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The Independent Importer's Right of Review of Antidumping Regulations Before the Court of Justice of the European Communities

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Meg A. Mataraso

Abstract

This Note argues that the Court should interpret the EEC Treaty to admit actions brought by independent Community importers. Part I of this Note examines the structure of Community antidumping proceedings. Part II sets forth the two methods that permit private parties to seek judicial review of antidumping regulations. Part III argues that admission to the Court should not be restricted so as to exclude independent importers. This Note concludes that allowing independent importers to challenge directly antidumping regulations is necessary to provide equality of treatment, and that such actions neither undermine the Community policy nor destroy the structure of the Community judiciary.

THE INDEPENDENT IMPORTER'S RIGHT OF REVIEW
OF ANTIDUMPING REGULATIONS BEFORE
THE COURT OF JUSTICE OF THE
EUROPEAN COMMUNITIES

INTRODUCTION

The Treaty Establishing the European Economic Community (the "EEC Treaty")¹ limits direct actions by private parties challenging measures of the European Economic Community (the "Community" or the "EEC").² The Council of Ministers

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English version), 298 U.N.T.S. 11 (unofficial English trans.) [hereinafter EEC Treaty or Treaty]. The EEC is currently comprised of 12 Member States: Belgium, Denmark, Federal Republic of Germany, France, the United Kingdom, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. See Treaty Between the Member States of the European Communities and the Kingdom of Spain and the Portuguese Republic Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, O.J. L 302/9 (1985).

2. See, e.g., *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. 1005, 1031, ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127 (denying admission to independent importer of chemical fertilizer in antidumping case); *Alusuisse v. Council and Commission*, Case 307/81, 1982 E.C.R. 3463, 3473, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8869, at 8244 (denying admission to independent importer of orthoxylene in antidumping case); *Wagner v. Commission*, Case 162/78, 1979 E.C.R. 3467, 3488, ¶ 22, Common Mkt. Rep. (CCH) ¶ 8623, at 7394 (denying admission to sugar exporters to challenge Commission regulation concerning export refunds); *Société des Usines de Beauport v. Council*, Joined Cases 103 to 109/78, 1979 E.C.R. 17, 25, ¶ 23, Common Mkt. Rep. (CCH) ¶ 8531, at 7631 (denying admission to sugar-producing undertakings challenging Council regulation providing for reduction of quotas by Member States); *Compagnie Française Commerciale v. Commission*, Case 64/69, 1970 E.C.R. 221, 227, ¶ 18, Common Mkt. Rep. (CCH) ¶ 8091, at 8323 (denying admission to applicant challenging Commission regulation concerning agricultural policy); *Glucoseries Réunies v. Commission*, Case 1/64, 1964 E.C.R. 413, 417, Common Mkt. Rep. (CCH) ¶ 8024, at 7407 (denying admission to a Community manufacturer who sought annulment of Commission decision providing for countervailing duties on certain agricultural products); *Plaumann v. Commission*, Case 25/62, 1963 E.C.R. 95, 107-08, Common Mkt. Rep. (CCH) ¶ 8013, at 7274 (denying admission to importer who challenged Council regulation that refused to suspend certain custom duties); *Producteurs de Fruits v. Council* (Fruits and Vegetables), Joined Cases 16 & 17/62, 1962 E.C.R. 471, 480, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8005, at 7187 (denying admission to a fruit growers association challenging a Council regulation concerning agricultural policy); cf. Dinnage, *Locus Standi and Article 173 EEC: The Effect of Metro SB Grossmärkte v. Commission*, 4 EUR. L. REV. 15, 18 (1979) (noting that from outset Court has taken a narrow approach); Rasmussen, *Why is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112 (1980) (arguing that Court's interpretation is restrictive).

(the "Council"), the Commission of the European Communities (the "Commission"), and the Member States, however, enjoy unfettered access to the Court of Justice of the European Communities (the "Court of Justice" or the "Court").³ Within the past decade certain private parties have succeeded in gaining admission to the Court to challenge antidumping regulations. The Court has permitted exporters⁴ and non-EEC producers,⁵ and their EEC subsidiaries,⁶ to bring direct actions. In addition, the Court has permitted representatives of Community industries⁷ and individual Community producers⁸ to bring direct actions. The Court has not admitted, however, independent Community importers.⁹

This Note argues that the Court should interpret the EEC Treaty to admit actions brought by independent Community importers. Part I of this Note examines the structure of Community antidumping proceedings. Part II sets forth the two methods that permit private parties to seek judicial review of

3. See EEC Treaty, *supra* note 1, art. 173, 1973 Gr. Brit. T.S. No. 1, at 57, 298 U.N.T.S. at 75. The relevant portion provides that "[t]he Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission . . ." *Id.*; see Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229 (1984) (referring to Council, Commission, and Member States as "privileged" plaintiffs).

4. See, e.g., *Allied Corporation*, 1984 E.C.R. at 1030, ¶ 14, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127; *NTN Toyo Bearing Company v. Council (Ball Bearings)*, Case 113/77, 1979 E.C.R. 1185, 1205, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

5. See, e.g., *Allied Corporation*, 1984 E.C.R. at 1030, ¶ 14, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127; *Ball Bearings*, 1979 E.C.R. at 1205, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

6. See, e.g., *Tokyo Electric v. Council (Electric Typewriters)*, Joined Cases 260/85 & 106/86, 1988 E.C.R. __, __, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,832; *Ball Bearings*, 1979 E.C.R. at 1205, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

7. See, e.g., *Fediol v. Commission*, Case 191/82, 1983 E.C.R. 2913, 2929, 2936, ¶¶ 1, 33, Common Mkt. Rep. (CCH) ¶ 14,013 at 14,170, 14,173.

8. See, e.g., *Electric Typewriters*, 1988 E.C.R. at __, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,832; *Timex v. Council and Commission*, Case 264/82, 1985 E.C.R. 849, 866, ¶ 17, Common Mkt. Rep. (CCH) ¶ 14,143, at 15,782.

9. See *Aluisisse v. Council and Commission*, Case 307/81, 1982 E.C.R. 3463, 3471, 3473, ¶¶ 3, 14, Common Mkt. Rep. (CCH) ¶ 8869, at 8242, 8244. An independent importer is a party in the Community that purchases products from an exporter or manufacturer, but with whom there exists no affiliation. *Id.* at 3471, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8869, at 8242.

antidumping regulations. Part III argues that admission to the Court should not be restricted so as to exclude independent importers. This Note concludes that allowing independent importers to challenge directly antidumping regulations is necessary to provide equality of treatment, and that such actions neither undermine Community policy nor destroy the structure of the Community judiciary.

I. *THE NATURE OF ANTIDUMPING PROCEEDINGS*

Antidumping laws penalize foreign trade practices that involve price discrimination and injure a domestic industry.¹⁰ Such practices typically involve the sale of a product at a lower price in the importing country than that charged in the country of origin.¹¹ Exporters and producers often engage in this practice to increase their market share.¹²

Article VI of the General Agreement on Tariffs and Trade ("GATT")¹³ provides a uniform international framework for the supervision of antidumping laws enacted by the signatory

10. J. BESELER & A. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW* 41 (1986); J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 1 (1966).

11. Council Regulation No. 2423/88 of July 11, 1988 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, art. 2(2)-(3), O.J. L 209/1, at 4 (1988) [hereinafter *Antidumping Regulation*]. See generally E. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* 1 (1987) (discussing antidumping practices).

12. J. BESELER & A. WILLIAMS, *supra* note 10, at 44. Additional reasons that an exporter might dump include: to establish itself in a market, to maintain market position, to eliminate competitors, or to maximize short term profits. *Id.* The authors note that for the purposes of an antidumping action, the exporters' motive is irrelevant, because the antidumping laws are "concerned with the effect of dumping rather than its cause." *Id.*

13. The General Agreement on Tariffs and Trade is attached to the Final Act of the United Nations Conference on Trade and Employment, which was signed in Geneva, Switzerland, on October 30, 1947. It is in force by virtue of the Protocol of Provisional Application, signed by the original parties to GATT, and the subsequent accession protocols signed by new members. 61 Stat. (pt. 5) A3, T.I.A.S. No. 1700, 55 U.N.T.S. 188 [hereinafter *GATT*]. The text of the agreement as amended to date was published in 1969 by GATT. 4 *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (1969) [hereinafter *BISD*]. In 1979 the GATT Code was amended by the Tokyo Round. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *BISD* (26th Supp. 1980) [hereinafter *Tokyo Round*]. For a further discussion of the EEC and the Tokyo Round negotiations, see J. JACKSON, J. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND* 21-76 (1984).

parties.¹⁴ In accordance with GATT,¹⁵ EEC proceedings are conducted pursuant to the procedures in Council Regulation No. 2423/88 of 11 July 1988 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community (the "Antidumping Regulation").¹⁶

A. Antidumping Investigations

Under the Antidumping Regulation, investigations begin with a petition to the Commission either from a Community industry or a Member State requesting an investigation of alleged dumping.¹⁷ The Commission, which conducts the inves-

14. Toyko Round, *supra* note 13, art. VI, at 171; E. VERMULST, *supra* note 11, at

4. One commentator writes:

International supervision of national antidumping laws takes place within the General Agreement on Tariffs and Trade. Article VI of the General Agreement condemns injurious dumping, but is mainly devoted to international control of *anti*dumping action. To a certain extent this emphasis follows logically from the definition of dumping as price discrimination, practiced by private individuals. GATT addresses governmental behavior and therefore could not possibly prohibit dumping.

Id. (emphasis in original).

15. Toyko Round, *supra* note 13, art. 1, at 171-72. Article 1 provides:

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code. The following provisions govern the application of Article VI of the General Agreement in so far as action is taken under anti-dumping legislation or regulations.

Id.

16. Antidumping Regulation, *supra* note 11. The EEC has maintained exclusive jurisdiction over antidumping law in the Member States since 1968 with the enactment of Council Regulation No. 459/68, O.J. L 92/1 (1968). J. BESELER & A. WILLIAMS, *supra* note 10, at 23, 33; E. VERMULST, *supra* note 11, at 7.

The Antidumping Regulation has been amended several times since 1968. See Council Regulation No. 2011/73, O.J. L 206/3 (1973); Council Regulation No. 1411/77, O.J. L 160/4 (1977); Council Regulation No. 1681/79, O.J. L 196/1 (1979); Council Regulation No. 3017/79, O.J. L 339/1 (1979); Council Regulation No. 1580/82, O.J. L 178/9 (1982); Council Regulation No. 2176/84, O.J. L 201/1 (1984), Common Mkt. Rep. (CCH) ¶ 3821, at 3001. For a discussion of these amendments, see J. BESELER & A. WILLIAMS, *supra* note 10, at 21-29.

17. Antidumping Regulation, *supra* note 11, art. 5, at 8. Article 5 provides in relevant part:

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.

tigation, then submits questionnaires to all known¹⁸ exporters and importers of the allegedly dumped merchandise, and possibly to the petitioning Community producers as well, in order to gather the information that is necessary to determine whether the merchandise has been dumped.¹⁹ These parties are encouraged to cooperate and provide information, because, under the "best information available" rule, the Commission is permitted to make determinations on the basis of whatever facts are available.²⁰ Thus, if exporters, non-EEC producers, and EEC importers fail to provide relevant information, the Commission may use data provided solely by the Community industry.²¹ Information provided by the Community industry or party petitioning the Commission for relief is probably more likely to result in the imposition of a higher duty than if information was also provided by the non-EEC

2. The complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom.

....

6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping or subsidization and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission.

Id.; see J. BESELER & A. WILLIAMS, *supra* note 10, at 175-83 (regarding specific content of a complaint).

18. "Known" parties normally include only those non-EEC producers, exporters, and importers identified in the petitioner's complaint. E. VERMULST, *supra* note 11, at 205-06.

19. Antidumping Regulation, *supra* note 11, art. 7(2)(a), at 9. Article 7(2)(a) provides: "The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, examine and verify the records of importers, exporters, traders, agents, producers, trade associations and organizations." *Id.* The questionnaire requests pricing information over the last five years, including information on a transaction-by-transaction basis on prices charged by the non-EEC producers in "their home market, the Community market and other export markets" E. VERMULST, *supra* note 11, at 205. Information on cost of production may also be requested. *Id.*

20. Antidumping Regulation, *supra* note 11, art. 7(7)(b), at 10. Article 7(7)(b) further provides that the Commission may make the determination on the basis of facts available if information is not provided within a reasonable period or if an interested party significantly impedes the investigation. *Id.* The "best information available" may be obtained from any published material or data obtained from other parties who have cooperated with the investigation if certain parties fail to provide relevant information. J. BESELER & A. WILLIAMS, *supra* note 10, at 191-92; E. VERMULST, *supra* note 11, at 207-08.

21. Antidumping Regulation, *supra* note 11, art. 7(7)(b), at 10; E. VERMULST, *supra* note 11, at 208.

producers, exporters, and EEC importers.²² The Commission will usually independently verify the data received before issuing preliminary findings.²³ The Commission also makes available to a party all relevant information submitted to the Commission that could be of aid to a party's defense, subject to certain restrictions.²⁴

After reviewing this information, the Commission determines whether a product has been dumped. A product has been dumped when the export price²⁵ to the Community is less than the normal value²⁶ in the country of origin or the ex-

22. E. VERMULST, *supra* note 11, at 444. Community complainants will tend to miscalculate pricing information so as to increase the dumping margin. *Id.* Moreover, the Commission may use import statistics declared by exporters in the past, which are used to calculate customs duties. *Id.* The use of these figures in an antidumping investigation is likely to result in a higher dumping margin than if the exporter had provided more reliable information. *Id.*

23. Antidumping Regulation, *supra* note 11, art. 7(2)(a), at 9. Verification and further fact finding may be made during on-site inspections at the premises of the non-EEC producers, exporters, and importers and EEC producers and trade associations concerned. *Id.* art. 7(3)(a), at 9.

24. *Id.* art. 7(4)(a), at 9. Article 7(4)(a) states:

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

Id. Where requested, confidential treatment is given to information provided by interested parties. *Id.* art. 8, at 10. Information received in an antidumping or countervailing duty investigation may not be used for other purposes. *Id.* Thus, confidential treatment serves to encourage non-EEC parties to participate in the investigation and provide information that may be sensitive. J. BESELER & A. WILLIAMS, *supra* note 10, at 200-01.

Interested parties may also request a hearing with the Commission where there are specific reasons why the party should be heard orally. Antidumping Code, *supra* note 11, art. 7(5), at 10.

25. Antidumping Regulation, *supra* note 11, art. 2(8)(a), at 5. Article 2(8)(a) provides that the export price equals the price that is "actually paid or payable for the product sold for export to the Community . . ." *Id.* In instances "where the foreign exporter sells directly to an independent EC importer, the price that the exporter charges the importer constitutes the export price." E. VERMULST, *supra* note 11, at 439.

26. Antidumping Regulation, *supra* note 11, art. 2(3)(a), at 4. Article 2(3)(a) states that the normal value is "the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin." *Id.* A "'like product' means a product which is identical, i.e., alike in all respects, to the product under consideration, or, in the ab-

porting country.²⁷ The dumping margin equals the difference between the normal value and the export price²⁸ and is used to determine the amount of the duty to be imposed.²⁹

There are situations where the normal value and the export value must be determined by constructing such values.³⁰ For example, the Commission will construct the normal value where the product under investigation is not sold in the home market of the producer or exporter or where, if sales do exist, a proper comparison is not possible.³¹

The Commission will construct the export price where the Commission finds that there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party.³² In addition, the Commission will construct the export price where, for some reason, the Commission determines that the price actually paid or payable is unreliable.³³

sence of such a product, another product which has characteristics closely resembling those of the product under consideration." *Id.* art. 2(12), at 6. For a further discussion of normal value, see J. BESELER & A. WILLIAMS, *supra* note 10, at 52-57; E. VERMULST, *supra* note 11, at 416-21.

27. Antidumping Regulation, *supra* note 11, art. 2(2), (6), at 4-5. Article 2(6) allows the Commission to calculate the normal value based on the price of the product in the exporting country if the origin of the product was not that country. *Id.* For a more detailed discussion of calculating margins, see J. BESELER & A. WILLIAMS, *supra* note 10, at 73; E. VERMULST, *supra* note 11, at 416-80.

28. Antidumping Regulation, *supra* note 11, art. 2(14), at 6.

29. *Id.* art. 13(3), at 12.

30. *Id.* arts. 2(3)(b), (8)(b), at 4-5.

31. *Id.* art. 2(3)(b), at 4. A proper comparison of the price in the home market and the price charged in the Community may not be possible where the physical characteristics of the product are altered; where import charges and indirect taxes are attached to the product when consumed in the home market but are not levied if the product is exported; or where various selling expenses affect the price. *Id.* art. 2(9), at 5. When constructing the normal value, the Commission must add the cost of production and a reasonable margin of profit. *Id.* art. 2(3)(b)(ii), at 4. For a more detailed discussion of these factors, see, J. BESELER & A. WILLIAMS, *supra* note 10, at 84-112.

32. Antidumping Regulation, *supra* note 11, art. 2(8)(b), at 5.

33. *Id.* Article 2(8)(b) provides:

[T]he export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation [into the Community] and resale and for a reasonable profit margin.

Id. The costs incurred between importation into the Community and resale may include "(i) usual transport, insurance, handling, loading and ancillary costs; (ii) cus-

If the Commission determines that a product has been dumped, a duty will be imposed only after consultation with the advisory committee established by the Antidumping Regulation (the "Advisory Committee")³⁴ and then only if the dumped product causes injury to a Community industry.³⁵ Under the "lesser duty" rule, the Commission may recommend a duty less than the dumping margin if that "duty would be adequate to remove the injury."³⁶

toms duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods; (iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed." *Id.*

34. Article 6(1) of the Antidumping Regulation provides that the Advisory Committee "shall consist of representatives of each Member State, with a representative of the Commission as chairman." *Id.* art. 6(1), at 8. Under article 11(2), the Commission must consult the Advisory Committee with regard to provisional duties. *Id.* art. 11(2), at 11. Article 6(4) dictates that consultations shall cover:

- (a) the existence of dumping or of a subsidy and methods of establishing the dumping margin or the amount of the subsidy;
- (b) the existence and extent of injury;
- (c) the causal link between the dumped or subsidized imports and injury;
- (d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping or the subsidy and the ways and means for putting such measures into effect.

Id. art. 6(4), at 8.

35. *Id.* art. 4(1), at 7. An injury will be found "only if the dumped or subsidized imports are, through the effects of dumping or subsidization, . . . causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry." *Id.* The Commission considers the volume and price of dumped imports and the consequent impact on the Community industry as indicated by certain trends in economic factors, such as production, utilization of capacity, stocks, sales, market share, prices, profits, return on investment, cash flow, and employment. *Id.* art. 4(2), at 7.

The Commission may also find injury

even where a major proportion of the total Community industry is not injured, provided there is a concentration of dumped or subsidized imports into such an isolated market and provided further that the dumped or subsidized imports are causing injury to the producers of all or almost all of the production within such market.

Id. art. 4(5), at 8.

When determining whether a duty should be imposed, the Commission and the Advisory Committee also consider the "interest of the Community" in such a measure. See Stanbrook, *The Impact of Community Interest and Injury Determination on Antidumping Measures in the EEC*, in 1985 *FORDHAM CORP. L. INST.* 623, 625 (B. Hawk ed. 1986) ("'[I]nterests of the Community' is not defined anywhere in the Antidumping Regulation but it clearly refers to the overall interests of the Community and not just to those of the . . . [petitioning] domestic industry.").

36. Antidumping Regulation, *supra* note 11, art. 13(3), at 12.

It is significant that international rules have always focused more on the trade-distorting effects of antidumping action than on the effects of the

After consulting with the Advisory Committee, and after the first stage of the investigation, the Commission may issue regulations for the imposition of provisional duties to prevent injury during the course of the proceedings.³⁷ A provisional duty is not collected until the investigation is completed.³⁸ With such a duty, the importer provides security for the amount that may be finally imposed.³⁹ The security may be either a cash deposit or a banker's guaranty.⁴⁰

Before the conclusion of a full investigation, exporters and non-EEC producers may offer to raise prices or revise the volume of exports to a level deemed satisfactory to the Commission.⁴¹ A promise to make such adjustment, known as an undertaking,⁴² may be a substitute for the imposition of an antidumping duty.⁴³ An undertaking is considered more advantageous to exporters, non-EEC producers, and importers who may still profit from the per-unit increase in price, which may compensate partly for any loss in volume of sales and avoids

dumping itself: the common denominator of all GATT refinements of the antidumping regime over the last forty years has been that they limit the freedom of the importing country to take protective action.

E. VERMULST, *supra* note 11, at 2. Thus, Vermulst notes that the lesser duty rule corresponds with the intent of the drafters of GATT in recommending administrative discretion to prevent a windfall to Community producers where the injury suffered is less than the dumping margin. *Id.* at 228-29.

37. Antidumping Regulation, *supra* note 11, art. 11(1), at 11. Article 11 provides in part:

Where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member State or on its own initiative, shall impose a provisional anti-dumping or countervailing duty.

Id.

38. *Id.*

39. *Id.*

40. J. BESELER & A. WILLIAMS, *supra* note 10, at 210-11. The authors note that usually a banker's guaranty is provided, but that the form of the security that will be accepted may depend "on the good standing of the importer concerned." *Id.*

41. *Id.* at 215.

42. Antidumping Regulation, *supra* note 11, art. 10(1), at 11. This provision requires that the Commission consult with the Advisory Committee prior to the acceptance of an undertaking. *Id.*

43. *Id.* The Antidumping Regulation provides that the Commission's ultimate decision shall not be prejudiced where the undertaking suggested by the Commission is not offered by the non-EEC producer or exporter or if an offer of an undertaking is rejected by the Commission. *Id.* art. 10(3), at 11.

any additional duty on the goods.⁴⁴

After a full investigation and consultation with the Advisory Committee, the Commission submits its proposal to the Council.⁴⁵ The Council may impose definitive duties and make definitive the collection of provisional duties imposed by the Commission.⁴⁶ The Council generally adopts the Commission's proposal⁴⁷ and imposes duties by regulation.⁴⁸ Regulations must detail the facts and reasons that are the bases for the determination.⁴⁹ Thereafter, the Member States collect the duties from the importer as the goods in question enter the Community.⁵⁰

B. *Administrative Review*

Once a duty has been imposed, the Antidumping Regulation provides for two types of administrative adjustment.⁵¹ Under the first procedure, a private party may request that the Commission revise the regulation after demonstrating changed circumstances sufficient to warrant review, provided

44. E. VERMULST, *supra* note 11, at 220; see Bourgeois, *EC Antidumping Enforcement—Selected Second Generation Issues*, in 1985 FORDHAM CORP. L. INST. 563, 588 (B. Hawk ed. 1986); Hindley, *Dumping and the Far East Trade of the European Community*, WORLD ECON. 445, 446 (1988).

45. Antidumping Regulation, *supra* note 11, art. 12(1), at 12 (providing for consultation with regard to the imposition of definitive duties).

46. *Id.* art. 12(1), (2)(a), at 12. The Council must approve such measures by a qualified majority vote. *Id.*

47. E. VERMULST, *supra* note 11, at 196.

48. Antidumping Regulation, *supra* note 11, art. 13(1), at 12. Article 13(1) provides that "[a]nti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by Regulation." *Id.* The EEC Treaty defines a regulation as a measure that "shall have general application. It shall be binding in its entirety and directly applicable in all Member States." EEC Treaty, *supra* note 1, art. 189, 1973 Gr. Brit. T.S. No. 1, at 60, 298 U.N.T.S. at 78-79. Whereas, "[a] decision shall be binding in its entirety upon those to whom it is addressed." *Id.*

49. Antidumping Code, *supra* note 11, art. 13(2), at 12. The antidumping regulation also specifies the product concerned, the type and amount of the duty imposed, the countries involved, and, where practicable, the suppliers involved. *Id.*

50. See *id.* art. 13(8), at 13. Article 13(8) provides that "[a]nti-dumping or countervailing duties shall be collected by Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports." *Id.*; see NTN Toyo Bearing Company v. Council (Ball Bearings), Case 113/77, 1979 E.C.R. 1185, 1205, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8574, at 8342 (implementation of an antidumping regulation is purely automatic); J. BESELER & A. WILLIAMS, *supra* note 10, at 233.

51. Antidumping Regulation, *supra* note 11, arts. 14, 16, at 14-15.

that at least one year has elapsed since the conclusion of the investigation.⁵² The second procedure allows EEC importers to seek refunds where the importer can show that the duty collected exceeds the actual dumping margin.⁵³ The Antidumping Regulation does not provide, however, for judicial review of the legality of the regulation.⁵⁴

II. *THE RIGHT OF JUDICIAL REVIEW AND ANTIDUMPING CASES*

While the Antidumping Regulation does not provide for judicial review of Council and Commission determinations, the EEC Treaty grants certain private parties direct access to the Court of Justice.⁵⁵ Certain private parties may also indirectly challenge a regulation in Member State courts.⁵⁶ Various hy-

52. *Id.* art. 14(1), at 14. After the Commission consults the Advisory Committee, the Commission determines whether review is warranted. *Id.* art. 14(2), at 14. A review of regulations imposing duties and decisions to accept undertakings may also be initiated by the Commission or may be held at the request of a Member State. *Id.* art. 14(1), at 14. The review procedures allow for a regulation to be amended, repealed, or annulled. *Id.* art. 14(3), at 14.

53. *Id.* art. 16(1), at 15. Refunds shall be adjusted to reflect the changes that have occurred in the dumping margin since the original investigation, based on shipments from the importer's supplier. *Id.* Calculations are made in accordance with the same method applied in the original investigation. *Id.*

The refund procedures require that an importer submit an application to the Member State in the territory where the products were released for free circulation. *Id.* art. 16(2), at 15. Further, the applicant must submit the application "within three months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty." *Id.*

The Member State forwards the application either with or without an opinion on the merits to the Commission. *Id.* The Member State should forward the application to the Commission as soon as possible. *Id.*

The Commission informs the Member States of its opinion with regard to the application. *Id.* A Member State must inform the Commission within one month if it objects to the Commission's findings. *Id.* Where there are no objections the Commission will issue a decision in accordance with the opinion. *Id.* Where a Member State objects, the Commission shall consult with the Advisory Committee as to whether and to what extent the application should be granted. *Id.*

An importer may not use the refund procedure to allege that a particular shipment had not caused injury but may allege only that dumping has been eliminated. J. BESELER & A. WILLIAMS, *supra* note 10, at 235.

54. See Bellis, *Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determinations After FEDIOL: The Emergence of a New Admissibility Test*, 21 *COMMON MKT. L. REV.* 539, 540 (1984).

55. See *infra* notes 70-101 and accompanying text.

56. See *infra* notes 202-13. But see Temple Lang, *Judicial Review of Trade Safeguard*

potheses have been asserted that might explain the intent of the EEC drafters in limiting direct access of private parties to the Court of Justice.⁵⁷ One explanation is that if private parties are denied access to the Court, these parties cannot disturb the Community's carefully developed commercial policies.⁵⁸ In antidumping investigations, the Commission may ar-

Measures in the European Community, in 1985 FORDHAM CORP. L. INST. 641, 683 (B. Hawk ed. 1986) (national courts are not open to exporters and non-EEC producers).

57. See Rasmussen, *supra* note 2, for a discussion of various explanations for the limited right of private parties to bring direct actions. Rasmussen explores the argument that the drafters of the EEC Treaty intended that a private right of action should be restricted as evidenced by contrasting the language of Article 173 with that of Article 33 of the European Coal and Steel Community Treaty (the "ECSC Treaty"), which provides a more liberal test for judicial review. *Id.* at 119. Article 33 of ECSC provides:

The Court shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the High Authority declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Undertakings or . . . associations . . . may, . . . institute proceedings against decisions or recommendations concerning them which are individual in character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them.

Treaty Establishing the European Coal and Steel Community, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) at 31 (official English version), 261 U.N.T.S. 140, 167 (unofficial English trans.).

58. See *Producteurs de Fruits v. Council (Fruits and Vegetables)*, Joined Cases, 16 & 17/62, 1962 E.C.R. 471, 486, Common Mkt. Rep. (CCH) ¶ 8005, at 7192 (opinion of Mr. Advocate-General Lagrange). Lagrange notes that allowing individuals affected by regulations, which are quasi-legislative in nature, greater participation in the parliamentary branch of government is preferable to providing for annulment actions because of the often extensive negotiations needed to forge a regulation and because of the possible negative effects of a successful annulment action. *Id.*

The Antidumping Regulation, authorized by Article 113 of the EEC Treaty, provides for the development of a common commercial policy for the Community. EEC Treaty, *supra* note 1, art. 113, 1973 Gr. Brit. T.S. No. 1, at 42-43, 298 U.N.T.S. at 60. Article 113(1) provides:

1. After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

Id. Article 113 grants the authority to develop this policy to the Commission and the Council. Article 113(2) states that "[t]he Commission shall submit proposals to the

gue that if disputes do arise, they are most likely not factual disputes, but rather disputes as to inferences that the Commission, with its expertise, has drawn from the facts.⁵⁹ Thus, it may be argued that such expert determinations should remain within the domain of the Commission and the Council and should not be subject to judicial scrutiny.⁶⁰

Council for implementing the common commercial policy." *Id.* Thus, it is argued that antidumping regulations are legislative measures and not administrative decisions. Consequently, private parties should be denied the opportunity to interfere with Community policy-making. Stein & Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, in *EUROPEAN LAW AND THE INDIVIDUAL* 113, 122-23 (F.G. Jacobs ed. 1976); see Harding, *The Review of EEC Regulations and Decisions*, 19 *COMMON MKT. L. REV.* 311, 312 (1982). Harding states:

[T]he regulation may be said to be "legislative" or "normative" in character while the particular application of the decision connotes the idea of an administrative act. Indeed, it is the "legislative" nature of the regulation which mainly justifies the exclusion of its review at the instance of individuals. In the first place, since a regulation has a general application, an individual is just one of an indeterminate number of persons affected by it, so that his interest in its annulment would be proportionately small and uncertain. Secondly, the annulment of a legislative act is potentially more disruptive of established interests than that of an individual act and it may be reasoned that the private party's proportionately small interest in a general measure does not justify his being able to set in motion the process which may lead to its annulment.

Id.

Another aspect of concern to the Commission and the Council when developing commercial policy is the conflicting nature of competition law and antidumping law. J. BESELER & A. WILLIAMS, *supra* note 10, at 3. Thus, the Commission and the Council take into consideration the interest of competition law when considering antidumping determinations. Decision on Glycine, Council Regulation No. 2322/85, O.J. L 218/1 (1985); J. BESELER & A. WILLIAMS, *supra* note 10, at 38. See generally Temple Lang, *The Impact of the New Court of First Instance in EEC Antitrust and Trade Cases*, in 1987 *FORDHAM CORP. L. INST.* 579, 603 (B. Hawk ed. 1988) (concerning relationship between antitrust and antidumping law):

59. See E. VERMULST, *supra* note 11, at 272 (noting that Community authorities view antidumping regulations as part of Community's trade policy and argue that Court's review of such measures should be limited, particularly because antidumping law, like competition law, involves interpretation of facts).

60. See Stein & Vining, *supra* note 58, at 123. The authors note that attorneys for the Commission and Counsel have consistently opposed admitting private parties. *Id.* Although, in *Allied Corporation v. Council*, Case 53/83, 1985 E.C.R. 1640, *Common Mkt. Rep.* (CCH) ¶ 14,200, the second case involving the Allied Corporation, the Council agreed that direct judicial review under Article 173, rather than proceedings in the Member States courts had certain advantages from the standpoint of legal protection. *Id.* at 1644, *Common Mkt. Rep.* (CCH) ¶ 14,200, at 16,212-13. The Council asserted, however, that allowing exporters and producers to bring direct actions, but not independent importers, creates a second parallel remedy in the national courts. *Id.* Judicial review under Article 177 in the Member States' courts,

Another theory that might explain the drafters' intent involves concern for Member State sovereignty. Because "the Community was created as a compact among sovereign States,"⁶¹ whereby private citizens remain directly subject to the laws of a Member State and not that of the Community, it is argued that direct access to the Court was limited.⁶² Private individuals were considered to lack an international legal personality to enable a direct suit before the Court of Justice.⁶³

It has also been argued that by restricting direct access, the Court is able to further its goal of becoming a high court of appeal rather than a court of first instance.⁶⁴ There are several lower courts available to private parties, including the Member States' national courts, administrative courts, and the newly-created Court of First Instance.⁶⁵ It is argued that once a lower court has established the facts, the Court of Justice may issue judgments more quickly by acting as a court of appeal.⁶⁶ In its proposed plan for the new Court of First Instance, the Court of Justice expressed concern for its increasing case

however, is inconvenient and unsatisfactory for the Commission and Council, as well as private parties. Temple Lang, *supra* note 56, at 683.

61. Rasmussen, *supra* note 2, at 117.

62. See Stein & Vining, *supra* note 58, at 116 ("Member States carry the bulk of responsibility for implementing Community law.").

63. *Id.* at 113. The authors note that "[d]espite the dramatically increased emphasis upon international protection of basic human rights, individuals have been given access to international dispute settlement machinery in only a few isolated instances within the United Nations system, and on a regional level pursuant to the European convention on human rights." *Id.*

64. See Rasmussen, *supra* note 2, at 114. Rasmussen asserts that the Court's restrictive interpretation of Article 173(2) is to further the Court's role as a high court of appeal; an interest that outweighs a private party's direct access to the Court of Justice. *Id.* at 122. Compare *id.* with Harding, *The Private Interest in Challenging Community Action*, 5 EUR. L. REV. 354, 355 (1980) (Court may sustain use of restrictive policy of judicial review to further its role as an appellate court, however, right of judicial review by Court was originally structured so private parties may not challenge Community measures that are not of direct and individual concern).

65. See Rasmussen, *supra* note 2, at 122.

66. *Id.* at 126. Rasmussen notes that in a direct action before the Court, the amount of time necessary to issue a ruling may take between 12 and 18 months, whereas, under Article 177, a ruling may take only seven months. *Id.*

One explanation for the Court's delay in issuing rulings in direct proceedings stems from the fact-finding procedures. *Id.* In direct proceedings, the record is compiled by way of pleadings. von Heydebrand und der Lasa, *Confidential Information in Antidumping Proceedings Before United States Courts and the European Court*, 11 EUR. L. REV. 331, 344 (1986). Consequently, the Council and the Commission need not submit all the information collected during an investigation to the Court. *Id.*

load.⁶⁷ In that proposal, the Court argued that jurisdiction over cases challenging the Commission's or Council's acts or failure to act in antidumping investigations should be granted to the Court of First Instance.⁶⁸ However, the Council, which has control over the jurisdictional grant to the Court of First Instance, rejected this plan in July 1988.⁶⁹

A. *Private Parties and Article 173*

The first way in which a private party may seek direct review by the Court of Justice is under the second paragraph of Article 173 of the EEC Treaty.⁷⁰ In such actions, the Court may annul acts of the Council or Commission other than opinions or recommendations.⁷¹ The bases for annulment include: lack of competence, infringement of an essential procedural requirement, infringement of the EEC Treaty, infringement of any rule of law relating to its application, or misuse of powers.⁷² Article 173 limits the individuals who may initiate annul-

67. H.L., SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, 1987-88 Sess., FIFTH REPORT, A EUROPEAN COURT OF FIRST INSTANCE 5 (1987) [hereinafter SELECT COMMITTEE]. As the Committee report indicates:

This [workload] is more than the Court can handle satisfactorily. Consequently, individual cases take longer to complete and an ever-increasing number are pending at any given time. The primary objective of the Court[] [of Justice's] proposal [to create the Court of First Instance] is to lighten this work-load, reduce the arrears and shorten the time taken to conclude cases.

Id. Between 1970 and 1986, the number of cases brought before the Court of Justice increased from 79 in 1970 to 329 in 1986; this figure includes staff cases, references for preliminary rulings, and other direct actions. *Id.* at 32. The Court's measurable increase in its work-load combined with the increasing complexity of the cases is possibly a sufficient reason to further the Court's role as a court of appeal. See Harding, *supra* note 64, at 354-55. But see Mancini, *Access to Justice: Individual Undertakings and EEC Antitrust Law—Problems and Pitfalls*, 12 *FORDHAM INT'L L.J.* 189, 189-90 (1989) (concerns for providing efficient system of legal protection and not overload of Court of Justice is principle reason for establishment of Court of First Instance).

68. SELECT COMMITTEE, *supra* note 67, at 10. The Court of First Instance will not hear cases seeking to invalidate antidumping regulations. *Id.*

69. E.C. BULL. No. 7/8, at 108-09 (1988). However, the Council agreed to re-examine the Court's proposal after the Court of First Instance had been operating for two years. *Id.* at 109.

70. EEC Treaty, *supra* note 1, art. 173, 1973 Gr. Brit. T.S. No. 1, at 57, 298 U.N.T.S. at 75. The second paragraph of Article 173 provides: "Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." *Id.*

71. *Id.*

72. *Id.*

ment proceedings to natural or legal persons who fulfill the following three-pronged admissibility test: the applicant must demonstrate that (1) the regulation constitutes a decision that is of (2) direct and (3) individual concern to it.⁷³

In order to understand the application of Article 173 to antidumping cases, it is beneficial to examine briefly the development of this test in the case law of the Court of Justice.

1. Distinguishing a Decision from a Regulation

The first hurdle facing an applicant involves the "decision" requirement, which is illustrated by the 1962 case of *Producteurs de Fruits v. Council (Fruits and Vegetables)*.⁷⁴ In this case, the applicant argued that the term "regulation" was interchangeable with the term "decision" and, therefore, it did not need to establish that the regulation was of direct and individual concern as required by Article 173.⁷⁵ The Court rejected the applicant's contention, because Article 189 of the EEC Treaty makes a clear distinction between a "decision" and a "regulation," and it was, therefore, inconceivable that the terms were interchangeable.⁷⁶ The Court noted that a regulation, addressed to all Member States, has general application to all individuals, whereas a decision is binding only upon those to whom it is addressed, whether a Member State or a private party.⁷⁷ Thus, if the nature of a regulation is legislative, it has a general application to all Member States and may not be challenged.⁷⁸

In a 1975 case, the Court looked only to the second and third prongs of the admissibility test—whether the challenged act was of direct and individual concern.⁷⁹ However in 1979,

73. *Id.*

74. Joined Cases 16 & 17/62, 1962 E.C.R. 471, Common Mkt. Rep. (CCH) ¶ 8005.

75. *Id.* at 478, ¶ 1, Common Mkt. Rep. (CCH) ¶ 8005, at 7185-86.

