the definition of the like products taken into consideration, the determination of normal value, the determination of the injury suffered by the Community industry and the assessment of the Community interest. It is appropriate to examine first the plea concerning the determination of the injury suffered by the Community industry.
- 13 In support of that plea, the applicant contends in particular that P echiney itself caused the injury suffered since it refused to supply calcium metal to Extramet. According to Extramet, if P echiney had agreed to deliver calcium metal to it, it would not have suffered, during the period chosen for consideration of the injury, any loss of production and Soviet and Chinese imports into the Community would have fallen by half and thereafter accounted for only a minimal share of the Community market.
- 14 Extramet also states that, following P echiney's refusal to sell calcium metal to it, it commenced legal proceedings against P echiney before the competent French authorities for abuse of a dominant position. It considers that, in anti-dumping proceedings, account must be taken of such anti-competitive practices and that an anti-dumping duty must not be imposed if its effect would be to maintain an unjustified advantage in the Community market resulting from a cartel or an abuse of a dominant position, provided that formal evidence of such practices is produced and an action is brought on the basis of the Community competition rules.
- 15 In that connection, it must first be recalled that, pursuant to Article 4(1) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against

dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1), 'a determination of injury shall be made only if the dumped or subsidized imports are ... causing injury' to Community producers and 'injuries caused by other factors ... must not be attributed to the dumped or subsidized imports.'

- 16 In determining the injury, the Council and the Commission are thus under an obligation to consider whether the injury on which they intend to base their conclusions actually derived from dumped imports and must disregard any injury deriving from other factors, in particular from the conduct of Community producers themselves.
- 17 It must next be noted that, in order to refute Extramet's argument, the Council merely referred, in the proceedings before the Court, to recital 15 in the preamble to the contested regulation, contending that, because of its specific nature, an anti-dumping procedure cannot prevent other actions from being brought in order to penalize anti-competitive conduct.
- 18 In recital 15 in the preamble to the contested regulation, however, the Council had merely stated that, according to the Commission, first, Péchiney had denied Extramet's allegations and no final judgment had yet been reached by the French authorities before which Extramet had commenced proceedings and, secondly, an anti-dumping investigation could not prejudice the outcome of proceedings brought under Article 85 or 86 of the Treaty and, if an infringement of those rules were discovered, Article 14(1) of Regulation No 2423/88 would enable the anti-dumping procedure in question to be reviewed.
- 19 None of those statements shows that the Community institutions actually considered whether Péchiney itself contributed, by its refusal to sell, to the injury suffered and established that the injury on which they based their

conclusions did not derive from the factors mentioned by Extramet. They did not therefore follow the proper procedure in determining the injury.

20 Consequently, the plea as to errors made in the determination of the injury suffered by the Community industry must be upheld and the contested regulation must be annulled, without its being necessary to consider the other pleas and arguments put forward by the applicant.

Costs

21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Council has failed in its submissions, it must be ordered to pay the costs, including those relating to the application for interim measures. The Commission, Péchiney and the Chambre Syndicale, which intervened in support of the Commission, must, under the first and second subparagraphs of Article 69(4) of the Rules of Procedure, bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports;

2. Orders the Council to pay the costs, including those relating to the application for interim measures;
3. Orders the Commission, Péciney and the Chambre Syndicale, the interveners, to bear their own costs.

Schockweiler

Kapteyn

Mancini

Kakouris

Murray

Delivered in open court in Luxembourg on 11 June 1992.

J.-G. Giraud

F. A. Schockweiler

Registrar

President of the Sixth Chamber