The Council does not exceed the limits of its discretionary power when it decides, in the interests of transparency, efficiency and in order to induce exporters to raise their prices, to impose a variable duty calculated according to the difference between the net, free-at-frontier price and a minimum price, and in considering it necessary, as regards importers associated with an exporter, to base its calculation of the anti-dumping duty on the customs value of the imported goods, determined in accordance with Article 6 of Regulation No 1224/80 on the basis of the price paid by the first buyer not associated with the exporter. First, a variable duty is generally more favourable to the traders in question, on account of the fact that it enables collection of anti-dumping duty to be avoided entirely provided that the imports are effected at prices above the minimum price fixed; secondly, in respect of transactions between associated parties and as regards the determination of the net unit free-at-Community-frontier price, the same uncertainties apply as in calculating the dumping margin with regard to the genuineness of the export price paid or payable by an importer associated with the exporter.

10. The legality of a regulation imposing a definitive anti-dumping duty and definitively collecting the provisional anti-dumping duty may be affected by any illegality of the provisional regulation only in so far as that illegality is reflected in the definitive regulation.

REPORT FOR THE HEARING
in Joined Cases C-305/86 and C-160/87 *

I — Facts

In October 1985 the Commission was requested to review certain anti-dumping measures by the Groupement des industries de matériels d'équipement électrique et de l'électronique industrielle associée (Association of electrical equipment and industrial electronics industries, hereinafter referred to as 'Gimelec'), supported by four other national electronics associations, pursuant to Article 14 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). The Commission was requested to review its decisions to accept the price undertakings given by the exporters involved in the previous proceeding concerning imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW originating in Bulgaria,

* Language of the case: German.

Poland, the German Democratic Republic, Romania and Czechoslovakia (Council Regulation (EEC) No 2075/82 of 28 July 1982 (Official Journal L 220, p. 36)), Hungary (Commission Regulation (EEC) No 724/82 of 30 March 1982 (Official Journal L 85, p. 9)) and the USSR (Commission Decision 84/189/EEC of 2 April 1984 (Official Journal L 95, p. 28)).

Following the request for a review, the Commission in November 1985 published a notice reopening an anti-dumping proceeding concerning imports of electric motors originating in the abovementioned countries (Official Journal 1985 C 305, p. 2) and commenced an investigation.

On 30 September 1986 the Council adopted Regulation (EEC) No 3018/86 repealing Regulation No 2075/82 accepting undertakings given respectively by exporters from Bulgaria, Poland, the German Democratic Republic, Romania and Czechoslovakia (Official Journal 1986 L 280, p. 66). By Regulation (EEC) No 3019/86 of the same date, the Commission repealed its Regulation No 724/82 and its Decision 84/189 accepting undertakings given respectively by Hungarian and Soviet exporters and imposed a provisional anti-dumping duty in respect of imports of electric motors originating in Bulgaria, Hungary, Poland, the German Democratic Republic, Romania, Czechoslovakia and the Soviet Union (Official Journal 1986 L 280, p. 68). In regard to imports originating in countries not having a market economy, the normal value was determined on the basis of the prices prevailing on the Swedish market. In pursuance of Article 2(3) of that regulation, the amount of the anti-dumping duty was equivalent, in the case of importers associated with an exporter, in respect of each type of motor, to the difference between the price at which the imported product was resold for the first time to an independent buyer and the minimum price mentioned in Annex B to the regulation.

The validity of the provisional duty was extended for a period of two months by Council Regulation (EEC) No 254/87 of 26 January 1987 (Official Journal 1987 L 26, p. 1).

At the request of Gimelec, the Commission in November 1986 extended the anti-dumping proceeding to imports of electric motors originating in Yugoslavia (Official Journal 1986 C 282, p. 2).

On 23 March 1987, the Council adopted Regulation (EEC) No 864/87 imposing a definitive anti-dumping duty on imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties (Official Journal 1987 L 83, p. 1). The normal value of the imports in question was established on the basis of the weighted average of Yugoslav producers' domestic sales prices. As regards export prices, it is explained in the ninth recital to the regulation that 'the prices actually paid or payable on export to each of the main Community markets' were selected and that that 'was the case even for linked importers, taking into account the fact that a comparison between the normal value and the transfer price resulted in such a dumping margin that even a reconstruction of the

export prices would not have influenced the level of the measure finally adopted.' In accordance with Article 1(3) of the regulation, the amount of the anti-dumping duty is to be equal, for each type of motor, to the difference between the net price, free-at-Community-frontier, not cleared through customs, and the price specified in the annex to the regulation. In the case of associated importers, the net unit price, free-at-Community-frontier, is, in accordance with paragraph 4 of Article 1, to be the customs value as determined in accordance with Article 6 of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal 1980 L 134, p. 1). Failing that, that price shall correspond to the customs value as determined in accordance with Article 2(3) of that regulation.

By an application lodged with the Court Registry on 4 December 1986, Neotype Techmashexport GmbH, a company incorporated according to German law (hereinafter referred to as 'Neotype'), in which Energomachexport, a Soviet company exporting electric motors, is a shareholder, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Regulation No 3019/86, mentioned above, imposing a provisional anti-dumping duty on imports of electric motors originating in the Soviet Union and certain other East European countries (Case C-305/86).