76. *Id.*

77. *Id.* ¶ 2, Common Mkt. Rep. (CCH) ¶ 8005, at 7186.

78. H. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* § 406 (4th ed. 1987).

79. See *C.A.M. v. Commission*, Case 100/74, 1975 E.C.R. 1393, 1401-03, ¶¶ 3-20, Common Mkt. Rep. (CCH) ¶ 8328, at 7843-44. In admitting this suit, the Court stated:

Such a measure, even if it is one of a number of provisions having a legislative function, individually concerns the persons to whom it applies in that it affects their legal position because of a factual situation which differentiates

the Court emphasized that a regulation does not constitute a decision, because a regulation is a measure of general application and not of individual concern to the applicants.⁸⁰

2. Direct Concern

Once an applicant establishes that a regulation involves or constitutes a decision, it is necessary to show that that decision is of direct concern to it. A decision is of direct concern when it leaves no latitude of discretion to the addressee of the decision and affects the applicant.⁸¹ In *Toepfer v. Commission*,⁸² for example, the applicant challenged a Commission decision⁸³ that did not require the Member State to make any subsequent determinations in order for the measure to be implemented.⁸⁴ In this instance, the Court found that the decision was of direct concern to the applicant.⁸⁵ Thus, an applicant is directly con-

them from all other persons and distinguishes them individually just as in the case of the persons addressed.

Id. at 1403, ¶ 19, Common Mkt. Rep. (CCH) ¶ 8328, at 7844; *see also* H. SCHERMERS, *supra* note 78, § 405. The Court's decision gave

the impression that individuals can bring an action whenever they are able to demonstrate that an act concerns them directly and individually, irrespective of the nature of the act. In the *CAM Case* . . . the Court took up the questions of direct and individual concern, without previously considering whether the act indeed was a decision. When it had established that there was individual concern, it declared the case admissible, apparently implying that in a case of individual concern the act must be a decision.

Id. § 405 (footnote omitted); *see* Dinnage, *supra* note 2, at 20.

80. *See* *Wagner v. Commission*, Case 162/78, 1979 E.C.R. 3467, 3487-88, ¶¶ 17-22, Common Mkt. Rep. (CCH) ¶ 8623, at 7381-93; H. SCHERMERS, *supra* note 78, § 406 (when regulation is clearly legislative in character, Court uses decision requirement as preliminary barrier question to question of whether it concerns applicant directly and individually); Dinnage, *supra* note 2, at 20 (Court again began considering whether regulation was part of general regulatory scheme).

81. *See* *Toepfer v. Commission*, Joined Cases 106 & 107/63, 1965 E.C.R. 405, 410-11, Common Mkt. Rep. (CCH) ¶ 8031, at 7460; H. SCHERMERS, *supra* note 78, § 422 ("Court of Justice interprets direct concern to mean that the addressee is left no latitude of discretion, that is that the decision affects the applicant without the addressee being necessitated to take any decision himself.").

82. 1965 E.C.R. at 405, Common Mkt. Rep. (CCH) ¶ 8031.

83. *Id.* at 410, Common Mkt. Rep. (CCH) ¶ 8031, at 7460. Although the contested measure in this instance was a decision and not a regulation, the applicant must still establish that the measure is of direct and individual concern. *See* EEC Treaty, *supra* note 1, art. 173, 1973 Gr. Brit. T.S. No. 1, at 57, 298 U.N.T.S. at 75-76.

84. *Toepfer*, 1965 E.C.R. at 411, Common Mkt. Rep. (CCH) ¶ 8031, at 7460. The Commission's decision automatically replaced another measure that had been directly applicable to the applicant. *Id.*

85. *Id.* The Court found that the Commission's decision was of direct concern

cerned where the challenged act affects the applicant "without the influence of other circumstances."⁸⁶

In contrast to *Toepfer*, the Court in *Société des Usines de Beauport v. Council*⁸⁷ held that the Council's regulation addressed to the Member State was not of direct concern to the applicant, because the regulation did not take effect until the Member State made certain determinations.⁸⁸ These determinations concerned whether or not to reduce certain quotas.⁸⁹ Thus, the Council's regulation was not of direct concern to the applicant, but rather the Member State's determinations with respect to the quotas were of direct concern to the applicant.⁹⁰

3. Individual Concern

The final requirement is that the decision must be of individual concern to the applicant. An applicant is individually concerned with a decision that is addressed to another if the "decision affects [the applicant] . . . by reason of certain attributes which are peculiar to [it]."⁹¹ For example, in *Fruit Com-*

to the applicant, because the decision had an immediate effect upon the applicant. *Id.*

86. J. BESELER & A. WILLIAMS, *supra* note 10, at 250.

87. Joined Cases 103 to 109/78, 1979 E.C.R. 17, Common Mkt. Rep. (CCH) ¶ 8531.

88. *Id.* at 25, ¶¶ 20-22, Common Mkt. Rep. (CCH) ¶ 8531, at 7630-31.

89. *Id.* ¶ 21, Common Mkt. Rep. (CCH) ¶ 8531, at 7630-31.

90. *Id.* ¶ 22, Common Mkt. Rep. (CCH) ¶ 8531, at 7631.

91. *Plaumann v. Commission*, Case 25/62, 1963 E.C.R. 95, 107, Common Mkt. Rep. (CCH) ¶ 8013, at 7274. In *Plaumann*, the Court deemed an EEC importer not individually concerned with a decision addressed to a Member State, which denied authorization for the partial suspension of custom duties on a certain product. *Id.* at 107-08, Common Mkt. Rep. (CCH) ¶ 8013, at 7274. The Court held:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

Id.

In a later action by exporters who had entered into contracts at a time prior to the date of the contested regulation, the Court held that the exporters were individually concerned by a regulation that raised prices, because

[b]y adopting these distinguishing criteria the contested measure affects a

*pany v. Commission*⁹² the Court held that a regulation affecting the availability of import licenses was of individual concern to parties who had already applied for the licenses, because the content of the regulation was determined with respect to the fixed number of applications that had been filed.⁹³ In a more recent case, *Piraiiki-Patraiki v. Commission*,⁹⁴ the Court held that a Commission decision providing for import restrictions was of individual concern to certain Greek companies.⁹⁵ These parties had entered contracts prior to the adoption of the decision and the contracts were to be carried out during the months in which the decision applied.⁹⁶ Thus, the Court held that these applicants were distinguished from all other firms concerned by the decision, because their contractual obligations were impaired by the Commission decision.⁹⁷

In a number of cases, the Court has stated what is not of individual concern to an applicant. For example, an applicant is not individually concerned by an act that merely affects its business activity when such activity may be practiced by any other person at any time.⁹⁸ Nor will the Court find an action of individual concern if the challenged decision is of a general

fixed number of traders identified by reason of the individual course of action which they pursued or are regarded as having pursued during a particular period.

Such a measure, even if it is one of a number of provisions having a legislative function, individually concerns the persons to whom it applies in that it affects their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually just as in the case of the person addressed.

C.A.M. v. Commission, Case 100/74, 1975 E.C.R. 1393, 1403, ¶¶ 18-19, Common Mkt. Rep. (CCH) ¶ 8328, at 7844. For a detailed discussion on "individual concern," see H. SCHERMERS, *supra* note 83, §§ 408-21.

92. Joined Cases 41 to 44/70, 1971 E.C.R. 411, Common Mkt. Rep. (CCH) ¶ 8142.

93. *Id.* at 422, ¶¶ 16-22, Common Mkt. Rep. (CCH) ¶ 8142, at 7628. The regulation had been adopted with consideration of the state of the market during the time period in question and with respect to the number of requested import licenses during that time period. *Id.* ¶ 20, Common Mkt. Rep. (CCH) ¶ 8142, at 7628.

94. Case 11/82, 1985 E.C.R. 227, Common Mkt. Rep. (CCH) ¶ 14,159.

95. *Id.* at 240-44, ¶¶ 1-19, Common Mkt. Rep. (CCH) ¶ 14,159, at 15,934-36.

96. *Id.* at 244, ¶ 19, Common Mkt. Rep. (CCH) ¶ 14,159, at 15,936.

97. *Id.*

98. See *Producteurs de Fruits v. Council (Fruits & Vegetables)*, Joined Cases 16 & 17/62, 1962 E.C.R. 471, 479, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8005, at 7186; Dinnage, *supra* note 2, at 20 ("[T]he act in question was intended to apply objectively in this instance, for anyone who exercised, or who might exercise, the trade in question was or would be affected by it.").

economic scope, that is, a measure designed to affect the entire Common Market and not solely the applicant.⁹⁹ In addition, a decision addressed to another is not of direct and individual concern to an applicant if the measure merely influences competition in the applicant's line of business.¹⁰⁰ Moreover, the Court of Justice has held that even a regulation using objective legal or factual criteria, so that the number and the identities of the persons to whom the regulation applies may possibly be determined, does not constitute a decision of individual concern.¹⁰¹

In sum, in a direct action under Article 173, an applicant's admissibility to the Court of Justice to challenge an antidumping regulation is contingent upon three factors. The applicant must establish, first, that the regulation constitutes a binding decision upon him; second, that the regulation directly affects the applicant without the influence of other circumstances;

99. See *Glucoseries Réunies v. Commission*, Case 1/64, 1964 E.C.R. 413, 417, Common Mkt. Rep. (CCH) ¶ 8024, 7407. In *Glucoseries*, while the decision in question was directed to all Member States, the applicant, a Belgian exporter, argued that it was of concern individually because it was "the only Belgian undertaking with an economic interest in the matter and both willing and able to export glucose from Belgium to France in significant quantities during the period of validity of the contested Decision." *Id.* The Court stated that, "[i]n view of the general economic scope of the contested Decision, it is not of individual concern to the applicant even if the latter does occupy the position which it claims on the Belgian market in respect of glucose exporters to France." *Id.* The Court noted that the entire Common Market, not only the Belgian market was concerned by the regulation. *Id.*

100. See *Eridania v. Commission*, Joined Cases 10 & 18/68, 1969 E.C.R. 459, 481, ¶ 7, Common Mkt. Rep. (CCH) ¶ 8099, at 8425-26. In *Eridania*, the Court held:

The mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure.

Only the existence of specific circumstances may enable a person subject to Community law and claiming that the measure affects his position on the market to bring proceedings under Article 173.

Id.

101. *Compagnie Française Commerciale v. Commission*, Case 64/69, 1970 E.C.R. 221, 226-27, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8091, at 8323. In *Compagnie Française*, the Court held that a regulation does not constitute a decision of individual concern where the "number and even the identity of the persons to whom it applies at a given moment may be determined more or less precisely, provided that it is clear that this application depends on an objective legal or factual situation defined by the measure with reference to its purpose." *Id.*; see Dinnage, *supra* note 2, at 20.

third, that the regulation distinguishes the applicant from any other person by reason of specific circumstances.

B. *Antidumping Cases and Article 173*

In antidumping cases, these three requirements have been met by exporters, non-EEC producers, and the EEC subsidiaries of both.¹⁰² The entities need only establish that they were identified in the regulation or were concerned by the preliminary investigation.¹⁰³ Furthermore, EEC producers have been admitted where they have participated in the investigations,¹⁰⁴ and a Community association representing EEC producers has been admitted in an antisubsidy case where the Court held that the Antidumping Regulation implied a cause of action.¹⁰⁵

1. Exporters, Non-EEC Producers, and Their EEC Subsidiaries

The first antidumping case to reach the Court under Article 173 was *NTN Toyo Bearing Company v. Council* ("Ball Bearings").¹⁰⁶ In this case, the applicants, four major non-EEC producers and their affiliated EEC subsidiaries, sought partial annulment of a regulation.¹⁰⁷ The applicants contested an article of the regulation that provided for the definitive collection of the amounts secured by way of a provisional antidumping duty.¹⁰⁸ Although the applicants agreed that the contested portion of the regulation was drafted in abstract terms,¹⁰⁹ they argued that it affected only the importers of products manufac-

102. See *infra* notes 106-41 and accompanying text.

103. See *infra* notes 131-32 and accompanying text.

104. See *infra* notes 155-60 and accompanying text.

105. See *infra* notes 152-54 and accompanying text.

106. Case 113/77, 1979 E.C.R. 1185, Common Mkt. Rep. (CCH) ¶ 8574.

107. *Id.* at 1202, ¶ 1, Common Mkt. Rep. (CCH) ¶ 8574, at 8340-41.

108. *Id.* at 1203, ¶ 6, Common Mkt. Rep. (CCH) ¶ 8574, at 8341.

109. Article 3 of Council Regulation No. 1778/77, O.J. L 196/1 (1977) provides that

[t]he amounts secured by way of provisional duty under the provisions of Regulation (EEC) No 261/77 extended by Regulation (EEC) No 944/77, in respect of products manufactured and exported by the following producers, shall be definitively collected to the extent that they do not exceed the rate of duty fixed in this Regulation: Koyo Seiko Company Limited; Nachi Fujikoshi Corporation; NTN Toyo Bearing Company Limited; Nippon Seiko K.K.

Id. at 3.

tured by the four major non-EEC producers under investigation.¹¹⁰ The article provided for the collection of amounts secured by known enterprises that had been individually evaluated by the Commission during the investigation.¹¹¹ Thus, the applicants contended that the provision constituted a decision.¹¹²

The Council asserted that the identification of the Japanese producers in the regulation did not alter the nature of the measure.¹¹³ The regulation remained a legislative measure as an instrument of commercial policy and, thus, did not constitute a decision.¹¹⁴

The Court found that the regulation providing for the collection of provisional duties only from the four major producers "constitutes accordingly a collective decision relating to named addressees."¹¹⁵ Thus, the regulation constituted a binding decision with regard to the named entities and not a measure with general application.¹¹⁶ Because the amount of the duties had been determined by inspecting the premises of both the subsidiaries and the Japanese producers, the Court found that the measure was of individual concern to these parties.¹¹⁷

The Court held that the collection of a provisional duty is *per se* of direct concern to any importer who has imported the products in question.¹¹⁸ In this instance, the importers were, therefore, individually concerned, because the measure applied to only those importers that had imported products from the four major Japanese producers in the past.¹¹⁹ In addition, the Court found the regulation to be of direct and individual concern to the non-EEC producers, because these producers

110. *Ball Bearings*, 1979 E.C.R. at 1204, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8574, at 8341.

111. *Id.*

112. *Id.*

113. *Id.* at 1193, Common Mkt. Rep. (CCH) ¶ 8574, at 8334.

114. *Id.* The Council asserted that while the non-EEC producers were named in compliance with article 8(b) of the GATT Antidumping Code, the duty is payable by all importers and thus the regulation is not of direct and individual concern to the producer. *Id.*

115. *Id.* at 1205, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

116. *Id.*

117. *Id.* at 1204-05, ¶¶ 8-12, Common Mkt. Rep. (CCH) ¶ 8574, at 8341-42.

118. *Id.* at 1205, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

119. *Id.* ¶¶ 11-12, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

were clearly related to the importers, who were their EEC subsidiaries.¹²⁰

The Court rejected the Council's argument that the importers were not directly concerned by the regulation but rather by the collection of duties by the Member States.¹²¹ The Court stated that such implementation is "purely automatic and . . . in pursuance not of intermediate national rules but of Community rules alone."¹²² Thus, because the Member States had no latitude of discretion, the importers were directly concerned by the regulation imposing a duty.¹²³

Despite the apparent significance of this case, commentators have deemed the decision of limited precedential value, because the Court stressed the extraordinary manner in which the regulation was drafted, by specifically naming the four producers.¹²⁴

Five years after *Ball Bearings*, the Court in *Allied v. Commission*,¹²⁵ admitted an action by non-EEC producers and exporters seeking to annul a provisional antidumping regulation.¹²⁶ As in *Ball Bearings*, the regulation specifically identified the individual parties.¹²⁷ The Court noted that non-EEC producers

120. *Id.* at 1204-05, ¶¶ 9-12, Common Mkt. Rep. (CCH) ¶ 8574, at 8341-42. The Court made this determination, because the Commission had treated the producer and its EEC subsidiaries as one unit during the investigation, when calculating the export price. *See id.* at 1204, ¶ 9, Common Mkt. Rep. (CCH) ¶ 8574, at 8341-42. The Antidumping Regulation provides that where there exists an association or compensatory agreement between the exporter and the importer and it appears that the export price is an unreliable guide, the Commission may construct the export price on the basis of the price of re-sale to the first independent buyer. Antidumping Regulation, *supra* note 11, art. 2(8)(b), at 5.

121. *Ball Bearings*, 1979 E.C.R. at 1205, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8574, at 8342.

122. *Id.*

123. *Id.*

124. *See* J. BESELER & A. WILLIAMS, *supra* note 10, at 248-49; E. VERMULST, *supra* note 11, at 261; Bellis, *supra* note 54, at 544-45; Temple Lang, *supra* note 56, at 644; *see also supra* note 109 (text of the contested portion of the regulation).

After *Ball Bearings*, in which the Community's procedures in antidumping investigations were criticized, the Community amended the Antidumping Regulation. R. DALE, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER* 98-99 (1980).

125. Joined Cases 239 & 275/82, 1984 E.C.R. 1005, Common Mkt. Rep. (CCH) ¶ 14,084.

126. *Id.* at 1030, ¶ 14, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127.

127. Comm'n Regulation No. 2302/82, O.J. L 246/5 (1982).

and exporters cannot go to Member States' courts.¹²⁸ Consequently, these non-EEC entities would be denied an opportunity for any judicial review if the Court were to hold their claim inadmissible.¹²⁹ Thus, the Court and the Commission favored admission to ensure reciprocity for Community producers and exporters subject to antidumping duties in non-Member States who might similarly be denied access to judicial review.¹³⁰

The Court in *Allied* further asserted that, while a regulation may have a legislative character with regard to all traders concerned, producers and exporters who were charged with dumping may be directly and individually concerned if they were identified in the regulation or were concerned by the preliminary investigations.¹³¹ The Court determined that the regulation was of direct and individual concern to these applicants, non-EEC producers and exporters, because it was necessary to identify them individually during the investigation in order for the Commission to calculate the dumping margin.¹³²

Allied established a "broad approach" with regard to admissibility of non-EEC producers and exporters.¹³³ These entities need only establish that they were identified in the regulation or that the Commission imposed a duty on the basis of

128. *Allied Corporation*, 1984 E.C.R. at 1029, ¶ 8, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,126.

129. *Id.* ¶¶ 8-9, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,126.

130. *Id.* at 1029-30, ¶¶ 9, 13, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,126-27; see Kuyper; *Some Reflections on the Legal Position of the Private Complainant in Various Procedures Relating to Commercial Policy*, in LEGAL ISSUES OF EUROPEAN INTEGRATION 115, 125 (1983) (noting the concern that access to judicial review be available to non-Member State parties so Community parties would have access to judicial review in antidumping proceedings in non-Member States).

131. *Allied Corporation*, 1984 E.C.R. at 1030, ¶¶ 12, 14, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127. The original French version of ¶ 12 reads as follows: "Il apparaît ainsi que les actes portant institution de droits antidumping sont de nature à concerner directement et individuellement celles des entreprises productrices et exportatrices qui peuvent démontrer qu'elles ont été identifiées dans les actes de la Commission ou du Conseil ou concernées par les enquêtes préparatoires." *Allied Corporation v. Commission*, Affaires jointes 239 et 275/82 (E.C.J. Feb. 21, 1984) (LEXIS, Intnat library, CJCE file).

132. See *Allied Corporation*, 1984 E.C.R. at 1030, ¶¶ 11-12, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127. The Court held that "anti-dumping duties may be imposed only on the basis of the findings resulting from investigations concerning the production prices and export prices of undertakings which have been individually identified." *Id.*

133. See Temple Lang, *supra* note 56, at 643-44.

the entities' pricing information.¹³⁴ For example, three years later, in *Nachi Fujikoshi v. Council (Mini Ball Bearings)*,¹³⁵ the Court admitted an action for annulment by a non-EEC producer.¹³⁶ The applicant challenged a regulation imposing definitive duties.¹³⁷ The Court held, however, that because the contested regulation imposed different antidumping duties on a series of expressly-named manufacturers or exporters of the dumped product, the applicant was individually concerned only by the specific provision in which it was named and not by the entire regulation.¹³⁸ Consequently, the Court declared the action admissible only with respect to those specific provisions.¹³⁹ In a more recent case, *Tokyo Electric v. Council (Electric Typewriters)*,¹⁴⁰ the Court admitted—without reference to the “Allied standard”—a Japanese producer and its EEC subsidiaries that sought annulment of specific provisions of an antidumping regulation under Article 173.¹⁴¹

2. EEC Producers and Associations

Community producers and trade associations representing such producers are another category of parties interested in antidumping determinations. Unlike individuals, however, trade associations at one point faced the additional hurdle of establishing a legal personality.¹⁴² The Court addressed this issue in the 1962 *Fruits and Vegetables* decision.¹⁴³ In that case, the Court denied an association that was representing EEC producers status as a legal personality under Article 173.¹⁴⁴ The Court rejected the argument that an association representing certain businessmen could be individually concerned

134. *Allied Corporation*, 1984 E.C.R. at 1030, ¶¶ 11-12, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127.

135. Case 240/84, 1987 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,486.

136. *Id.*

137. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,486, at 18,545.

138. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,486, at 18,558.

139. *Id.*

140. Joined Cases 260/85 & 106/86, 1988 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,512.

141. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,851.

142. See *supra* note 73 and accompanying text.

143. *Producteur de Fruit v. Council (Fruits & Vegetables)*, Joined Cases 16 & 17/62, 1962 E.C.R. 471, Common Mkt. Rep. (CCH) ¶ 8005.

144. *Id.* at 479-80, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8005, at 7186-87.

by a measure affecting the association's general interests.¹⁴⁵ In 1983, however, in *Fediol v. Commission*,¹⁴⁶ the Court revised its reasoning and granted an association representing Community producers legal status under Article 173.¹⁴⁷ In that case, the Commission reasoned that it would be illogical to interpret narrowly the definition of a legal person under Article 173 with respect to antisubsidy cases, because the Antidumping Regulation provides that associations acting on behalf of Community industry may lodge complaints.¹⁴⁸

Nevertheless, the Commission still asserted that the action was inadmissible under the decision prong of Article 173.¹⁴⁹ *Fediol*, which lodged the initial complaint, sought annulment of a communication in which the Commission announced that a proceeding would not be initiated.¹⁵⁰ The Commission argued that the communication was merely a means of informing interested parties of the Commission's action, as required under the Antidumping Regulation, but that such a measure did not involve a decision.¹⁵¹

The Court rejected the Commission's argument.¹⁵² It admitted the action and held that the applicant's rights, as defined by the Antidumping Regulation, implied a cause of action.¹⁵³ In addition, the Court held that the applicants should

145. *Id.* at 480, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8005, at 7187. The Court noted that "[s]uch a principle . . . would derogate from the system of the Treaty which allows applications for annulment by private individuals only of decisions which have been addressed to them, or of acts which affect them in a similar manner." *Id.*, Common Mkt. Rep. (CCH) ¶ 8005, at 7186-87.

146. Case 191/82, 1983 E.C.R. 2913, Common Mkt. Rep. (CCH) ¶ 14,013.

147. *Id.* at 2935-36, ¶¶ 28-33, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,172-73. The Court examined the rights of an association under the Antidumping Regulation but did not discuss the requirement of legal personality. *Id.*

148. *Id.* at 2918, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,162-63; see Antidumping Regulation, *supra* note 11, art. 5(1), at 8 (association acting on behalf of a Community industry may lodge complaint). Although *Fediol* was an antisubsidy case and not antidumping, the procedures for an antisubsidy investigation are similar to those in an antidumping case and are governed by the same regulation. J. BESELER & A. WILLIAMS, *supra* note 10, at 173.

149. *Fediol*, 1983 E.C.R. at 2931, ¶ 11, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,171; see *supra* notes 74-80 and accompanying text.

150. *Fediol*, 1983 E.C.R. at 2929, ¶ 1, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,170.

151. *Id.* at 2931, ¶ 11, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,171.

152. *Id.* at 2934, ¶ 25, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,172.

153. *Id.* The Court noted that the Antidumping Regulation

recognizes the existence of a legitimate interest on the part of Community

be granted the right to submit any information that would aid the Court in determining whether the Commission had observed the procedural guarantees provided by the Antidumping Regulation, erred in its assessment of the facts, failed to consider relevant facts, or misused its power.¹⁵⁴

Two years later in *Timex v. Council and Commission*,¹⁵⁵ the Court admitted the action of an individual Community producer.¹⁵⁶ The applicant challenged a regulation imposing a duty, because the duty was allegedly too low.¹⁵⁷ The Court noted the applicant's dominant position in the EEC market, that it was responsible for initiating the complaint, that it had participated in the proceedings,¹⁵⁸ and that the amount of the duty was determined with respect to the injury suffered by Timex.¹⁵⁹ Thus, the contested regulation constituted a decision of direct and individual concern to Timex.¹⁶⁰

The Court's decisions in *Allied*, *Fediol*, and *Timex* would suggest that the Article 173 admissibility test in antidumping cases is contingent upon the procedures that lead to the contested measure rather than the nature of the contested measure.¹⁶¹

3. Independent Importers

a. *Direct Actions Contesting Regulations*

Another category of private parties interested in an-

producers in the adoption of anti-subsidy measures and that it defines certain specific rights in their favour, namely the right to submit to the Commission all evidence which they consider appropriate, the right to see all information obtained by the Commission subject to certain exceptions, the right to be heard at the request and to have the opportunity of meeting the other parties concerned in the same proceeding, and finally the right to be informed if the Commission decides not to pursue a complaint.

Id.

154. *Id.* at 2935, ¶ 30, Common Mkt. Rep. (CCH) ¶ 14,013, at 14,173.

