JUDGMENT OF THE COURT (Fifth Chamber)
10 March 1992 *

In Case C-188/88,

NMB (Deutschland) GmbH, a company incorporated under German law and established at Neu-Isenburg (Federal Republic of Germany),

NMB Italia Srl, a company incorporated under Italian law and established at Mazzo di Rho (Italy),

NMB (UK) Limited, a company incorporated under English law and established at Bracknell (United Kingdom),

represented by I. S. Forrester, Advocate of the Scots Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

applicants,

v

Commission of the European Communities, represented by Jacques Bourgeois, Principal Legal Adviser, acting as Agent, assisted by Mark Cran Q. C. and David Anderson, Barrister, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

and

The Federation of European Bearing Manufacturers' Associations (FEBMA), represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Arles,

intervener,

* Language of the case: English.

APPLICATION under Article 173 of the EEC Treaty for the annulment of Commission Decisions 88/327/EEC, 88/328/EEC and 88/329/EEC of 22 April 1988 concerning applications for refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (Official Journal 1988 L 148, pp. 26, 28 and 31), of which the applicants were the respective addressees, inasmuch as those decisions reject in part their applications for refund of anti-dumping duties levied in 1985 and 1986 on imports of ball bearings originating in Singapore,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of Chamber, President of the Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

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

having regard to Report for the Hearing and further to the hearing on 5 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1991,

gives the following

Judgment

1 By an application lodged at the Court Registry on 8 July 1988 NMB (Deutschland) GmbH, NMB Italia Srl and NMB (UK) Ltd (hereinafter referred to as 'NMB's European subsidiaries') brought an action under the second subparagraph of Article 173 of the EEC Treaty for annulment of Commission Decisions 88/327/EEC, 88/328/EEC and 88/329/EEC of 22 April 1988 concerning applications for refund of anti-dumping duties collected on certain imports of certain ball bearings originating in Singapore (Official Journal 1988 L 148, pp. 26, 28 and 31, hereinafter referred to as 'the contested decisions'). By

those decisions the Commission rejected in part the applications for refund made by NMB's European subsidiaries in respect of anti-dumping duties levied in 1985 and 1986.

2 NMB's European subsidiaries distribute within the Community high-precision ball bearings supplied by NMB Singapore Ltd. All the applicants and also NMB Singapore Ltd are part of the Minebea (Nippon Miniature Bearing) group and are wholly owned subsidiaries of the Japanese parent company.

3 Under Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore (Official Journal 1984 L 193, p. 1) an anti-dumping duty equal to 33% of the net free-at-Community-frontier price was imposed on imports of ball bearings manufactured in Singapore by the European subsidiaries of NMB Singapore Ltd.

4 Pursuant to Article 16 of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1, hereinafter referred to as 'the basic regulation'), all the applicants submitted an application for partial refund of the anti-dumping duties levied on the imports of ball bearings made by them during the years 1985 and 1986.

5 Article 16 provides that, where an importer can show that the duty collected exceeds the actual dumping margin (that is to say the difference between the normal value and the export price), the excess amount is to be reimbursed.

6 By Notice 86/C 266/02 of 15 October 1986 (Official Journal 1986 C 266, p. 2) the Commission issued guidelines concerning the application of Article 16 of the basic regulation. Point 2(a) of Section II of the Notice states that the actual dumping margin will be established by comparing the normal value and the export price. Point 2(c) lays down the principles applicable where there is an association between the exporter and the importer within the meaning of Article 2(8)(b) of the basic regulation.

7 The latter provision states *inter alia* that:

'... the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer ... In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.

Such allowances shall include, in particular, the following:

...

(ii) customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods'.

8 Point 2(c) of Section II of the Notice provides that:

'Where an export price is constructed pursuant to Article 2(8)(b) of Regulation (EEC) No 2176/84, any payment of anti-dumping duties for the release for free

circulation of the product concerned in the Community will be regarded as a cost incurred between importation and resale.

Consequently, any reimbursement, in total or in part, of anti-dumping duties paid on shipments imported by an importer which is associated with the exporter concerned will only be granted under the following circumstances, all other factors remaining equal:

— where the products in question were resold to the first independent buyer on a duty unpaid basis, a reimbursement will be granted to the company which paid the duty, if the resale price has been increased by the amount of the dumping margin or a part thereof,

— where the products in question were resold to the first independent buyer on a duty paid basis, a reimbursement will be granted, if the resale price has been increased by an amount equivalent to the margin of dumping and the amount of the duty paid. In this case the applicant is not prevented from passing on to the buyer the amount eventually reimbursed.'

In accordance with those principles the Commission, by the three contested decisions of 22 April 1988, partly accepted and partly rejected the applications for refund of anti-dumping duties submitted by NMB's European subsidiaries. The partial rejection of the applications was due to the fact that, in calculating the constructed export price, the Commission deducted the anti-dumping duties paid by the applicants.