By an order of 8 May 1987, the Court permitted Gimelec to intervene in Case C-305/86 in support of the defendant's conclusions.

By an application lodged at the Court Registry on 1 June 1987, Neotype brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation No 864/87, mentioned above, imposing a definitive anti-dumping duty on imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties (Case C-160/87).

By orders of 30 September and 15 October 1987, the Court permitted Gimelec and the Commission of the European Communities to intervene in Case C-160/87 in support of the defendant's conclusions.

By order of 11 November 1987, the Court joined Cases C-305/86 and C-160/87 for the purposes of the oral procedure and the judgment and reserved its decision on the objection of inadmissibility raised by Gimelec in Case C-305/86 for the final judgment, without prejudice to the admissibility of that application.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

1. *In Case C-305/86*

Neotype claims that the Court should:

(i) annul Article 2 of Commission Regulation No 3019/86 of 30 September 1986, in so far as it concerns imports by

the applicant of electric motors originating in the Soviet Union;

(ii) order the Commission to pay the costs.

The *Commission* contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

The intervening party, *Gimelec*, contends that the Court should:

(i) declare the application inadmissible;

(ii) in the alternative, dismiss the application as ill founded;

(iii) order the applicant to pay the costs.

2. *In Case C-160/87*

Neotype claims that the Court should:

(i) annul Article 1 of Council Regulation No 864/87 of 23 March 1987, in so far as it concerns imports by the applicant of electric motors originating in the Soviet Union;

(ii) annul Article 2 of that regulation in so far as it relates to imports originating in the Soviet Union and provides for the definitive collection of the amounts lodged on a provisional basis by the applicant;

(iii) order the Council to pay the costs.

The *Council*, supported by *Gimelec* and the *Commission*, contend that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

Since the submissions and arguments are to some extent the same in both cases, reference is made to Case C-305/86 only in so far as the submissions and arguments in that case differ from those put forward in Case C-160/87.

1. *Admissibility*

(a) *Case C-305/86*

The *Commission* casts doubts on whether the applicant has an interest in proceeding against Commission Regulation No 3019/86 (hereinafter referred to as 'the provisional regulation'). Council Regulation No 864/87 (hereinafter referred to as 'the definitive regulation') superseded the provisional regulation, which therefore no longer produces any direct legal effects and no longer has any legislative value of its own following the definitive collection of the provisional duties in accordance with the definitive regulation. The question whether, and to what extent, the provisional regulation must produce effects in order that the provisional duties may be recovered may be examined incidentally in the course of the procedure in Case C-160/87 relating to the definitive regulation (see Article 184 of the EEC Treaty).

Since the Commission is obliged to comply with the legal assessment made by the Court in the latter case, it is also doubtful whether in the present case the applicant has any interest in bringing the proceedings from the point of view of the danger of repetition. Unlike the decisions cited by the applicant (in Case 74/81 *Flender* [1982] ECR 395 and Case 92/78 *Simmenthal* [1979] ECR 777) which definitively settled the question in issue, the provisional regulation was followed by a definitive regulation.

Moreover, the applicant has adduced no evidence to show that the provisional regulation is likely to cause it any disadvantages going beyond the recovery, by way of duty under the definitive regulation, of the amounts lodged provisionally. Any such disadvantages should, if necessary, be raised and discussed in the context of separate proceedings under Article 215 of the Treaty.

As regards the link between the determination of a provisional duty and the definitive recovery thereof, the Commission considers that the decisive question is whether errors on its part which would automatically entail the nullity of a regulation imposing a provisional duty, may be corrected by subsequent findings made by the Council in the regulation definitively recovering the provisional duty.

In that context the Commission contends that, even though it was under an obligation to make a finding of dumping in accordance with Regulation No 2176/84, the requirements in regard to the establishment of the facts are less strict for the imposition of a provisional duty and the initial assessment of the facts could differ from the facts as definitively established. Only when after provisional investigations it is not possible under the legal principles contained in Regulation No 2176/84 to make a finding of dumping and of injury, may the provisional regulation be vitiated by a defect entailing its nullity and preventing the definitive recovery of the provisional duty.

As regards procedural rules, the Commission considers that an infringement of the rights of the defence in general has no effect on the recovery of the provisional duty where the situation is regularized — for example by subsequently taking into account the arguments of the party concerned — during the course of the administrative procedure between determination of the provisional duty and its definitive collection (see the judgment of the Court in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, pp. 510 to 513). Since the applicant put forward no submission going beyond the ancillary review of the provisional regulation in Case C-160/87, it is no longer necessary to continue with Case C-305/86 and there is no longer any need to give a decision in that case.

In its observations, the intervener Gimelec raises an objection of inadmissibility based on the fact that the imposition of a provisional anti-dumping duty is in the nature of an interim measure and should not therefore be subject to an appeal under Article 173 of the Treaty. Moreover, the annulment of Commission Regulation No 3019/86 imposing a provisional anti-dumping duty would in no way prejudge the validity of Council Regulation No 864/87 imposing the definitive duty and

providing for the definitive collection of the amounts secured as provisional duty.

The *applicant* considers that the regulation imposing a provisional anti-dumping duty in respect of which it had to lodge an appropriate deposit is a measure producing mandatory legal effects which affect the interests of the applicant and in respect of which an application for annulment lies. The provisional regulation did not become superfluous on the adoption of the definitive regulation because collection presupposes that there was an obligation to deposit the amounts secured by way of a provisional anti-dumping duty. Should the provisional regulation be vitiated by nullity, the collection of those amounts would involve an unlawful element of retroactivity, contrary to Article 13(4) of Regulation No 2176/84.

Moreover, the applicant has an interest in securing a finding that the provisional regulation was unlawful owing to the fact that it suffered significant damage and there was a risk of repetition (see the *Flender* and *Simmenthal* judgments mentioned above). Since anti-dumping duties had already been imposed in respect of electric motors originating in the Soviet Union, during previous proceedings, only the annulment of the provisional regulation could eliminate the risk that the Commission might again commit the errors of which it is accused in the present case.

Should the Commission's view prove to be correct, Article 173 of the Treaty would be neutralized in regard to provisional anti-dumping duties. If, moreover, there was no question of obtaining a suspension of operation by means of interim measures, on the ground that the costs of providing a guarantee do not constitute serious and irreparable damage, and if the applications themselves were quickly to become devoid of purpose, the Commission's acts in this field would escape any judicial review.

(b) *Case C-160/87*

The intervener, *Gimelec*, has doubts as to the admissibility of the submissions made by Neotype in regard to the findings of dumping. Those findings are not, it says, of direct concern to the applicant since in the present case the existence of dumping was established by reference to the export prices of the exporters in question and not by reference to the resale prices charged by importers (see the judgment of the Court of 21 February 1984 in Joined Cases 239 and 275/82 *Allied Corporation* [1984] ECR 1005).

2. *The substance*

(a) *Case C-305/86*

(i) Information supplied to the applicant

The *applicant* criticizes the Commission for not advising it of the reopening of the anti-dumping proceeding until nine months later, that is to say 34 days before the adoption of the provisional regulation, and for adopting that regulation at a time when the applicants' observations, which were submitted within the time-limits, could not have received any examination. That procedure constitutes an infringement of Article 7(1)(b) of Regulation No 2176/84, which requires the Commission to advise importers known to it to be concerned. The publication of a notice in the Official

Journal does not discharge it of this obligation. The Commission knew that the applicant was an importer concerned given that it had already been involved in the previous anti-dumping proceedings and had been identified in Council Regulation No 2075/82, mentioned above.

Moreover, the Commission infringed the principle of the rights of the defence. Only if it is informed of the reopening of a proceeding can an interested party exercise properly the rights which it enjoys under the procedural rules. In that context, the applicant denies that it was informed of the reopening of the present proceeding by the Soviet exporter, Energomachexport.

Finally, the applicant claims an infringement of the principle of equality of treatment on account of the fact that the Commission did not make available to it, as it did without request to all the other interested importers, the request for a review which underlay the reopening of the anti-dumping proceedings. If the applicant had been provided in time with a copy of that request it would have been possible for it to take a much more accurate and substantial view than it was able to do on the basis of the notice of reopening transmitted to it.

The *Commission* replies that it announced the reopening of the anti-dumping proceeding by a publication in the *Official Journal of the European Communities*. All producers, exporters and importers concerned therefore had knowledge of it and of the possibility of the imposition of a provisional anti-dumping duty. Consequently, they had the opportunity of communicating all necessary information to the Commission.

The applicant did not appear amongst the 'importers known to the Commission to be concerned', within the meaning of Article 7(1)(b) of Regulation No 2176/84, on account of the fact that it was not mentioned in the request for a review. The Commission considers that it was entitled to place reliance on the matters contained in that request, in the absence of any actual knowledge to the contrary. Even if it was true that the applicant had already been involved in other anti-dumping proceedings, the Commission could not rest content with a mere presumption, namely that it continued to be an importer associated with the Soviet exporter. The Commission cannot be required to verify the matters mentioned in a request in order to establish the possible existence of other interested parties. Moreover, it is neither obliged nor in a position to keep a register of undertakings likely to be concerned.

In actual fact, the applicant was informed of the reopening of the proceeding by virtue of its position as an importer closely associated with the Soviet exporter, Energomachexport. It is clear from the observations of the applicant itself that it is merely an offshoot of the latter. It is therefore contradictory to maintain that no information was communicated between the Soviet exporter and the applicant. Energomachexport ought, furthermore, to have communicated to the Commission the list of all relevant associated importers, not only in reply to a request to that effect by the Commission

addressed to exporters on 29 July 1986 but even at an earlier stage of the proceedings. In any event the rights of the defence were observed, since the applicant was heard subsequently during the proceedings and its arguments were examined.

As regards the alleged discrimination suffered by the applicant, the Commission asserts that a copy of the request for a review was sent to the exporters and importers mentioned therein. That was done for reasons of administrative ease without there being the least legal obligation to do so, experience having shown that economic operators identified in the request generally ask for a copy and participate in the subsequent proceeding. As regards the other parties subsequently involved in the proceeding, such transmission was not effected in all cases. When the other parties concerned came forward following the abovementioned publication in the Official Journal, they generally took the initiative to ask for a copy of the request. The applicant did not deem it necessary to do so.

(ii) The choice of Sweden as an analogous country

The *applicant* considers that the Commission committed manifest errors of assessment and omitted to take into account certain essential matters in calculating the normal value and, in particular, in making the choice of a market-economy third country in accordance with Article 2(5) of Regulation No 2176/84. Even if the imposition of the provisional duty required a less thorough examination than in the case of definitive measures, the legal criterion was nevertheless identical in both cases.

Having chosen Austria and Brazil as comparable countries in the previous anti-dumping proceedings, the Commission in the provisional regulation once again took as its basis another market, namely the Swedish market, without giving adequate reasons as laid down in Article 190 of the Treaty. It did not study the possibility of referring to the Brazilian market, which would not have had the disadvantages identified by the Commission on the Swedish market, in particular with regard to the size of the market and the number of manufacturers. It also omitted to take account of the fact that labour costs in Sweden are higher than average and that the prices of electric motors are exceptionally high there on account of the small number of units produced, which is reflected in higher production costs. Comparability of production is, moreover, one of the decisive criteria in determining what is an 'appropriate and not unreasonable manner' for the purposes of Article 2(5) aforesaid. Furthermore, in the contested regulation the Commission neither examined nor mentioned the question of the comparability of technical standards in the different countries.

The *Commission* considers that the choice of Sweden as the reference country was appropriate and not unreasonable and refers to the reasons set out in the 12th recital to the provisional regulation. A copy of the complaint, in which Austria and Sweden were put forward as comparable countries, was addressed to all the parties known to be concerned, including the Soviet exporter Energomachexport. The choice of the Swedish market was not contested by any of the exporters concerned within the time-limits laid down in the preliminary stage of the investigation. Given that Brazil had not been suggested as the reference market, it was not necessary to go into that question in the recitals to the contested regulation.

Moreover, in the context of the imposition of a provisional anti-dumping duty the choice of a comparable country is the result of a preliminary examination, and that choice is always subject to a fresh examination prior to the imposition of a definitive duty, in the light of any objections that may be made by the parties concerned (see paragraphs 6 and 7 of the definitive regulation). However, the applicant raised no objection within the time provided and in particular did not put forward the Brazilian or any other market. The Commission cannot be criticized for not taking into consideration facts which were unknown at the time when the provisional regulation was adopted.

The applicant's allegations concerning labour costs and the level of production costs are too vague to be taken into consideration. They are moreover irrelevant given that in the present case the normal value was determined not on the basis of costs, but on the basis of prices on the Swedish market, which is influenced by imports and other competitive factors. Finally, the Commission's findings with regard to the calculation of the normal value are of no interest, because they were supplemented or superseded by the findings contained in the definitive regulation.

(iii) *Differences in physical characteristics*

The *applicant* considers that, in calculating the normal value and in making the comparison with the export price, the Commission failed to take into consideration certain important differences in the physical characteristics of the products in question. The letter addressed to the Commission on 26 September 1986 had already explained that Soviet electric motors are not comparable to western European electric motors, in particular Swedish ones, and that they did not therefore constitute like products. The Commission took no account either of differences in quality (non-compliance with DIN norms) or of the major alterations needed in order to obtain a normal standardized electric motor from a Soviet electric motor (verification of functioning and quality, change of ball-bearings, balancing, trimming of shaft ends, improvement in insulation and protection). Moreover, the Commission was already aware of these matters in view of the previous anti-dumping proceedings concerning Soviet electric motors.

The *Commission* considers it necessary to distinguish the concept of 'like product' within the meaning of Article 2(5)(a) of Regulation No 2176/84 from that of differences in physical characteristics (Article 2(9) and (10) of that regulation). With regard, on the one hand, to standardized electric motors, all motors complying with the international standard are in principle interchangeable and similar, irrespective of their origin. If, on the other hand, as regards certain motors, there were differences in physical characteristics, it would be for the parties concerned to request an adjustment in accordance with the abovementioned provisions by showing the demand to be justified. The Soviet exporter who was involved in the inquiry from the beginning nevertheless did not make any request to that effect and the

Commission is not required under Article 11(1) of Regulation No 2176/84 to make any such adjustments on its own initiative. The circumstances mentioned in the applicant's letter of 26 September 1986 do not constitute sufficient evidence and ought to have been mentioned at an earlier stage of the proceeding in order, if appropriate, to be taken into consideration in the provisional regulation. The question of differences in physical characteristics was in any event examined in detail from the ninth to the 14th recitals of the definitive regulation in which the Council dealt *inter alia* with the questions raised by the applicant and, in certain cases, even followed the applicant's opinion.

(iv) *Injury*

In addition to the arguments put forward in Case C-160/87, the *applicant* contends that the Commission ignored a fundamental aspect in its conclusions with regard to price undercutting margins. In comparing the resale price of imported motors with Community producers' cost prices, the Commission did not comply with Article 4(2)(b) of Regulation No 2176/84, and did not therefore prove any undercutting of truly comparable prices within the Community.

The *Commission* replies that, in a case such as this, where Community producers' sales prices were depressed as a result of imports, those sale prices themselves are affected by factors constituting injury. In such situations it is appropriate to base the comparison of prices intended to establish undercutting on target prices or on production costs.

