REPORT FOR THE HEARING
in Case C-188/88 *

I — Facts

NMB Deutschland GmbH, a German limited liability company, NMB Italia S. r. l., an Italian limited liability company and NMB (UK) Limited, a company incorporated under English law, are distributors within the Community of high-precision ball bearings supplied by NMB Singapore Limited. Both the applicants and NMB Singapore Limited are part of the Minebea (Nippon Miniature Bearing) Group and are wholly-owned subsidiaries of the Japanese parent company. It is uncontested that NMB Singapore Limited, as exporters, and the applicants, as importers, are in association within the meaning 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'). It is also uncontested that each of those importers is 'associated with the exporter' for the purposes of paragraph I B (b) (iii) of the Commission Notice concerning the reimbursement of anti-dumping duties (86/C266/02).

Provisional anti-dumping duties were imposed on ball bearings imported by the applicants by Commission Regulation (EEC) No 744/84 of 19 March 1984 (Official Journal 1984 L 79, p. 8). Definitive anti-dumping duties were subsequently imposed by Council Regulation (EEC) No 2089/84 of 19 July 1984 (Official Journal 1984 L 193, p. 1), at the rate of 33.89%.

During 1985 and 1986 each of the applicants applied regularly, in accordance with Regulation No 2176/84, for the partial refund of anti-dumping duties paid during those two years.

On 22 April 1988 the Commission gave three decisions on those refund applications, namely decisions 88/327, 88/328 and 88/329 mentioned above. Each applicant was held to have proved that the duty collected exceeded the dumping margin to various degrees, and the Commission authorized repayments to them in a total sum of some ECU 4 500 000. The Commission however refused additional requests for the refund of DM 3 254 925, UK £202 163 and LIT 1 566 861 000, sums totalling some ECU 2 900 000.

II — The legislative background

Article 16(1) of the basic regulation provides that 'where an importer can show

* Language of the case: English.

that the duty collected exceeds the actual dumping margin . . . the excess amount shall be reimbursed'.

The dumping margin for the purposes of Article 16(1) is defined by Article 2(13)(a) as 'the amount by which the normal value exceeds the export price'. The calculation of normal value (in this case, a normal value constructed in accordance with the detailed rules contained in Article 2(3)(b)(2) of the basic regulation) is not in issue.

The export price was constructed in accordance with the principles set out in Article 2(8)(b) of the basic regulation, which provides:

'In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer . . . , the 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 and resale, including all duties and taxes, and for a reasonable profit margin.

Such allowances shall include, in particular, the following:

(i) usual transport, insurance, handling, loading and ancillary costs;

(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;

(iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.'

The basic regulation was promulgated in pursuance of the agreement on implementation of Article VI of the General Agreement on Tariffs and Trade of 12 April 1979 ('the GATT anti-dumping code'), published in the Official Journal of 17 March 1980 (Official Journal L 71, p. 90). The GATT anti-dumping code states in Article 2(5) and (6), as regards calculation of the export price and the dumping margin, as follows:

'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, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

In order to effect a fair comparison between the export price and the domestic price in the exporting country [that is to say, the normal value] ..., the two prices shall be compared at the same level of trade, ... Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. 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.'

As regards the procedure for refunds of anti-dumping duties, the GATT anti-dumping code also states in the second sub-paragraph of Article 8(4) that:

'In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.'

On 22 October 1986 the Commission published in the Official Journal (Official Journal 1986 C 266, p. 2) a 'Commission Notice concerning the reimbursement of anti-dumping duties' (hereinafter referred to as the '1986 Notice'). That Notice contains guidelines drawn up after consultation with the Member States on the reimbursement of anti-dumping duties for the purpose of 'informing interested parties and guiding the internal procedure of the Commission'. Under the terms of 'II. Merits', at paragraph 2(c):

'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.'

III — Written procedure and conclusions of the parties

The application was received at the Court Registry on 11 July 1988.

By order of 18 January 1989, the Court allowed the application by the Federation of European Bearing Manufacturers' Association (FEBMA) to intervene in support of the Commission's conclusions.

The written procedure followed the normal course. Upon hearing the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry.

The *applicants* claim that the Court should:

— annul Commission Decisions 88/327, 88/328 and 88/329 in so far as they deny refunds to the applicants;

— order the Commission to pay the costs.

The Commission contends that the Court should:

— dismiss the application and

— order the applicants to pay the Commission's costs.

The *intervener, FEBMA*, claims that the Court should:

— dismiss the application;

— order the applicants also to pay the costs of the intervener.

IV — Submissions and arguments of the parties

In support of their applications, the applicants ('NMB') rely on the following grounds of complaint:

(1) illegal refusal to grant refunds when no dumping has occurred.

(2) the three grounds of the decisions:

(i) misinterpretation of the relevant provisions of the basic regulation and infringement of the principle of proportionality;

(ii) prohibition of non-discrimination;

(iii) incorrect reasoning underlying the third ground of the decisions;

(3) infringement of the principle of the protection of legitimate expectations;

(4) inconsistency of the EEC system with the practices of its trading partners;

(5) misuse of power;

(6) the Commission's policy reflects an illegal trade policy.

1. *Illegal refusal to grant refunds when no dumping has occurred*

NMB argues that the Commission has failed to fulfil its obligation to grant refunds on anti-dumping duties when no dumping has occurred, an obligation which is imposed on it by Community and international law. The purpose of anti-dumping duties is not to penalise exporters or importers, but to eliminate the distortions of trade caused by dumping. If the margin has been eliminated, the anti-dumping duties are unnecessary and must be refunded. The economic consequence of the Commission's policy is to treat the payment of duty as a factor in the dumping calculation which artificially counts in favour of a finding of dumping.

In that connection NMB stresses that, in the context of a dumping margin based on an export price 'constructed' in pursuance of Article 2(8) of the basic regulation, the treatment accorded to an importer associated with the exporter is significantly different from that accorded to the unrelated importer. If, in response to the imposition of anti-dumping duties, the exporter increases his price, his unrelated importer can file a refund application seeking the repayment of the whole amount of anti-dumping duty paid, if the dumping has been eliminated. On the other hand anti-dumping duties paid by related importers are treated as their costs of doing business in the Community. By raising his prices by an amount equivalent to the dumping margin found, the related importer cannot eliminate dumping. According to NMB, he must make a double increase in price, by both the amount of the margin and the amount of the anti-dumping duty. NMB observes that, on account of the lapse of time between collection and the refund of the duty and the number of NMB's many customers, it is completely impossible for it to pass on to the buyer the amount finally paid, as suggested by the 1986 Notice.

2. *The three grounds for the decisions*

In the opinion of NMB, the reasoning on which the contested decisions is based is vitiated by three defects:

(i) misinterpretation of the relevant provisions of the basic regulation and infringement of the principle of proportionality.

NMB considers in the first place that the Commission is interpreting and applying the basic regulation in an incorrect manner inasmuch as it allows no other interpretation than that adopted both in the 1986 Notice and in the contested decisions. In NMB's view, it is however possible to interpret Article 2(8)(b) by reading into it the words 'where appropriate', which would be more in keeping with logic, equity and fairness, would accord with the general economy of the regulation and would enable the perverse and excessively rigorous consequences of the interpretation adopted by the Commission to be avoided. In that connection NMB refers to the opinion of

Mr Advocate General Warner and to the judgments of 20 February 1975 in Case 64/74 (*Reich* v *Hauptzollamt Landau* [1975] ECR 268) and of 5 February 1976 in Case 94/75 (*Süddeutsche Zucker* v *Hauptzollamt Mannheim* [1976] ECR 153), and to the judgment of 1 February 1978 in Case 78/77 (*Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169). NMB considers that the Commission's policy runs counter to the principle of proportionality inasmuch as it imposes on an importer associated with an exporter a burden in excess of that which is necessary to correct the effects of dumping.

In the alternative and with reference to Articles 184 and 173 of the EEC Treaty, NMB argues that, should the Court hold that Article 2(8)(b)(2) of the basic regulation is clear and admits of no other interpretation, that portion of the regulation when applied to refund requests is void as illegal, on the grounds set forth in the application. As regards infringement of the principle of proportionality, NMB supplements the arguments already developed to some extent in connection with its interpretation of Article 2(8)(b) of the basic regulation, by going on to claim that the burden imposed on associated importers by the Commission's policy exceeds the purpose of dumping measures which is to make prices rise to a level which eliminates dumping. In that connection NMB relies on the judgments of 24 October 1973 in Case 57/73 (*Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091), of 20 February 1979 in Case 122/78 (*Buitoni* v *FORMA* [1979] ECR 677), 18 March 1980 in Cases 26 and 86/79 (*Forges de Thy-Marcinelle et Monceau* v *Commission* [1980] ECR 1083), and 24 September 1985 in Case 181/84 (*MAN (Sugar) Ltd* v *Intervention Board for Agricultural Produce* [1985] ECR 2889), and on the opinion of Mr Advocate General Capotorti in Case 114/76 (*Bela-Mühle* v *Grows Farm* [1977] ECR 1211).

(ii) Infringement of the principle of non-discrimination

Secondly NMB considers that the policy as implemented results in the different treatment of similar situations and thus involves an unjustified discrimination against importers associated with exporters in relation to importers who are not so associated and are not affected as significantly. NMB observes at the outset that the availability of a commercially unacceptable alternative to discrimination — namely for NMB Singapore the option of giving up trading with its European sales affiliates to enable its European customers to obtain full refunds of anti-dumping duty — does not eliminate the discrimination.

According to NMB, the principle of non-discrimination requires that similar situations may not be treated differently unless differentiation is objectively justified. In that connection NMB refers to the judgments of 19 October 1977 in Joined Cases 117/76 and 16/77 (*Ruckdeschel* v *Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753), of 8 October 1980 in Case 810/79 (*Überschär* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2747), and 15 September 1982 in Case 106/81 (*Kind* v *EEC* [1982] ECR 2885). NMB alleges that by creating an appreciable disequilibrium in the competitive situation of the undertakings concerned (whereby NMB refers to the judgment of 17 July 1959 in Joined Cases 32 and 33/58 *Société Nouvelle des Usines de Pontlieue Aciéres du Temple* v *High Authority* [1959] ECR 127), the Commission's policy

is treating two similar situations differently, to the detriment of associated importers.

(iii) The incorrect reasoning of the third ground for the decisions

Thirdly, NMB considers that the Commission's reasoning is erroneous when it states: 'even where ... 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 amount of the duty is necessary, provided that the Commission is satisfied that in the particular circumstances of the case under consideration this increase in the price paid by the independent buyer eliminates or reduces the dumping margin and does not represent merely the anti-dumping duty which the importer could pass back to its customer if it obtained a refund.'

3. *Infringement of the principle of the protection of legitimate expectations*

NMB considers that the policy also frustrates the legitimate expectations of those who, having, like the applicants and their Singapore supplier, reduced or eliminated the dumping margin, were entitled to assume that anti-dumping duties would be refunded to them (at least until October 1986 when the Commission's Notice was published). NMB submits first that the agent of the Commission stated in oral proceedings before the Court in anti-dumping cases concerning electronic typewriters from Japan, that the policy of the Commission on this topic had not yet been decided, and that there were several approaches to the subject. Secondly, both the rules of the GATT anti-dumping code and Article 16 of the basic regulation led the applicants and NMB Singapore to believe that refunds would be obtained if the dumping were eliminated.

4. *Inconsistency with the practices of the EEC's international trading partners*

NMB argues that, in comparison with the methods adopted in the United States, Australia and Canada, there is nothing inherently necessary or inevitable about the policy pursued by the Commission, and that in fact it does not accord with the practices of the Community's trading partners. NMB explains by way of example that, in a similar context (an anti-dumping investigation into television receivers from Korea: Zenith Electronics Corporation), the United States Department of Commerce refused to apply that kind of policy by stating that it did not consider anti-dumping duties to be expenses related to the sales under consideration, and that adding those (provisional) duties to the dumping margins 'would artificially inflate' them. According to NMB, Australia and Canada also avoid this problem.

5. *Misuse of power*

NMB considers that the Commission used its powers in a manner and to ends other than those for which the power was provided. According to NMB, the contested

decisions are therefore vitiated by misuse of powers and must be annulled.

6. *The illegal trade policy reflected in the Commission's policy*

According to NMB, the Commission's policy reflects an illegal trade policy which, far from encouraging the elimination of dumping, is liable to do the opposite, because the forfeiture of the anti-dumping duty paid by the associated importer gives a double layer of protection to the Community industry and imposes a double penalty on the exporter. NMB recalls that the GATT anti-dumping code provides, as does Article 16 of the basic regulation, that if the amount of anti-dumping duty collected exceeds the level of dumping, a refund should be made.

NMB adds that the unsatisfactory nature of the system is exacerbated by the extremely long period of time which elapses before the requests for refunds are dealt with.

In its *reply*, NMB argues that, in accordance with the principles of Community law applicable to the present case, it is illegal to treat the payment of an anti-dumping duty as a factor counting against its reimbursability when a refund of it is sought. NMB disputes that the policy followed by the Commission is necessary in order to prevent what the Commission calls 'hidden dumping', for in practice, it considers it to be unlikely that the associated importer and the customer would treat the amount of a refund in the manner supposedly feared by the Commission. NMB describes as 'offensive and illegal' the fact that the Commission both attributes irrefutable dishonesty to related importers and relies on that fact in order to justify its policy. Moreover, NMB considers that the Commission's supposition, namely that associated importers would be likely to pass the amount of refund back to the customers is wrong.

NMB argues moreover that the problem could be resolved by securing undertakings from associated importers not to pass the refunds back to the customers. Such undertakings would then be subject to review.

Whilst acknowledging that the Court has never yet held that the GATT itself or its various codes create rights which can be invoked by individuals, NMB stresses that the Community's freedom to impose an anti-dumping duty in international law is constrained by the GATT. Once a dumping margin has been eliminated, the duty must be refunded because in international law which is binding on the Community it would be unlawful to do otherwise.

NMB goes on in its reply to point out other anomalies affecting the policy applied by the Commission.

The *Commission* considers that, once it is accepted that the associated importer and the independent importer are on opposite sides of the 'dumping fence' — defined as

the point at which the goods pass from the dumping party to the first independent importer or buyer — the scheme of the basic regulation becomes clear and equitable.

The Commission first explains the practical considerations which in its view justify the deduction of anti-dumping duty collected from associated importers when it constructs an export price in order to determine the amounts to be refunded. The controversial issue in the present case is the method of calculating the dumping margin and, in particular, the export price. According to the Commission, the principle whereby the amount of the duty may not exceed the dumping margin or that there must be a refund if the dumping has ceased, is not a matter in issue. In order to determine the export price it is necessary to use different bases depending on whether the importer is, or is not, 'associated' with his foreign supplier. The Commission regards that as a necessary distinction which is both firmly anchored in the Community's anti-dumping legislation and is based on objective and universally acknowledged principles.

The Commission observes that, in calculating a 'constructed' export price, the expenses to be deducted must include the duties and charges, including the anti-dumping duties, as a cost factor of importation, otherwise there would be a complete distortion of the calculation of the constructed export price.

The Commission argues that the provisions of the regulation are essential to prevent abuses and avoidable harm to producers within the Community. The Commission stresses that the associated importer is able to secure a refund by a single increase in the resale price. If he resells the goods on a duty-paid basis, a single increase in the resale price will suffice to secure a refund if there is a corresponding reduction in the importer's costs or change in the normal value. If he sells them on a duty-unpaid basis, that leaves the purchaser with the responsibility of paying any anti-dumping duty and seeking reimbursement.

The Commission explains, moreover, that it can place a reasonable degree of trust in an independent importer since he is not a dumping party. By contrast, the Commission has no reason to place any particular trust in the associated importer who is a dumping party and who has every incentive not to raise his prices or, if he does so, to pass back to his customer the benefit of the reimbursement of anti-dumping duty. In that connection, the Commission goes on to point out that, in accordance with Article 16(1) of the basic regulation, any prejudice to the importer, even if it can be shown, is not a relevant factor for the purposes of a reimbursement decision.

The Commission then raises some jurisdictional objections in respect of the grounds relied on by the applicants. It alleges first that it is impossible to challenge a 'policy' of the Commission, having regard to the sphere of application of Article 173 of the EEC Treaty. It acknowledges that a decision (but not a policy) may be challenged on the ground that it infringes the principles of proportionality, non-discrimination or the protection of legitimate expectations, or constitutes a misuse of powers. On the other hand, the Commission

disputes that Article 173 permits a decision to be challenged on the grounds that the Commission has not met its GATT obligations, that the refund requests have taken a long time to process, that the Commission's practices differ from those of certain of its trading partners, or that the Commission is operating an 'illegal trade policy'.

The Commission also raises an objection of inadmissibility as regards the applicant's ancillary submission going to the validity of the basic regulation. It considers that the provisions of the regulation which the applicants seek to attack are not adequately specified, that the application does not mention, except in passing, the challenge to the basic regulation and that in any event, for reasons of legal certainty, Article 173 requires proceedings for the annulment of a regulation to be brought within two months of its publication. Article 184 of the EEC Treaty permits a party to invoke the inapplicability of an application before the Court, but not to challenge its validity.

As regards the applicants' other submissions, the Commission considers that as a matter of common sense Article 2(8)(b) of the basic regulation admits of only one interpretation: in arriving at the constructed export price the Commission must deduct the costs referred to from the price on first resale to an independent buyer including anti-dumping duties which may already have been levied in respect of the goods in question. That subparagraph carries the same meaning in each of its language versions. The Commission contends that when there is some logic or equity in the construction which is consistent with the natural and ordinary meaning of the regulation, as in the present case, the Court can in no circumstances give to the regulation a construction other than this natural and ordinary one. In that connection, the Commission considers that, to accept that the words 'where appropriate' should, as the applicants contend, be implied into the provision in question would create very grave problems for the future on account of the resulting vagueness.

The Commission refers specifically to the judgments of the Court of 12 December 1972 in Joined Cases 21 to 24/72 (*International Fruit Company* v *Produktschaap voor Groenten en Fruit* [1972] ECR 1219) and 16 March 1983 in Cases 267 to 269/81 (*Amministrazione delle Finanze dello Stato* [1983] ECR 801), in order to assert that, even if the decisions and/or the basic regulation were in contradiction with the provisions of the GATT anti-dumping code, NMB would not be entitled to rely directly on the code since neither the GATT nor agreements entered into thereunder have direct application in the Community or confer rights upon individuals. Moreover Article 2 of the basic regulation closely follows Article 2 of the anti-dumping code and is perfectly consistent with it.

Given that the Commission considers that the deduction of anti-dumping duty as a cost is an essential prerequisite to the effective functioning of the anti-dumping laws of the Community, the Commission contends that any prejudice (often 'illusory') incurred by associated importers could not be considered disproportionate when matched against the risk incurred, namely a system of anti-dumping legislation which would fail in its principle aim of protecting Community industries against the unfair trading practices of its competitors.

As regards the principle of non-discrimination, the Commission contends that this principle can be infringed only if the different treatment complained of is of comparable entities and without objective justification: yet, neither of these two conditions is satisfied in the present case. First, the roles of the independent importer and the associated importer are fundamentally different and, secondly, the existence of an objective justification for treating the associated importer differently from the independent importer is abundantly clear from the whole structure of the Community mechanism for calculating the price, and from the varying degree of confidence which the Commission may legitimately place in the two categories of importers.

In the Commission's view, nor has there been an infringement of the principle of the protection of legitimate expectations because the applicants knew, both from a letter addressed to them on 6 March 1985 by the competent departments of the Commission in reply to requests for refunds, and from a reading of the Community provisions in question, that calculations of the export price had to include as a cost element the anti-dumping duty paid.

The Commission goes on to refute the submission based on the delay in processing refund requests. It disputes that it comes within the grounds permitted by Article 173. As regards the practices of the Community's trading partners, the Commission considers that NMB has not demonstrated that those practices are binding on the Community. According to the Commission, those laws are implemented within the framework of systems different from the Community system.

The Commission argues that, inasmuch as it was not pursuing another objective than that for the purposes of which it was entitled to act there can be no question of any finding that it committed a misuse of powers. Nor can there be any question of any illegal trade policy.

In its *rejoinder* the Commission notes that the reply does not address at all the question of the true construction or interpretation of Articles 16(1) and 2(8)(b) of the basic regulation.

In the Commission's view it is not enough to contend that the result of the application of the basic regulation to the applicants is unfair. In that connection it refers to the judgment of 24 October 1973 in Case 9/73 (*Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135); in the Commission's view, that principle is equally applicable to questions of non-discrimination and to the protection of legitimate expectations and proportionality. NMB must demonstrate that the regulation is unjustifiable and unlawful in order to succeed in its submissions.

The Commission maintains its objection of inadmissibility with regard to those parts of the application which seek to call in question the provisions of the basic regulation and requests the Court to declare admissible only such arguments as go to the interpretation of the regulation. It considers that in the absence of any attempt in the reply to answer the other jurisdictional objections relating to four of the applicants' submissions (failure to comply with its GATT obligations, delay in processing refund requests, difference between the Commission's practices and those of certain of its trading partners and illegal trade policy), the Court ought not to examine these grounds of complaint either.

The Commission stresses the fact that the independent buyer who pays the duty likewise suffers a double burden between the payment of the duties and its reimbursement by the Commission. It stresses both the administrative and practical difficulties which would result from the adoption of a solution, such as that suggested by the applicants (undertakings) in the context of a refunds procedure, when undertakings have been deemed inappropriate in administrative procedures. In the Commission's view, it accords with normal practice that Article 16(1) of the basic regulation reflects a situation in which undertakings are not acceptable since no anti-dumping duty would have been necessary if undertakings had been acceptable from the outset. The Commission also recalls the need to observe a certain reserve as regards operators engaging in dumping. The latter may in fact choose to engage in it or not. The requirement that they raise their price by twice the dumping margin in order to obtain a refund does nothing more than ensure as far as possible that the price increase to all customers within the Community is the same until the dumping duty is reimbursed, when the reimbursement may be passed back to them. Thus the apparent unequal treatment leads in fact to coherent results.

The Federation of European Bearing Manufacturers' Associations (FEBMA), intervening in support of the Commission's conclusions, limits its observations to four of the submissions put forward by the applicants, namely the interpretation of Article 16 of the basic regulation with regard to Article 2(8)(b) of that regulation, the consistency of those two provisions with the GATT anti-dumping code, their consistency with the principle of non-discrimination and their consistency with the principle of proportionality. FEBMA considers that all the other legal grounds submitted by the applicants are either irrelevant or misconceived.

FEBMA points out first that Article 16 of the basic regulation refers implicitly to Article 2(8)(b) for the determination of the export price. That means that the latter provision is fully applicable in the framework of a claim for a refund. The wording of that article is, in FEBMA's view, clear and unambiguous: it requires anti-dumping duties to be included as allowances in a constructed export price, and its provisions may not be interpreted contrary to their wording (see the judgment of 15 March 1983 in Case 61/82, *Italy* v *Commission* [1983] ECR 655) and its objective, namely that of preventing a circumvention of the anti-dumping duties. FEBMA considers it to be essential that the customer is definitively charged a price which includes the anti-dumping duty, before any refund can be claimed.

As regards the alleged infringement of the GATT rules, FEBMA considers that the provisions of Article 16 and Article 2(8)(b) of the basic regulation fully comply with Article 8(3) and Article 2(5) of the GATT anti-dumping code. FEBMA adds that NMB is not entitled to rely directly on the provisions of the GATT or the agreements reached within the GATT.

FEBMA argues that there are objective criteria justifying the different treatment of 'reliable' and 'non-reliable' export prices. In any case different treatment of 'related importers' (whose prices are 'unreliable') and 'unrelated' importers (whose prices are, on the other hand, 'reliable') cannot be regarded as arbitrary. In FEBMA's view, a different treatment should not be regarded as discrimination unless it has no adequate justification and is not based on objective criteria (see the judgment of 15 September 1982 in Case 106/81 *Kind* v *EEC* [1982] ECR 2886), and the Court also takes account of co-liability of the undertakings concerned: they may be treated differently if that is the consequence of their free choice (judgment of 29 October 1980 in Case 139/79, *Maizena GmbH* v *Council* [1980] ECR 3393).

According to FEBMA, 'related' and 'unrelated' importers are legally and factually in a different situation. Consequently, those are two different situations which have been treated differently. Even if it were acknowledged that Article 2(8) of the basic regulation does not place related and unrelated importers in a different situation, the distinction applied by the Commission should be regarded as being based on adequate justification and on objective criteria, namely the reliability of the price structure and the pricing policy in respect of the two categories of importers. In that respect, FEBMA expresses its doubts as to the degree of protection actually granted to the Community industry by the imposition of the anti-dumping duties which underlie the present case. FEBMA also points out that the exporter deliberately decides to sell his products in the Community through the intermediary of related importers, to practice dumping in the Community market and to cause material injury to European manufacturers. It is the exporter who created the disadvantageous situation for his related companies. Without the requirement of increasing the prices equal to twice the dumping duty before a refund can be successfully claimed, dumping duties would remain without effect.

FEBMA finally considers that the Commission's policy does not infringe the principle of proportionality because the treatment of anti-dumping duties as allowances in the framework of Article 16 and Article 2(8)(b) of the basic regulation is appropriate and necessary in order to fulfil the purpose of anti-dumping duties (see in particular the judgment of 20 February 1979 in Case 122/78, *Buitoni* v *FORMA* [1979] ECR 677). FEBMA points out that when balancing the necessity of the measure concerned for the Community and/or for the industry affected against disadvantages to related importers, the Community institutions enjoy a wide margin of appreciation. The obligation which they chose to impose on related importers cannot be regarded as constituting a disproportionate requirement.

Gordon Slynn
Judge-Rapporteur