The Commission gave the following reasons for its position in the contested decisions. First, according to the terms of Article 2(8)(b) of the basic regulation, it was necessary to deduct from the resale price all duties, including anti-dumping duties. Secondly, the Commission stressed that, if the applicant had sold on a duty unpaid basis, a single increase would have been sufficient to allow it to qualify for a refund. Even where, as in this case, the imported product was resold in the

Community on a duty-paid basis, only one increase of the resale price by an amount equivalent to the duty was necessary provided that the Commission was satisfied that in the particular circumstances of the case this increase in the price paid by the independent buyer eliminated or reduced the dumping margin and did not represent merely the anti-dumping duty, which the importer could pass back to its customer if it obtained a refund. This would be the case, for example, if the costs incurred between importation and resale by NMB or Minebea's normal value had been reduced since the original investigation period. In addition, other changes in circumstances might require the application of different adjustment or calculation methods which could lead to the same result, that is to say the elimination or reduction of the dumping margin by a single price increase. In the present case there was no evidence that these conditions were met.

11 In their application NMB's European subsidiaries set out the conditions which associated importers must comply with under the rules if they wish to obtain full or partial refund of anti-dumping duties which they have paid. According to the applicants, such importers must show that the price at which they buy their products, namely the export price, is no longer lower than the normal value. For that purpose they must demonstrate that the price at which they resell the products to their customers, which is the price used for calculating the export price, has been increased twice. The first increase is intended to eliminate the dumping margin, and the second represents the anti-dumping duties which they have been obliged to pay. Following that analysis the applicants put forward the following four complaints.

12 First, the applicants consider that, by taking the view that it was necessary to deduct the anti-dumping duties in constructing the export price of associated importers, the Commission incorrectly interpreted Article 2(8)(b) of the basic regulation. They put forward the following arguments in support of that complaint. First, the Commission's interpretation is incompatible with the principle of proportionality since it imposes on associated importers a burden in excess of that which is necessary to remedy the dumping and thus affords excessive protection to undertakings established in the Community. Secondly, the interpretation is discriminatory. Independent importers and associated importers are treated differently for the purposes of refund of anti-dumping duties without any objective justification: the former may obtain a refund of duties where the dumping margin

has been eliminated, whereas the latter must in addition increase the price which they charge their customers by an amount representing the duties paid. Finally, in interpreting the basic regulation, the Commission should have taken account of the practice of the Community's trading partners, who do not deduct the anti-dumping duties in constructing the export price.

13 Secondly, they contend that, by basing the contested decisions on a Notice published after the years in respect of which a refund of duties is sought, the Commission infringed the principle of the protection of legitimate expectations. They argue that, before the publication of the Commission Notice of 1986, they could legitimately expect to receive a refund of the duties paid in 1985 and 1986 provided that the dumping margin had been eliminated. In their view, the Commission infringed their legitimate expectations by announcing in its Notice that, in order to obtain a refund, associated importers must in addition increase the prices which they charge their customers by an amount equal to the duties paid.

14 Thirdly, the applicants consider that the Commission acted in a manner and to ends other than those for which its powers were conferred upon it and that it therefore misused its powers. In that regard they repeat their claim that associated importers are subject to a burden in excess of that which is necessary to remedy the dumping, that they are subject to discrimination and that the European industry is afforded excessive protection.

15 Finally, in the event of the Court upholding the Commission's interpretation, the applicants contend that the basic regulation is contrary to Article VI of the GATT and the anti-dumping code adopted in implementation thereof (hereinafter referred to as 'the GATT anti-dumping code'). They conclude that pursuant to Article 184 of the EEC Treaty the regulation must be declared inapplicable in this case, with the result that the contested decisions are deprived of any legal basis.

16 By order of 19 January 1989 the Court granted the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as 'FEBMA') leave to intervene in support of the Commission.

17 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the applicable legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility of certain pleas

18 The Commission first of all objects that certain pleas put forward by NMB's European subsidiaries in support of their application are inadmissible.

19 It maintains first that those pleas are directed against a policy, namely the Commission's policy with respect to refund of anti-dumping duties, whereas under Article 173 of the EEC Treaty the Court's review concerns the legality of measures adopted by the Council or the Commission.

20 The Court considers that it is apparent from the form of order sought by the applicants that the application merely seeks the annulment of Decisions 88/327, 88/328 and 88/329. Whilst it is true that NMB's European subsidiaries make numerous references to the 'policy' of the Commission, it is clear that they are merely challenging those decisions, which apply that policy.

21 Secondly, the Commission argues that some of the pleas put forward by NMB's European subsidiaries in support of their application fall outside the scope of

Article 173 of the Treaty, in particular those relating to the differences between the Community's practice and that of the Community's trading partners and to the infringement of the GATT anti-dumping code.