(v) *Variable rate of the anti-dumping duty*

In addition to the arguments put forward in Case C-160/87, the *applicant* maintains that Article 2(3) of the provisional regulation is imprecise and conflicts with the principle of legal certainty. It is clear from the Council directives on customs duties that the decisive moment for determining the amount of the customs liability is the time when customs clearance is requested. However, at that time it is not known at what price the imported products will be resold to an independent buyer. In addition, the applicant raises a number of questions (long-term storage, alteration of the imported products, availability in the context of a guarantee, consumption for own use, re-exportation) on which the contested regulation is silent and in respect of which an equitable determination of the provisional duty is impossible.

Finally, the contested regulation also runs counter to the requirement of certainty in administrative acts by making the amount of the anti-dumping duty dependent on a factor which it is in general not possible to determine at the relevant time.

The *Commission* contends that it is empowered under Article 2(8)(b) of Regulation No 2176/84 to fix the rate of anti-dumping duty in accordance with the resale price of the imported products. Furthermore, customs liability may arise at a date at which the amount thereof is not yet determined, such determination only becoming necessary when the duty is in fact collected. The amount fixed in relation to the resale price is determined with effect

from the 'reference date'. That is not contrary to the principle of legal certainty since the principles on which customs liability is calculated are firmly established from the beginning. The application of the general provisions relating to customs duties, provided for in Article 2(5) of the contested regulation, enables the various specific cases cited by the applicant to be resolved (see also the arguments put forward on that point in Case C-160/87).

(b) *Case C-160/87*

(i) Calculation of the normal value

The *applicant* criticizes the Council for committing manifest errors in the assessment of the facts and for neglecting essential aspects in calculating the normal value and in particular in the choice of the comparable country. Whereas previous anti-dumping regulations had chosen Austria, Brazil and Sweden as reference countries, the Council chose a fourth country, namely Yugoslavia, as the basis of comparison. The Council did not explain why the Brazilian market, which had proved to be reasonably suitable, was no longer to be taken as the basis of comparison as requested by the applicant in its letter of 26 September 1986, and in Case C-305/86. The Council therefore failed to fulfil its obligation to provide a statement of reasons under Article 190 of the Treaty.

Moreover, the definitive regulation makes no reference to the size and the appropriateness of the reference market chosen. The Yugoslav market is relatively small and at the very least smaller, by sales figures, than the Austrian, Brazilian or Swedish markets. Unlike those markets, there are practically no imports capable of creating any competition on the Yugoslav market. Furthermore, Yugoslavia is not a market-economy country within the meaning of Article 2(5) of Regulation No 2176/84, owing to the fact that there is a State-organized system of price control, maintaining prices at an artificially high level. Prices of electric motors on the Yugoslav market are not determined by supply and demand and do not therefore constitute an appropriate basis for determining the normal value.

Moreover, the Council did not take into account the rate of Yugoslav inflation which reached 80% in 1985 and was higher than the Brazilian rate.

Finally, the Council did not take into consideration the fact that the official rate of exchange of the Yugoslav dinar did not correspond to the real value of that currency. Banks pay only DM 0.15 to 0.17 for 100 dinars, whereas the official buying rate is DM 0.27. Unlike in the *Nachi Fujikoshi* v *Council* case (judgment of the Court of 7 May 1987 in Case 255/84), in which the normal value was calculated in the same currency as that of the manufacturer, in the present case the normal value for Soviet exports was calculated in accordance with the prices in a non-member country, on the basis of an unrealistic rate of exchange.

The *Council*, supported by the *Commission*, and *Gimelec*, consider that the institutions are not obliged always to choose the same country as the basis for comparison in analogous anti-dumping proceedings. The Yugoslav market is larger than the Swedish

market, which was used for the purpose of the provisional findings. Moreover, none of the parties proposed in time choosing the Brazilian market as the basis for reference in the context of the administrative proceedings conducted by the Commission. The vague references by the applicant in its letter of 26 September 1986 are not sufficient to be considered a serious proposal. The proposal made by the applicant in Case C-305/86 was made at a time when the definitive findings had already reached a very advanced stage.

Moreover, the Council is not required to review all the markets falling to be considered or to give reasons for its refusal to choose a given market. It is sufficient for it to give reasons for the choice of the country finally chosen for purposes of comparison (see the eighth recital to the definitive regulation). In the same way, it is for the Court to verify, not whether other countries were also capable of constituting a valid basis for establishing the normal value, but merely whether the choice of Yugoslavia was unreasonable and inappropriate.

As regards the nature of the Yugoslav economy, the Council contends that Article 2(5)(a) of Regulation No 2176/84 does not require a free market economy to be chosen; a certain degree of coordination is also inherent in the social market economies of western countries. Moreover, the applicant did not clarify whether the products in question had really been subject to *dirigiste* measures.

As regards inflation in Yugoslavia, the applicant referred only to a theoretical rise in prices during the period of the investigation, without however maintaining that the products in question had undergone corresponding prices rises. To the extent to which inflation had an impact on conditions of payment (payment periods), the resulting differences were taken into consideration in the context of the adjustments requested and justified under Article 2(10) of Regulation No 2176/84.

Finally, the use of official rates of exchange for calculating the normal value was upheld by the Court in the abovementioned judgment of 7 May 1987. As in that case, the official rate was used in this case to determine the equivalent value for the calculation of the normal value, whilst the export prices were ascertained — as in the *Nachi Fujikoshi* case — on the basis of the currencies of the various Member States. The applicant did not state any other basis upon which the conversion might have been carried out. The official rates of exchange for the rouble are, moreover, also imperfect inasmuch as they do not exactly correspond to the actual value of the Soviet currency.

Gimelec adds that it is current practice and legitimate for the Community institutions to establish the normal value of the State-trading countries concerned on the basis of the market price of a market-economy country concerned by the same investigation. That practice may be explained by a concern to ensure administrative economy.

Moreover, the applicant has no interest in contesting the choice of Yugoslavia as the reference country since that choice results in the end in a dumping margin (131%) significantly lower than that resulting from the choice of the Swedish market (namely 193%). Nor has the applicant established

that the choice of another country would have resulted in a dumping margin lower than the rate of the definitive anti-dumping duty.

(ii) *Injury*

The *applicant* contends that the Council also committed manifest errors in determining injury. Imports in 1985 were lower than those achieved in 1977 and 1978, and also lower than those in 1979 and 1981, during the course of which imports exceeded 1 million units. In 1985, on the other hand, they fell to less than 75% of that figure. By comparing only the import figures for 1982 to 1985, the Council omitted to take into account the considerable reduction in imports as compared with the preceding period.

Moreover, the market share of imports originating in the States concerned went down from 23.3% in 1982 to 20.3% in 1985, which represents a decrease in market share of 13%. In relation to 1978, market share in fact declined by 27.5%. By proceeding on the basis of a consistently high market share, the Council did not take account of that reduction. Moreover, the Council committed errors in the assessment of the facts since in the 18th recital to the contested regulation it cites the figures of 23.2 and 20.3% for market share in 1982 and 1985, whilst in the 31st recital it mentions the figures of 23.0 and 19.6%.

Finally, the Council ought to have calculated market share on the basis of sales within the Community, and not on the basis of import figures, given that it was also the sales figures and not the quantities produced which were taken as the basis for Community producers. The motors imported by the applicant regularly remain in its customs warehouse for some considerable period of time, the duration of storage being accounted for by the great variety of motor types. Sales figures went up to 7 439 units only in respect of 1982 and 7 955 units in 1984.

The *Council* notes that the investigation was intended to verify the situation since the imposition in 1982 of the definitive duty and the subsequent acceptance of price undertakings, since the figures relating to the previous period had already been taken into account in the context of those measures. As to the different figures for market share relied on by the applicant, it is clear from the formulation of the 18th and 31st recitals, mentioned above, that the former is based on the result of provisional estimates whereas the latter sets out the definitive findings.

As regards the calculation of market share, the applicant's allegations as to the differences between the figures for imports and sales do not carry conviction, since the examples given are taken out of context. Moreover, it is only a question of a time-lag given that, in the long term, the applicant certainly does not import more motors than it can sell. Since the findings relating to injury cover some considerable period of time, time-lags between imports and sales essentially balance themselves out.

Regard being had to the totality of factors which are relevant for the purpose of determining injury, it is nevertheless the case that, despite an increase in Community

production and a certain reduction in the market share of imports originating in the countries concerned, the latter have exerted downward pressure on prices received by Community producers.

Gimelec considers that the factors relevant to injury must be analysed in the light of the purpose of the present proceedings, which is not to examine anew whether the conditions for the imposition of an anti-dumping duty are satisfied but to determine whether the anti-dumping measures previously in force were sufficiently effective. That fresh examination did in fact show that the price undertakings accepted in 1984 had not brought to an end the significant undercutting of the production costs of Community manufacturers caused by the products in question. Owing to those practices, Community producers suffered significant losses in their sales of electric motors. In spite of the anti-dumping measures previously in force, the imports in question increased in absolute terms between 1982 and 1985 and continue to hold a 20% share in the Community market, rising to as much as 45% in certain Member States.

(iii) *Variable rate of the anti-dumping duty*

The *applicant* contends that the method of determining the anti-dumping duty on the basis of the difference between the customs value as defined in Article 6 of Regulation No 1224/80, and the price mentioned in the annex to the contested regulation is not sufficiently specific and, therefore, constitutes an infringement of Community law. Neither Article 2(8)(b) nor Article 13(7) or (8) of Regulation No 2176/84 provide an adequate basis for determining an anti-dumping duty in accordance with the resale price.

Referring to the German and Netherlands versions of the definitive regulation, the applicant contends that the difference in the grammatical moods in the two sentences in Article 1(4)(a) points to the fact that the Council proceeded on the basis that the abovementioned Article 6 was already in principle applicable, thus making a reference to legal effects superfluous. As a general rule that is not the case since it follows from Article 2(1) and (2) of Regulation No 1224/80 that the methods of calculation set out in Articles 3, 4 and 5, and possibly 7, have priority, in that order. In those cases, however, there is no price which may be used as the basis for calculating the duty, since the contested regulation does not refer to the other aforementioned articles of the customs value regulation.

Article 2(3) of Regulation No 1224/80, which applies where the customs value cannot be determined in accordance with Article 6 of that regulation, may even be used in the context of the normal calculation of the customs value, since it is a provision of secondary importance to five other methods of calculation, but is not sufficiently precise to enable an anti-dumping duty to be calculated — as in the present case — in a very large number of cases. The principle that administrative decisions must be clear calls for the adoption of more specific rules than a mere reference to 'appropriate methods', which in no way gives the customs authorities the criteria for determining the differential price.

In addition to the Council's intention set out in the 38th recital to the contested regulation, which is to calculate the anti-dumping duty by reference to the price at which the importer resells the products in question to the first independent buyer, the abovementioned Article 6 also enables the price at which others sell identical or similar products to persons not associated with

them to be taken as the basis. It is therefore incorrect to suppose that the applicant could influence the amount of the duty by the formation of his resale prices. Such a method is not covered by the abovementioned statement of reasons by the Council, and it would, moreover, be unacceptable to allow a duty to vary according to the conduct of third-party undertakings.

The *Council*, supported by the *Commission*, considers that Regulation No 2176/84, and in particular Article 13(8) thereof, constitutes an adequate authority for determining the anti-dumping duty on the basis of the resale price. Moreover, it is clear from the 15th recital to that regulation, and from Article 13(7) thereof, that the Council might adopt certain provisions departing from the general customs rules and common implementing provisions.

In the present case the imposition of an anti-dumping duty on the basis of the difference between 'target prices' and actual resale prices appeared to be the appropriate means, in the case of associated importers, of eliminating injury. In order to simplify the calculation of the duty, the Council based itself on the rules for the calculation of the customs value, and in particular on Article 6, mentioned above, although such reference was not essential. Such express reference did, however, establish unequivocally and unmistakably the method for determining the resale price.

The choice of grammatical mood referred to by the applicant points to the fact that Article 2(3) of Regulation No 1224/80 is being referred to simply as an alternative provision, applicable only in cases where it is not possible to determine the duty in accordance with Article 6. The distinctions which the applicant believes it is possible to draw in the German version of the contested regulation are not supported in the texts published in the other official languages. Moreover, the applicant does not state why it considers that, in a large number of cases, it is not possible to calculate the resale price in accordance with Article 6. It is legitimate to doubt that, within a period of 90 days following importation, neither the imported products nor identical or similar imported products have not been sold in the Community.

Moreover, the anti-dumping duty to be paid may be determined by the applicant. If the applicant's resale price is the level of the minimum prices indicated in the annex to the contested regulation, or above those values, the applicant is not obliged to pay any duty.

Gimelec states that it is clear from the 38th recital to the provisional regulation that the system of protection established in 1982 and in 1984 was easily circumvented by importers associated with exporters. The latter were able to avoid anti-dumping duty by reselling at a loss, whilst observing the minimum prices laid down in the price undertakings. It was therefore necessary to have recourse to the system provided for in the contested regulation. Moreover, the applicant has no legitimate interest in calling in question the method of calculating anti-dumping duty chosen in the contested regulation, since the only reasonable alternative solution, namely the imposition of a specific

duty, would have been less favourable to it inasmuch as, unlike a variable duty, it would not have been possible for it to avoid payment of such a duty by increasing resale prices.

Moreover, it is clear from both Article 2(8)(b) of Regulation No 2176/84 and the practice of the institutions in regard to the reimbursement of anti-dumping duties that the institutions are empowered to take into account the level of resale prices to the first independent buyers for the purpose of collecting anti-dumping duties. The method chosen in the contested regulation entails no uncertainty as to the determination of the duty owing to the fact that the applicant, quite legally, could avoid collection of the duty by fixing their resale prices in accordance with the indicative table of minimum resale prices included in the contested regulation.

(iv) Definitive collection of the provisional duty

The *applicant* considers that the definitive collection of the amounts guaranteed, provided for in Article 2 of the definitive regulation, is unlawful, inasmuch as the provisional regulation was without legal effect. If the regulation imposing a provisional duty had been null and void, no provisional duty would have been imposed and there could have been no definitive collection of the provisional duty. A void Commission regulation cannot be covered by a valid Council regulation imposing a definitive anti-dumping duty, since the latter takes effect only with regard to the future. The fact that dumping and injury are to be established by both the Commission and the Council confirms that the lawfulness of the Commission's provisional regulation is a pre-condition for the collection of a provisional duty.

The *Council* in reply states that an analysis of Regulation No 2176/84 shows that the collection of the provisional duty is dependent only in exceptional cases on the validity of the provisional regulation. The decision to proceed to the definitive collection of the provisional duty is a distinct legal measure whose legality must be reviewed separately. The regulation imposing a provisional duty is reliant on a preliminary examination of the dumping, and it is not strictly necessary for the Commission itself to make any evaluation with regard to injury, provided that the complaint contains sufficient evidence. However, definitive collection can only be decided upon by the Council if there is a definitive finding that dumping has occurred and injury been caused. The provisional regulation is therefore a preventive measure intended to prevent injury at the investigative stage, subject to confirmation by the Council. The Council's definitive findings supplant the provisional evaluation on which the provisional regulation was based, and errors occurring in the context of the provisional examination are therefore covered by those findings.