155. Case 264/82, 1985 E.C.R. 849, Common Mkt. Rep. (CCH) ¶ 14,143.

156. *Id.* at 866, ¶ 17, Common Mkt. Rep. (CCH) 14,143, at 15,782.

157. *Id.* at 864, ¶ 6, Common Mkt. Rep. (CCH) 14,143, at 15,781.

158. *Id.* at 865-66, ¶¶ 14-15, Common Mkt. Rep. (CCH) ¶ 14,143, at 15,781-82.

159. *Id.* at 866, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,143, at 15,782.

160. *Id.* ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,143, at 15,782.

161. E. VERMULST, *supra* note 11, at 265; Bellis, *supra* note 54, at 549; Temple Lang, *supra* note 56, at 647, 654-55 (Complainants seem to have standing on the basis of "procedural rights given . . . [by the Antidumping Regulation] and *not* on the legal nature of the regulation imposing the duty or the legal effects it produces for the complainants." (emphasis in original)).

tidumping regulations is the independent importer. The Court has admitted an independent importer as an applicant in only one instance, *I.S.O. v. Council*¹⁶²—a companion case to the Court's 1979 *Ball Bearings* decision.¹⁶³ In *I.S.O.*, the independent importer imported exclusively from one of the four major non-EEC producers charged with dumping.¹⁶⁴ The Court's language in *I.S.O.* was similar to that used in *Ball Bearings*, where the Court determined that all three prongs of the Article 173 admissibility test had been satisfied with regard to the provision for the collection of provisional duties.¹⁶⁵

The contested regulation in *I.S.O.* contained two other articles that imposed a definitive duty and regulated the monitoring of undertakings.¹⁶⁶ The Court reasoned that, because these articles were of direct and individual concern to the producer who supplied *I.S.O.* and the producer and *I.S.O.* were sufficiently closely associated, that similarly, these provisions constituted decisions of direct and individual concern to *I.S.O.*¹⁶⁷

In subsequent cases, however, the Court has not admitted independent importers as applicants. For example, in *Alusuisse v. Council and Commission*,¹⁶⁸ a 1982 case, an independent importer challenged both a provisional and a definitive antidumping duty.¹⁶⁹ The applicant asserted that the action should be admitted for two reasons.¹⁷⁰ First, the importer argued that the contested regulations constituted decisions, because the importers formed a closed category of traders of a limited number, whose identities were known at the time the regulations were adopted.¹⁷¹ In rejecting the independent importer's claim, the Court reaffirmed that a regulation that uses

162. Case 118/77, 1979 E.C.R. 1277, Common Mkt. Rep. (CCH) ¶ 8575.

163. NTN Toyo Bearing Company v. Council (Ball Bearings), Case 113/77, 1979 E.C.R. 1185, Common Mkt. Rep. (CCH) ¶ 8574.

164. *I.S.O. v. Council*, 1979 E.C.R. 1291, ¶ 7, Common Mkt. Rep. (CCH) ¶ 8575, at 8403.

165. *Id.* at 1292, 1294, ¶¶ 13-14, 25-27, Common Mkt. Rep. (CCH) ¶ 8575, at 8403-04; see *supra* notes 115-20 and accompanying text.

166. *I.S.O.*, 1979 E.C.R. at 1292, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8575, at 8404.

167. *Id.* at 1292-93, ¶¶ 15-23, Common Mkt. Rep. (CCH) ¶ 8575, at 8403-04.

168. Case 307/81, 1982 E.C.R. 3463, Common Mkt. Rep. (CCH) ¶ 8869.

169. *Id.* at 3470, ¶ 1, Common Mkt. Rep. (CCH) ¶ 8869, at 8242.

170. *Id.* at 3472-73, ¶¶ 10, 12, Common Mkt. Rep. (CCH) ¶ 8869, at 8243-44.

171. *Id.* at 3472, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8869, at 8243.

objective legal or factual criteria related to the regulation's purpose, although it is possible to identify parties to whom it applies, remains a measure of general application and is not a decision of individual concern.¹⁷²

Second, the applicant argued that the procedures in the Antidumping Regulation allowing for the participation of interested parties suggest that any regulation, subsequently adopted, constitutes an individual administrative measure that a private party may contest.¹⁷³ The Court rejected this argument as well.¹⁷⁴ It held that the distinction between a decision and a regulation is based on the nature of the measure and its legal effect, not on the procedures for its adoption.¹⁷⁵ The Court further noted that the importers were not without a remedy, but could contest a Member State's collection of antidumping duties in a national court.¹⁷⁶

Although in *Allied*, the Court subsequently liberalized the admission standard with regard to non-EEC entities,¹⁷⁷ the Court did not admit an action by an independent importer in that case.¹⁷⁸ The Court found that the regulation could be of individual concern to the non-EEC exporter either because the measure identified the exporter or because the exporter was

172. *Id.* at 3472-73, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8869, at 8243. The Court held that

a measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose.

Id.; see *Compagnie Française Commerciale v. Commission*, Case 64/69, 1970 E.C.R. 221, 226-27, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8091, at 8323. A regulation does not constitute a decision of individual concern where the number and even the identity of the persons to whom it applies at a given moment may be determined more or less precisely, provided that the measure defines the purpose of the objective legal or factual criteria used. *Id.*

173. *Alusuisse*, 1982 E.C.R. at 3473, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8869, at 8243-44.

174. *Id.* ¶ 13, Common Mkt. Rep. (CCH) ¶ 8869, at 8244.

175. *Id.*

176. *Id.*

177. See *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. 1005, Common Mkt. Rep. (CCH) ¶ 14,084; J. BESELER & A. WILLIAMS, *supra* note 10, at 250.

178. *Allied Corporation*, 1984 E.C.R. at 1031, ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127.

concerned by the preliminary investigation.¹⁷⁹ The independent importer, however, failed to satisfy these requirements.¹⁸⁰ The Court held that the regulation did not constitute a decision with regard to the independent importer, because the importer was not referred to in any of the measures.¹⁸¹ The importer was, thus, only within the objective scope of the regulation.¹⁸² Furthermore, the Court found that the importer was not concerned by the preliminary investigation.¹⁸³ Although the importer acted as an importing agent for one of the exporters that was admitted, the Court still refused admission to the importer.¹⁸⁴

The Court distinguished *Allied* from *Ball Bearings* by observing that in *Ball Bearings*, the Commission established the dumping margin by reference to the retail price charged by the importer and not by reference to the non-EEC producers' price, as in *Allied*.¹⁸⁵ Moreover, in contrast to *Ball Bearings*, the Court advised the importer in *Allied* that the national courts were available to challenge the collection of duties.¹⁸⁶

Unlike in *Fediol* and *Timex*, the Court has not determined the admissibility of an importer with regard to procedural rights found in the Antidumping Regulation. Instead, the Court has determined admissibility based on whether the Commission determined the dumping margin by reference to the importer's pricing information.

b. Other Actions Involving Importers Before the Court of Justice

Since *I.S.O.*, the Court has not admitted an independent importer as an applicant, although it recently allowed one independent importer to intervene on behalf of the non-EEC producer and its EEC subsidiaries.¹⁸⁷ In *Tokyo Electric Co. v. Council (Electric Typewriter)*,¹⁸⁸ the independent importer was a

179. *Id.* at 1030, ¶ 12, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127.

180. *Id.* at 1031, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. See *Tokyo Electric Co. v. Council (Electric Typewriters)*, Joined Cases 260/85 & 106/86, 1988 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,851.

188. *Id.* at —, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,832.

Community manufacturer who resold the electric typewriters under its own brand name.¹⁸⁹ Under the rules of the Court, interested parties may intervene in cases before the Court if they have an interest in the result of the case.¹⁹⁰ In an application seeking admission to the Court as an intervener, the independent importer can only make arguments supporting the submissions of a party already admitted.¹⁹¹ The intervener may not assert new arguments.¹⁹²

In a February 1987 decision, *Continentale Produkten Gesellschaft Ehrhardt-Renken v. Commission*,¹⁹³ the Court admitted a direct action by an independent importer who challenged a Commission decision denying in part an application for the refund of antidumping duties paid by the importer.¹⁹⁴ Although the Commission had granted a refund of DM1638.01, the importer sought the award of an additional DM675,144.5 plus nine-percent interest from the date the application for the refund was submitted.¹⁹⁵ The importer challenged the accuracy of the normal values established by the Commission and sought to replace those values with different normal values that would revise the dumping margin and consequently affect the amount of the refund.¹⁹⁶ The applicant also contended

189. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,512, at 18,851.

190. Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, art. 37, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 141, 148, 298 U.N.T.S. 147, 154 [hereinafter Statute of the Court]. Article 37 provides: Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community.

Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties.

Id. In *Ball Bearings*, the Federation of European Bearing Manufacturers Association was granted leave to intervene. *NTN Toyo Bearing Company v. Council (Ball Bearings)*, Case 113/77, 1979 E.C.R. 1185, 1202, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8574, at 8341-42.

191. Statute of the Court, *supra* note 190, art. 37, 1973 Gr. Brit. T.S. No. 1, at 148, 298 U.N.T.S. at 154.

192. *Id.*

193. Case 312/84, 1987 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,447.

194. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,183-84.

195. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,181. The refund application was submitted in March 1982. *Id.*

196. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,182.

that the Commission's decision, denying the additional refund, failed to state adequate reasons for its determination that the importer did not prove that the normal value was lower.¹⁹⁷ The Commission countered that the importer was challenging the legality of the original regulation procedure, which resulted in the establishment of the dumping margin and the imposition of the duty, and that such a challenge was inadmissible under the refund procedures.¹⁹⁸

The Court considered the scope of the refund procedures and held that while the importer may not challenge the validity of the regulation imposing the duties, the importer may prove that the regulation does not apply in this particular applicant's case either because the importer purchased the goods at prices approaching or equal to the normal value or where the particular supplier did not dump the goods but was able to sell below the normal value and still make a profit because of low production costs.¹⁹⁹ After reviewing the statement of reasons, however, the Court rejected the importer's submission that the Commission had improperly refused to consider the new information submitted and held that the statement was adequate.²⁰⁰ The Court then dismissed the importer's action.²⁰¹

C. Article 177 Proceedings

An alternative procedure by which a private party may reach the Court of Justice is through a proceeding under Article 177 of the EEC Treaty.²⁰² In *Allied* and *Alusuisse*, the Court of Justice suggested that independent importers use this pro-

197. *Id.*

198. *Id.*

199. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,183.

200. *Id.* at ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,184.

201. *Id.*

202. EEC Treaty, *supra* note 1, art. 177, 1973 Gr. Brit. T.S. No. 1, at 58, 298 U.N.T.S. at 76-77. Article 177 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the

cedure.²⁰³ Under this procedure, private parties may challenge the collection of antidumping duties in Member State courts.²⁰⁴ Where the collection of duties is challenged, a question of Community law would arise.²⁰⁵ Under Article 177 a Member State court may then seek a preliminary ruling from the Court of Justice concerning the interpretation of the EEC Treaty and the validity and interpretation of acts of the institutions of the Community.²⁰⁶ National courts may not annul the regulation but may instead treat the regulation as inapplicable.²⁰⁷ Further, such decisions are not binding in other Member States.²⁰⁸

In contrast to an action under Article 173, a request for a preliminary ruling is considered a nonadversary proceeding.²⁰⁹ The Court of Justice, however, must invite all parties involved in the national court litigation, all Member States, and the Commission to submit written observations.²¹⁰ The Court must also invite the Council to submit a statement where the validity or interpretation of the act in dispute originates with the Council.²¹¹ The Council's right to defend the validity of the act is not as extensive, however, as that provided for in annulment actions under Article 173.²¹² In Article 177 pro-

question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Id.

203. See *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. 1005, 1031, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127; *Alusuisse v. Council & Commission*, Case 307/81, 1982 E.C.R. 3463, 3473, ¶ 13, Common Mkt. Rep. (CCH) ¶ 8869, at 8244.

204. *Allied Corporation*, 1984 E.C.R. at 1031, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127; *Alusuisse*, 1982 E.C.R. at 3473, ¶ 13, Common Mkt. Rep. (CCH) ¶ 8869, at 8244; Temple Lang, *supra* note 56, at 682.

205. E. VERMULST, *supra* note 11, at 268.

206. See *supra* note 202. The national court must submit a question if no judicial remedies are available under national law against a decision of a national court. *Id.*

207. Temple Lang, *supra* note 56, at 682.

208. *Id.* at 683.

209. Bebr, *supra* note 3, at 1235.

210. Statute of the Court, *supra* note 190, art. 20, 1973 Gr. Brit. T.S. No. 1, at 145-46, 298 U.N.T.S. at 152.

211. *Id.*

212. Bebr, *supra* note 3, at 1236.

ceedings, the parties submit only one set of written observations and there is only one hearing at which a party may reply to statements made by others.²¹³

III. A NEW ADMISSIBILITY TEST

While the Community importer pays the levied duty, it is precluded from direct access to the Court of Justice, unlike exporters and non-EEC producers. Even Community producers have direct access to the Court of Justice to challenge an allegedly too low duty.²¹⁴ The independent Community importer must, however, participate as merely an intervener, proceed through Member State courts under Article 177, apply for refunds of amounts already paid, or wait one year to allege changed circumstances. As the Community increasingly imposes antidumping duties in lieu of accepting price undertakings,²¹⁵ the Court should reevaluate whether independent im-

213. K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE PRACTICE AND PROCEDURE* 55 (1984). In a direct action, however, there are additional phases. First, the procedures provide for two sets of written submissions that allow for reply briefs; second, the Court makes inquiries to determine the facts; third, there is a hearing at which parties may again reply to each others statements and at which the Advocate-General's opinion is delivered; and finally, the judgment is issued by the Court. *Id.* at 29-46.

214. *See* *Timex v. Council and Commission*, Case 264/82, 1985 E.C.R. 849, Common Mkt. Rep. (CCH) ¶ 14,143.

215. *See* Council Regulation No. 1058/86 Imposing a Definitive Anti-Dumping Duty on Imports of Certain Electronic Scales Originating in Japan, O.J. L 97/1 (1986); Council Regulation No. 2322/85 Imposing a Definitive Anti-Dumping Duty on Imports of Glycine Originating in Japan, O.J. L 218/1 (1985); Council Regulation No. 1877/85 Imposing a Definitive Anti-Dumping Duty on Imports of Certain Hydraulic Excavators Originating in Japan, O.J. L 176/1 (1985); Council Regulation No. 2089/84 Imposing a Definitive Anti-Dumping Duty on Imports of Certain Ball Bearings Originating in Japan and Singapore, O.J. L 193/1 (1984); *see also* Bourgeois, *supra* note 44, at 586 (noting the increasing number of investigations that result in imposition of duties rather than price undertakings); Le Lièvre & Houben, *EC Versus Japan: The Community's Legal Weapons*, 24 COMMON MKT. L. REV. 427, 439 (1987) (noting Commission's recent refusal to accept price undertakings from Japanese exporters); *cf.* Hindley, *supra* note 44, at 447 (concluding that EEC antidumping methodology is biased against exporters and that Community's method of calculating dumping margins tends to over-estimate the amount and may find dumping where none exists). *But see* Comm'n Decision 87/135 Accepting an Undertaking Given by Kyocera Corporation in Connection with the Anti-Dumping Proceeding Concerning Imports of Plain Paper Photo Copiers Originating in Japan and Terminating the Investigation, O.J. L 54/36 (1987); Comm'n Decision 87/210 Accepting Undertakings Given in Connection with the Anti-Dumping Proceeding Concerning Imports of Outboard Motors Originating in Japan and Terminating the Investigation, O.J. L 82/36 (1987).

porters should be admitted in direct actions to challenge antidumping regulations.

A. *Concern for Equal Treatment*

In *Allied* and *Alusuisse*, the Court advised the independent importer to seek relief in the national court system under Article 177 proceedings,²¹⁶ a route not open to non-EEC producers and exporters because they do not pay a duty.²¹⁷ The Commission has argued that furnishing independent importers a second opportunity for judicial review under Article 173 would be unnecessary.²¹⁸ It may be argued that at a time when the Court of Justice is seeking to relieve itself of a burdensome caseload, as evidenced by the creation of the Court of First Instance, it is senseless to allow now the admission of applicants who have an adequate forum available through proceedings in Member State courts.²¹⁹

Article 177 proceedings, however, are not a reasonable alternative for the independent importer wishing to challenge an antidumping regulation.²²⁰ The drawbacks of Article 177 actions are overwhelming. An action under Article 177 may require proceedings before, first, the national court and then later the Court of Justice.²²¹ Moreover, there is no guarantee that an importer will be able to proceed to the Court of Justice. It is solely the national court that determines whether there exists a question to refer to the Court of Justice.²²² If a national court in one Member State finds a regulation unlawful, without referring a question to the Court of Justice, the ruling

216. See *supra* note 202-03 and accompanying text.

217. *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. 1005, 1028-29, ¶ 8, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,126. No cause of action is created until the goods are imported and a duty collected. *Id.* Thus, only importers who bring the goods into a Member State may bring an action in the national courts. *Id.*

218. *Id.* at 1013, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,115 (Commission argued that importers may challenge application of regulation in national courts).

219. See *Harding*, *supra* note 64, at 354-55; *supra* note 67, and accompanying text.

220. See *Temple Lang*, *supra* note 56, at 663, 682 (characterizing Article 177 proceedings as less satisfactory than direct proceedings).

221. See *Bellis*, *supra* note 54, at 540 (characterizing process as the "long march" through the Member State courts).

222. See *supra* note 202-06 and accompanying text; *Harding*, *supra* note 58, at 312; *Harding*, *supra* note 64, at 357; *Temple Lang*, *supra* note 56, at 682-83.

is not binding in other Member States.²²³ Thus, importers conducting business in more than one Member State may be faced with the possibility of court proceedings in more than one Member State.

In proceedings before the national court, the importer is confronted by a forum that lacks the expertise in Community law and the resources to verify and review determinations.²²⁴ Where the Council or the Commission do not intervene in the proceedings, the importer's opportunity to discover relevant documents may be limited, because the defendants in the proceeding are the national custom authorities and not the Council or the Commission.²²⁵

The procedures used by the Court of Justice when a question is referred to it may also be problematic in antidumping cases.²²⁶ These procedures provide for only one written document and one oral plea to contest opposing arguments.²²⁷ This limited opportunity to argue may be insufficient where the subject matter is complex and linguistic differences may hamper understanding.²²⁸ Furthermore, because the Court responds with an abstract ruling and conducts no fact finding,²²⁹ the independent importer must rely on the findings of fact made by the Member State court.²³⁰ Again, this may be troublesome for an importer where a Member State court may lack

223. Temple Lang, *supra* note 56, at 683.

224. *Id.*

225. *Id.* at 682.

226. Bellis, *supra* note 54, at 540; Harding, *supra* note 64, at 357.

227. ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS 24 (H. Schermers, C. Timmermans, A. Kellermann & J. Watson ed. 1987). Commentators have expressed the need for adding a second round of proceedings in which participants could reply to arguments. *Id.*

228. Harding, *supra* note 64, at 357; *see* Bellis, *supra* note 54, at 540 (Article 177 procedures are less suited to review of factual determinations than direct action under Article 173).

There is also an irrebuttable presumption of law that all institutions of the Community are "cognisant of all the official Community languages." K.P.E. LASOK, *supra* note 213, at 29. Lasok explains that as a result, a party may not assert that a fair trial has been denied where evidence is in a language different than that of the case. *Id.*

229. Rasmussen, *supra* note 2, at 116. *But see*, ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS, *supra* note 227, at 17 (noting that preliminary rulings are no longer abstract and that Court must consider facts and details).

230. *But see* ARTICLE 177 EEC: EXPERIENCE AND PROBLEMS, *supra* note 227, at 62. According to the president of the Finanzgericht, Hamburg, a party is not bound by the national court's statement of the facts in cases where the validity of a Community act is contested. *Id.* However, the contributors to the book "generally agreed that the

expertise in this complex area of law.²³¹

Furthermore, forcing the importer to wait for the states to implement the regulations, collect the duties, and then initiate an action under Article 177 may involve a delay that frustrates business planning.²³² Such delay is needless when the content of a regulation is known and the states are provided no discretion as to its implementation. Because of the uncertainty and cost confronting an independent importer, Article 177 is an inadequate alternative to a direct action before the Court of Justice²³³ and may even discourage importers from beginning national court proceedings.²³⁴

Although the Court of First Instance may have been an ideal forum for the review of the complex matters in antidumping cases, the Council rejected the Court's proposal to grant the Court of First Instance jurisdiction over this area.²³⁵ Because the Court of Justice will maintain exclusive jurisdiction over antidumping cases and yet lighten its docket by relinquishing jurisdiction over other matters, the Court should be inclined to admit actions by independent importers. In light of the Court of Justice's willingness and ability to review complex economic matters in other areas,²³⁶ the Court should not hesitate to admit actions by importers.

Just as Article 177 proceedings are an inadequate alterna-

responsibility for determining the facts rests primarily with the national court." *Id.* at 18.

231. See E. VERMULST, *supra* note 11, at 269; Temple Lang, *supra* note 56, at 683.

232. Stein & Vining, *supra* note 58, at 123.

233. Harding, *supra* note 64, at 357.

234. Temple Lang, *supra* note 56, at 683.

235. See *supra* note 69. The Council did agree, however, to reconsider whether the Court of First Instance should be granted jurisdiction over antidumping cases after the new court has been in operation for two years. *Id.*

With regard to antitrust actions, Mancini notes that with the establishment of the Court of First Instance, not only businessmen, but also consumers will initiate actions to assert their right to purchase goods at optimal market conditions. See Mancini, *supra* note 67, at 191.

Vermulst believes that while the Court of Justice is overqualified to handle direct actions challenging antidumping cases, it has established a satisfactory "system of judicial review" for all parties except independent importers. See E. VERMULST, *supra* note 11, at 333. Vermulst, however, favors the establishment of an appeals committee from which appeals could be made to the Court of Justice. *Id.*

236. See *Metro v. Commission*, Case 26/76, 1977 E.C.R. 1875, Common Mkt. Rep. (CCH) ¶ 8435 (concerning competition law); see Dinnage, *supra* note 2, at 15 (noting Court of Justice willingness to consider substantively complex cases).

tive for the Community importer, so too are the administrative review procedures. Under the Antidumping Regulation, an interested party must wait at least one year after the conclusion of the investigation before requesting administrative review.²³⁷ Furthermore, the party must submit evidence of changed circumstances sufficient to justify a review.²³⁸ This procedure, however, does not allow the importer to contest the legality of the original regulation.²³⁹

Similarly, refund procedures provide no alternative to importers wishing to contest the legality of a regulation imposing an antidumping duty.²⁴⁰ The refund procedures merely allow an importer to apply for reimbursement for excess duties already paid.²⁴¹ In addition, the refund procedures may be time-consuming and costly.²⁴² An importer must submit an application for a refund to the Member State, who must then forward the application, with or without an opinion as to the merits, to the Commission,²⁴³ and then the importer must submit an application in each Member State in which the duty was paid, on a per shipment basis.²⁴⁴ While an importer may bring a direct action before the Court challenging a Commission decision with regard to the amount of a refund, such action does not allow the importer to challenge the methodology used to calculate the dumping margin.²⁴⁵

B. Review of Council and Commission Determinations

While the Court does not want to open its doors to addi-

237. Antidumping Regulation, *supra* note 11, art. 14(1), at 14. Originally, the Community allowed a party to request a review at any time, however, the Community found that this practice was abused. J. BESELER & A. WILLIAMS, *supra* note 10, at 237. Parties would abstain from cooperation with the investigation, and once a duty was imposed, immediately request a review. *Id.*

238. Antidumping Regulation, *supra* note 11, art. 14(1), at 14.

239. *See* *Continentale Produkten v. Commission*, Case 312/84, 1987 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,183.

240. E. VERMULST, *supra* note 11, at 254.

241. Antidumping Regulation, *supra* note 11, art. 16(2), at 15; E. VERMULST, *supra* note 11, at 254.

242. E. VERMULST, *supra* note 11, at 254.

243. Antidumping Regulation, *supra* note 11, art. 16(2), at 15; E. VERMULST, *supra* note 11, at 254.

244. Antidumping Regulation, *supra* note 11, art. 16, at 15; E. VERMULST, *supra* note 11, at 252-53.

245. *See* *Continentale Produkten v. Commission*, Case 312/84, 1987 E.C.R. ___, Common Mkt. Rep. (CCH) ¶ 14,447, at 18,183.

tional applicants, it seems unfair to restrict an independent importer's access to judicial review in antidumping cases. The Court already grants independent importers the right to intervene,²⁴⁶ bring indirect actions under Article 177,²⁴⁷ and the Antidumping Regulation arguably provides procedural guarantees that imply a direct cause of action.²⁴⁸ This Note argues that the Court may admit independent importers in antidumping actions under Article 173 without creating new causes of action for other parties, which would be in violation of the EEC Treaty.

One explanation for the Court's hesitancy in admitting independent importers in antidumping cases under Article 173 stems from concerns that the Court would have to accept any case in which a party claims an interest in a regulation, not only in antidumping cases.²⁴⁹ Such a revision in the Court's practice would be a violation of the language of Article 173, which expressly limits the right of private parties to initiate actions before the Court.²⁵⁰

However, just as exporters, non-EEC producers, EEC producers, and Community associations have been granted direct judicial review, so too should independent importers. The Court may provide judicial review without opening itself to a deluge of other cases by applying the same standard used in *Fediol* and *Timex*.²⁵¹ The Court should thus consider whether the Antidumping Regulation provides procedural guarantees to importers. As in *Fediol*, the Court could find that there exists an implied right of action for the importer as to whether those guarantees had been observed. While the Court apparently rejected this approach in *Alusuisse*, where it held that the distinction between a decision and a regulation is based on the nature of the measure and its legal effect, not on the procedures for its adoption,²⁵² that 1982 decision pre-dated the 1983 *Fediol* and 1985 *Timex* decisions.