22 As regards the practice of the Community's trading partners, the Court considers that, whilst it is true that such a practice cannot constitute a criterion for review of legality under Community law, it may nonetheless be relied upon, as in this case, as an argument in support of the contention that the Commission has incorrectly interpreted the provisions of the Community regulation.

23 As regards the alleged infringement of the GATT anti-dumping code, it should be noted that it follows from the judgment in *Nakajima* v *Council* (Case C-69/89 [1991] ECR I-2619) that such an infringement may be pleaded for the purposes of review of the legality of the basic Community regulation.

24 Finally, the Commission asserts that the pleas put forward by the applicants in support of their contention that the basic regulation is unlawful are inadmissible. It puts forward three arguments in support of that assertion. First, the applicants call in question the entire regulation without identifying precisely the provision which they consider to be illegal. Secondly, no mention is made of the regulation in the form of order sought in their application. Finally, they seek the annulment of the regulation even though they may at most, since any action directed against it would be out of time, plead its inapplicability on the basis of Article 184 of the EEC Treaty.

25 The Court considers first that, since the dispute concerns the deduction of anti-dumping duties made in the three contested decisions pursuant to Article 2(8)(b) of the basic regulation, it is clear that the applicants contest the legality of that provision in so far as it is applied to the refund of anti-dumping duties and not the legality of the basic regulation as a whole. In addition, a submission that a regu-

lation is unlawful put forward in support of an action brought against individual decisions constitutes a plea in law raised in connection with the application. It follows that such a plea need not appear in the form of order sought in the application but need merely be mentioned in the body thereof. It is clear from the application that it seeks the annulment not of the basic regulation or of certain provisions thereof but of the three contested decisions, on the ground that they are based on an illegal provision of that regulation which should be declared inapplicable under Article 184 of the EEC Treaty.

26 The Commission's objection that certain pleas are inadmissible must therefore be rejected.

Substance

A — Plea concerning the incorrect interpretation of the basic regulation

27 NMB's European subsidiaries claim that the Commission incorrectly interpreted the basic regulation in the abovementioned Notice of 1986 and in the contested decisions. They observe that, in accordance with the GATT anti-dumping code, Article 16 of the basic regulation places a single condition on the right to reimbursement of anti-dumping duties, namely proof that the duty paid exceeds the actual dumping margin.

28 NMB's European subsidiaries observe that, where an associated importer has increased the resale price within the Community by an amount equal to the dumping margin previously established, such an increase is necessary and sufficient to put an end to the dumping and, consequently, to give rise to a refund of the duties paid. Where there is no change in any other major factor in the calculation of the dumping margin (in particular the normal value and the selling costs of the importer), the effect of increasing the resale price by an amount equal to the dumping margin is that the constructed export price becomes equal to the normal value, with the result that the dumping is eliminated.

29 NMB's European subsidiaries maintain that in order to arrive at that result anti-dumping duties should not be regarded as a cost borne between importation and resale and therefore should not be deducted in constructing the export price. Consequently, the expression 'where appropriate' should be read into Article 2(8)(b) of the basic regulation. This would have the effect of restricting the automatic deduction of anti-dumping duties paid by an associated importer in constructing the export price to procedures for review of anti-dumping duties and would allow the Commission to refrain from deducting such duties in connection with a refund procedure.

30 According to NMB's European subsidiaries, such an interpretation is necessary in order to avoid unjustified discrimination between associated importers and independent importers. The latter, having paid the anti-dumping duties, may apply for a refund of the duties if the exporter has increased his prices by an amount sufficient to eliminate the dumping independently of the payment of anti-dumping duties. In such circumstances the independent importer is free, pending refund of the anti-dumping duties, either to absorb the duties by making only a single increase in the prices charged to his customer, reflecting the increase in the price charged to him by the exporter, or to pass on the anti-dumping duties by making a double increase in the prices which he charges to his customer. In the latter case he is also free to pass on the refund of anti-dumping duties after he has received it. By way of contrast, an associated importer is obliged by virtue of the Commission's practice to charge his customer, who is the first independent buyer in the Community, a double increase representing the anti-dumping duties together with an increase sufficient to eliminate the dumping independently of the payment of those duties, pending the refund which he will receive of the anti-dumping duties and which he is free to pass on.

31 The interpretation put forward by NMB's European subsidiaries cannot be upheld.

32 First, it is contrary to the actual wording of the provision, which expressly provides that, as costs incurred between importation and resale, anti-dumping duties are to be deducted in constructing the export price. The provision makes no distinction between the procedures for review and refund.

33 Secondly, the purpose of constructing the export price is the same in the case of both review and refund. In both cases the purpose is to establish the actual dumping margin. It would therefore be illogical to deduct anti-dumping duties in one case and not in the other.