Any defects in the provisional regulation are therefore of relevance only if they have not been covered by the definitive regulation adopted by the Council, that is to say if the decision to proceed to the definitive collection of the provisional duty were itself vitiated by the same errors as the Commission's provisional regulation. However, no error has been discovered in the definitive findings on dumping and injury.

Moreover, any irregularity in the procedure for hearings would not affect the definitive collection of the provisional duty. The applicant made known its point of view during the administrative procedure which followed the imposition of the provisional

duty and its arguments were taken into consideration on the adoption of the definitive regulation. Consequently, even if the applicant had not been kept informed in due time prior to the imposition of the provisional duty, that cannot affect the definitive collection of the duty, since the applicant made known its arguments before the decision to proceed to collection was adopted.

IV — Replies to the questions put by the Court in Case C-160/87

1. The Court requested the Commission and the Council to explain the way in which account was taken of the Yugoslav rate of inflation in calculating the normal value.

In that request, the *Commission* and the *Council* reply that no express adjustment was made, or appeared to be necessary. The calculation of the normal value was based on the weighted average of domestic sales prices of three Yugoslav exporters during the reference period, namely 1985. The institutions contend, in that regard, that the difference between the rate of inflation in the EEC and in Yugoslavia is reflected in the alterations in the monthly ecu-dinar rate of exchange during 1985, in which the rate varied from 147.804 dinar to ECU 1 in January to 264.184 dinar to ECU 1 in December. The difference between those two figures represents an increase of 78.7% in the value of the ecu in relation to the dinar, which corresponds to the figure of 80% put forward by the applicant as being the rate of inflation in Yugoslavia in 1985. No other adjustment was therefore necessary in order to take account of the Yugoslav rate of inflation.

2. The Court also requested the parties to state their views on the question of the admissibility of the proceedings brought by associated importers, which had been raised in the observations of the intervener, Gimelec.

(a) *Neotype* refers to the Court's case-law on anti-dumping from which it is clear that there is no reason to draw a distinction between manufacturing and exporting undertakings, on the one hand, and importing undertakings associated with them legally or for business purposes, on the other. Both categories are directly and individually concerned when they can demonstrate that they have been identified in measures adopted by the Commission or the Council or have been the subject of preliminary investigations.

In that connection *Neotype* puts forward the following reasons why it is directly and individually concerned by Council Regulation No 864/87: the applicant is identified in that regulation, not only in the 38th recital but also in Article 1(4)(b) of the regulation. The abovementioned provision determines in the applicant's case a specific customs duty whose amount corresponds not to the difference between the net unit price free-at-Community-frontier, not cleared through customs, and the price mentioned in the annex to the regulation, as is provided for generally in Article 1(3), but to the difference between the customs value, determined in accordance with Article 6 of Regulation No 1224/80, and the price mentioned in the annex.

Moreover, the applicant was concerned by the investigations carried out by the Commission and the Council. In their analysis of injury, both Commission Regulation No 3019/86 (from the 22nd to the

24th recital) and the aforementioned Council regulation (from the 21st to the 24th recital) compare the production costs of Community producers with the resale prices of the motors in question, that is to say the prices charged by undertakings associated with the exporters. Those prices therefore underlie the finding of injury, which even leads to the specific consequence that the differential customs duty is calculated on the basis of the resale price charged by associated importers. They are therefore even more directly and individually concerned than if the export prices had been calculated on the basis of their resale price.

Finally, the Commission accepted, in its decision of 19 June 1980 (Official Journal 1980 L 153, p. 48), an undertaking by the applicant in the context of the previous anti-dumping proceeding relating to imports of electric motors originating in the Soviet Union.

(b) The *Council* and the *Commission* confirm that, for the reasons set out in the preamble to the contested regulation, it was not considered necessary, at the time when the existence of dumping was established, to refer in the case of associated importers to a constructed export price. The Council, nevertheless, introduced a specific method of calculation applicable to associated importers for the purpose of determining the amount of anti-dumping duties payable on importation.

It is clear from Article 1(4) of the contested regulation that, in the case of associated importers, the method used was that of 'reconstructing' the export price by using, for reference purposes, the price to the first buyer not linked with the exporter, in accordance with Article 2(8)(b) of Regulation No 2176/84. That price corresponds to the customs value determined in accordance with Article 6 of Council Regulation No 1224/80.

The Council stresses that it did not limit itself to establishing in a general and abstract manner the criteria for calculation in respect of that category of importers, but that it itself applied those criteria in regard to the seven importers named in Article 1(4)(b) of the contested regulation, including Neotype. Those importers are therefore identified within the meaning of the Court's case-law and they are therefore directly and individually concerned by that provision. The national customs authorities have no choice in the matter but have merely to apply automatically to the importers concerned the anti-dumping duty determined by reference to the difference between the two parameters. With regard to those importers the situation is perfectly comparable to that in Cases 138/79 *Roquette Frères* v *Council* [1980] ECR 3333 and 139/79 *Maizena* v *Council* [1980] ECR 3393, where the Court declared the applications to be admissible on the ground that the Council had itself applied the criteria in question to the undertakings concerned.

M. Zuleeg
Judge-Rapporteur