246. See *supra* notes 187-92 and accompanying text.

247. See *supra* notes 202-13 and accompanying text.

248. See *infra* notes 251-63 and accompanying text.

249. See Temple Lang, *supra* note 56, at 663.

250. See *supra* notes 70-73 and accompanying text; Harding, *supra* note 64, at 357.

251. See *supra* notes 152-61 and accompanying text.

252. See *supra* notes 173-75 and accompanying text.

This Note asserts that the Antidumping Regulation does provide procedural guarantees to independent importers, who may be more than just interested parties. Those importers who participate in the proceedings are guaranteed that the Community and Council will take into consideration relevant information. The Antidumping Regulation provides that importers may submit relevant information²⁵³ and that importers' records may be verified²⁵⁴ and premises inspected.²⁵⁵ An importer may also be provided notice of proposed measures²⁵⁶ and the opportunity to inspect all information.²⁵⁷ Furthermore, an importer may request both a hearing²⁵⁸ and the opportunity to meet with other parties directly concerned.²⁵⁹ Significantly, the importer pays or posts any duty required in accordance with a regulation as the goods enter the Community for free circulation.²⁶⁰ This obligation to pay the duty combined with an importer's right to participate in the investigation, and the Antidumping Regulation's "lesser duty" rule (under which the duty imposed should be less than the dumping margin if such an amount would be adequate to remove the injury),²⁶¹ logically establishes an importer's direct and individual concern in a regulation imposing an antidumping duty.

Ultimately, if the rationale for antidumping laws is to penalize unfair trade practices, these laws are not effectively used where unfounded injury determinations are made or excessive duties are levied.²⁶² Community industries may be overpro-

253. Antidumping Regulation, *supra* note 11, art. 7(1)(a), at 9.

254. *Id.* art. 7(2)(a), at 9.

255. *Id.* art. 7(3)(a), at 9.

256. *Id.* art. 7(4)(b), at 9.

257. *Id.* art. 7(4)(a), at 9.

258. *Id.* art. 7(5), at 10.

259. *Id.* art. 7(6), at 10.

260. *Id.* arts. 11(1), 13(4), at 11-12.

261. The second Allied Corporation v. Council decision, Case 53/83, 1985 E.C.R. 1640, Common Mkt. Rep. (CCH) ¶ 14,200, confirmed that the Council is obligated to limit the level of duties it imposes pursuant to the "lesser duty" rule. *Id.* at 1659, ¶¶ 17-19, Common Mkt. Rep. (CCH) ¶ 14,200, at 16,222; *see supra* note 36 and accompanying text on the "lesser duty" rule.

262. *See Davey, An Analysis of European Communities Legislation and Practice Relating to Antidumping and Countervailing Duties*, in 1983 *FORDHAM CORP. L. INST.* 39, 127 (B. Hawk ed. 1984) ("protection is really provided to weak industries, or perhaps industries seeking protection from the rigors of competition"); *see also* R. DALE, *supra* note 124, at 11. Dale notes that the "objective of anti-dumping action . . . must be to

tected in the marketplace, while exporters and Community importers are excessively penalized.²⁶³

Another explanation for the limited opportunity that Article 173 provides to private parties to initiate judicial review is the concern for the challenges to general Community policy schemes.²⁶⁴ Where an applicant's interest in a regulation is limited, that is, where an applicant fails to establish that a regulation does in fact constitute a decision of direct and individual concern, the Court should not review the contested regulation.²⁶⁵ The regulation is considered a policy choice, made by the Commission and Council, to which the Court of Justice should defer.²⁶⁶

It is also submitted that concern for the effectiveness of regulations that implement Community policy is evidenced by

identify temporarily low import prices . . . —a task involving subtle economic prediction which one might reasonably suppose to be well beyond the capacity of economists, let alone of lawyers or civil-servants." *Id.* Dale also notes that antidumping laws are promoted by politically active business groups, whereas consumers are relatively inactive. *Id.* at 34.

263. See E. VERMULST, *supra* note 11, at 229; R. DALE, *supra* note 124, at xiii (penalties imposed on importers discourage both dumped and undumped imports).

264. See Rasmussen, *supra* note 2, at 121 (opponents of Community measure would abuse free access to judicial review by initiating actions under the belief that as long as the validity of the contested measure is subject to litigation, enforcement would be frustrated).

Rasmussen characterizes the Court's interpretation of Article 173 as restrictive and contends that respect for the intent of the EEC Treaty drafters fails to support maintaining a restrictive interpretation. *Id.* Not only is it difficult to accurately interpret the founders' intent with respect to Article 173 in the absence of a legislative history of the negotiations of the Treaties, *id.*; Weiler, *The Court of Justice on Trial*, 24 *COMMON MKT. L. REV.* 555, 575 (1987), but according to Rasmussen, it is also highly unlikely that the drafters of the EEC Treaty meant to severely restrict a private party's access to the Court of Justice. See Rasmussen, *supra* note 2, at 119-20. Rasmussen asserts that because the drafters granted the Community broader powers under the EEC Treaty than under the ECSC Treaty, it would be odd if the drafters intended to provide less protection to private parties. See *id.* Rasmussen further argues that if democratic controls had been simultaneously institutionalized at the Community level, a restrictive interpretation of Article 173 might be more logical. *Id.*

265. Harding, *supra* note 64, at 356.

266. Rasmussen, *supra* note 2, at 114. Originally, the Commission was to have sole responsibility for the imposition of antidumping regulations. J. BESELER & A. WILLIAMS, *supra* note 10, at 173-74. Several of the Member States were reluctant, however, to relinquish all involvement. *Id.* Consequently, the Antidumping Code provides that both the Commission and the Council participate in the proceedings. *Id.* With the participation of the Council, a regulation is not just administrative but also legislative in nature. *Id.*

the structure of Article 177.²⁶⁷ If a private party does successfully challenge a regulation, the regulation is invalidated with respect to future transactions, so that prior transactions are not disrupted.²⁶⁸ However, it is not clear whether a judgment of invalidity under Article 177 has only a prospective effect.²⁶⁹ If, however, a judgment of invalidity is retroactive and an importer is refunded duties paid, it would seem that this procedure would be adequate. But, as one writer notes, it is possibly less disruptive to general Community policy schemes if a regulation is quickly annulled in a direct action under Article 173, rather than if Member States apply the regulation, with the possibility that the Court of Justice eventually deems the measure invalid under Article 177.²⁷⁰

C. Applying a New Admissibility Test

Under the current three-pronged admissibility test, one legal advisor to the Commission has suggested that the Court of Justice might admit importers who have concluded contracts before antidumping duties are imposed.²⁷¹ Thus, an importer could argue that a regulation for the definitive collection of provisional duties constitutes a decision of direct and individual concern where the Commission was in a position to know that the interests of a group were particularly and exclusively affected by a specific provision of a regulation.²⁷² This legal

267. Harding, *supra* note 64, at 358.

268. *Id.*

269. Bebr, *supra* note 3, at 1239.

270. *Id.* at 1248-49. Bebr notes that the Court's recent jurisprudence concerning the effect of a ruling of invalidity in Article 177 is welcomed and has increased the importance of this form of indirect judicial review. *See id.* at 1248. He notes that indirect judicial review under Article 177 initiated by private parties has surpassed in importance direct review under Article 173 and that it is only because of Article 177 that the validity of certain acts are reviewed at all. *See id.*

271. *See* Temple Lang, *supra* note 56, at 658.

272. *See id.* at 658, 663. Beseler and Williams assert that the Court admitted exporters in *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. 1005, Common Mkt. Rep. (CCH) ¶ 14,084, because the Court adopted its line of reasoning from the competition case *IBM v. Commission*, Case 60/81, 1981 E.C.R. 2639, Common Mkt. Rep. (CCH) ¶ 8708. J. BESELER AND A. WILLIAMS, *supra* note 10, at 247-48. In *IBM*, the Court stated that

any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in

advisor to the Commission also suggests that independent importers who have posted security for provisional duties might be admitted to the Court of Justice to challenge the definitive collection of provisional duties.²⁷³ These importers are identifiable and fixed in number, and thus, a regulation providing for the collection of the secured amounts constitutes a decision concerning only those parties and is of direct and individual concern to them.²⁷⁴ Furthermore, in instances where a regulation imposes a definitive duty and orders the definitive collection of provisional duties, the importer may "be able to use arguments which would . . . call in question the validity of the definitive duties, although they would not have standing to challenge them directly."²⁷⁵

The Court, however, should revise its admissibility test so that independent importers may challenge the imposition of a definitive duty even where an importer may not have pending any binding contracts or where the Commission has not used the independent importer's pricing information to construct the export price.²⁷⁶ In such cases, the Court should determine

which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.

Id. at 2651, ¶ 9, Common Mkt. Rep. (CCH) ¶ 8708, at 8464. Beseler and Williams thus opined that

[p]rovisional duties are binding on exporters and importers, whose interest they affect by bringing about a "distinct change" in their legal position. Individual importers are charged with the provisional duty and, even if the financial burden of the securities requested is limited, the imposition of provisional duties may, nevertheless, "compel the undertaking concerned to alter or reconsider its marketing practices."

J. BESELER & A. WILLIAMS, *supra* note 10, at 247-48. Accordingly, the independent importers who pay the duty and may revise their list of suppliers should be admitted to the Court to challenge the imposition of a provisional duty.

273. See Temple Lang, *supra* note 56, at 657.

274. *Id.* at 657. Temple Lang asserts that where a regulation contains a provision for the definitive collection of provisional duties and the imposition of definitive duties, an importer may be able to question the validity of the definitive duties but would not have standing to challenge them directly. *Id.*

275. *Id.*

276. In *Allied*, the Court held that an applicant who was identified in the regulation or was concerned by the preliminary investigation is admissible under Article 173. *Allied Corporation v. Commission*, Joined Cases 239 & 275/82, 1984 E.C.R. at 1030, ¶¶ 12, 14, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127; see *supra* notes 177-86 and accompanying text. In that case, however, the Court denied admission to an independent importer that exclusively imported from one the producers charged with dumping. *Allied Corporation*, 1984 E.C.R. at 1031, ¶ 15, Common Mkt. Rep. (CCH) ¶ 14,084, at 15,127. The Court noted that, in this case, the Commission did

admissibility with regard to whether the importer had participated in the investigation²⁷⁷ and had imported significant quantities of the product under investigation. These factors, linked to the procedural rights provided importers, would provide an adequate reason for direct judicial review. The Court would not be subjected to a dramatic increase in direct actions, because these factors would serve also to limit those *de minimis* cases where an importer does not purchase significant quantities of the product under investigation to warrant judicial review.

Finally, the Court has been criticized for the manner in which the export price has been calculated to determine admissibility (as in *Ball Bearings* where associated importers were admitted).²⁷⁸ One commentator notes that use of the export price is one of many factors considered in an antidumping investigation and that there is no apparent reason for the Court to use it to determine admissibility.²⁷⁹ Therefore, the Court should consider all relevant information, which would include arguments that may be offered by an independent importer as well.

not use the importer's pricing information to construct the export price. *Id.*; see E. VERMULST, *supra* note 11, at 274 (Importers are in a predicament because access to judicial review under Article 173 is dependent upon its relation to the exporter; that is, whether there is an "association or compensatory relationship" and upon whether the Commission views this relationship as "unreliable.").

277. Bellis, *supra* note 54, at 550. Bellis suggests determining admissibility solely on whether the importer had participated in the proceedings and not by whether the Commission used the applicant's pricing information. *Id.* at 550. Compare *id.* with Mancini, *supra* note 67, at 203. Mancini notes that in competition cases, where interested parties may request that the Commission investigate alleged infringements of antitrust laws, after *Metro v. Commission*, Case 26/76, 1977 E.C.R. 1875, Common Mkt. Rep. (CCH) ¶ 8435, at 7848, the Court seemed to relax the admissibility test and considered only whether the applicant had an overriding interest in verifying whether the competition rules had been properly applied. Mancini, *supra* note 67, at 203. However, Mancini asserts that an admissibility test based on whether the applicant participated in the administrative investigation or is a complainant is not a decisive guide. See *id.* Instead, Mancini argues that an applicant, even one that did not participate in the investigation, should be admitted if the "Commission's action would prejudice a legal position of [the applicant] . . . that is directly protected by Community antitrust rules." *Id.*

278. Bellis, *supra* note 54, at 550.

279. See *id.*

CONCLUSION

In the past decade the Court of Justice has established itself as the court of appeals for reviewing antidumping regulations challenged by non-EEC producers, exporters, and their EEC subsidiaries; EEC producers; and trade associations (in an antisubsidy case). The Court has developed expertise in this area and has relieved itself of many cases that will now be handled by the Court of First Instance. Thus, the Court of Justice should now agree to review direct actions by independent Community importers who have participated in the investigation before the Commission and the Council and have imported more than a *de minimis* amount of the product in question. Such a result is fairest to importers and gives to them direct judicial review where an antidumping regulation is of direct and individual concern.

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