34 Thirdly, the alleged difference in the treatment of independent importers and associated importers with respect to the refund of anti-dumping duties is justified by the difference in their respective situations in relation to the dumping and therefore does not constitute discrimination.

35 Whereas independent importers are not involved in the dumping, importers who are associated with the exporter are thereby placed on the other side of the 'dumping fence' in the sense that they participate in the practices which constitute dumping and, in any event, are in a position to have full knowledge of the circumstances underlying it.

36 The fact that they are in different situations affects the conduct of independent importers and associated importers with respect to the passing on of anti-dumping duties to their customers.

37 As the Commission correctly stated, independent importers may be expected to pass on the anti-dumping duties to their customers since otherwise they would incur a loss of interest on the amounts paid and suffer the effects of any currency devaluation and, since they have no knowledge of the facts on the basis of which the dumping margin was established, they would run the risk of not being granted the refund despite the increase in the export price.

38 That does not apply to associated importers, who may refrain from passing on the anti-dumping duties since they are aware of the commercial practices underlying the dumping and consequently are not in any doubt and run no risks with respect to the possibility of obtaining a refund.

39 Consequently, if the anti-dumping duties were not deducted in constructing the export price, associated importers would be in a more favourable position than independent importers.

40 It follows from the foregoing that Article 2(8)(b) of the basic regulation requires that anti-dumping duties be deducted in constructing the export price for the purposes of refunding duties. Consequently, the plea that the basic regulation was incorrectly interpreted must be rejected.

B — The plea that the contested provisions of the basic regulation are unlawful

41 NMB's European subsidiaries claim that, if the Commission's interpretation of Articles 2(8)(b) and 16 of the basic regulation is correct, those provisions infringe the principle of equal treatment and also the GATT anti-dumping code.

42 Since the Court has already rejected the argument concerning an infringement of the principle of equal treatment in considering the previous plea, it must now examine the argument concerning infringement of the GATT anti-dumping code.

43 NMB's European subsidiaries claim that the policy on which the contested provisions are based is unlawful in so far as it infringes the fundamental principle of anti-dumping law enshrined in Article 8(3) of the anti-dumping code laid down by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Official Journal 1980 L 71, p. 90). That provision states that: 'The amount of the anti-dumping duty must not exceed the dumping margin as established under Article 2'.

44 According to NMB's European subsidiaries, if an associated importer pays anti-dumping duties and subsequently increases the price which it charges to the first independent buyer in the Community by an amount equal to those duties, it thereby eliminates the dumping and is consequently entitled to receive a refund of the anti-dumping duties which it has paid.

45 In that regard the Court points out that Article 2(5) of the GATT anti-dumping code provides that:

'In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer . . . '.

Article 2(6) provides that in the cases referred to in Article 2(5) 'allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made'.

46 As the Commission correctly pointed out, the only difference between the GATT anti-dumping code and the Community regulation with respect to the construction of the export price is that, whereas the code merely lays down the principle that allowance should be made for costs incurred between importation and resale, 'including duties and taxes', the Community regulation specifies certain duties and other costs, including anti-dumping duties, for which allowance must be made.

47 It follows that there is no inconsistency between the basic regulation and the anti-dumping code.

48 Finally, NMB's European subsidiaries claim that the Commission's practice differs from that of the Community's trading partners.

49 In view of the fact that NMB's European subsidiaries have not shown that the system adopted by the Community is unlawful, the fact that the Community's trading partners adopt other methods does not render that system unlawful.

50 This argument must therefore also be rejected.

51 As regards the supposed infringement of the principle of proportionality and the alleged misuse of powers, those pleas are based on arguments which the Court has already rejected above in examining the plea concerning the incorrect interpretation of the basic regulation.

52 NMB's European subsidiaries argue further that there was a breach of the principle of the protection of legitimate expectations in so far as they were entitled to expect, until the Notice of 15 October 1986 was issued, that refunds would be granted in circumstances such as those of the present case.

53 The Court considers that the applicant could not reasonably have such an expectation since, as they themselves concede in their application, the Commission had not clearly defined its position on this matter prior to the publication of the Notice in 1986.

54 Consequently, this argument must be rejected.

55 Finally, NMB's European subsidiaries claim that the contested decisions are void because they are inadequately reasoned.

56 In that regard the Court would point out that the statement of reasons for the decisions, which expressly refers to the relevant provisions of the basic regulation and the Commission Notice of 1986, sets out, when read in conjunction with those provisions, the reasons for the partial rejection of the applications made by NMB's

European subsidiaries and the steps which the latter must take in order to obtain full refund of the anti-dumping duties paid.

57 Since none of the pleas put forward by NMB's European subsidiaries are well-founded, the application must be dismissed.

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their pleas, they must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to pay the costs, including those of the intervener.

Joliet Slynn

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 10 March 1992.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber