OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 21 March 1991 *

Mr President,
Members of the Court,

Introduction

The applicants challenge Commission Decisions 88/327, 88/328 and 88/329 which reject in part their requests for reimbursement of anti-dumping duties levied in 1985 and 1986 on imports of ball-bearings originating in Singapore.

The action is based on two submissions. Primarily, the applicants claim that the above-mentioned decisions are unlawful in so far as they are based on a misinterpretation of the relevant provisions of the basic regulation (Regulation No 2176/84). In the alternative, in the event of the Court's considering that the Commission applied those provisions correctly, the applicants claim, pursuant to Article 184 of the Treaty, that the same provisions are unlawful.

* Original language: Italian.

The legislation

A fundamental principle of the anti-dumping legislation is that the duty must not exceed the dumping margin.

Pursuant to Article 8(3) of the anti-dumping code, 'the amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2'.

I think it is appropriate to mention that elementary principle because, as we shall see, it is precisely the application of that principle which, on anything beyond a superficial reading, is at issue in this case.

The provision just cited reflects a strictly 'compensatory' approach, and its corollary is *the absolute obligation to refund any amount paid in excess of the dumping margin.* The provision in question in fact goes on to say that 'therefore, if subsequent to the application of the anti-dumping duty it is 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'.

In line with the GATT provisions, Article 16(1) of Regulation No 2176/84 provides that:

'where an importer can show that the duty collected exceeds the actual dumping margin ... the excess amount shall be reimbursed'.

A product is regarded as dumped where its export price to the Community is less than the normal value of the like product (see Article 2(2) of Regulation No 2176/84). The 'dumping margin' is precisely the amount by which the normal value exceeds the export price (see Article 2(13)(a) of Regulation No 2176/84).

The export price and, consequently, the dumping margin, is calculated differently depending on whether the importer into the Community is wholly independent of the exporter or, conversely, is associated with the latter, as in the case of the applicants.

In fact, where the importer is not independent from the exporter, the price at which the importer buys the goods is not regarded as a sufficiently reliable basis for determination of the 'export price' for the purposes of a procedure to establish the possibility of dumping. The Commission has emphasized that, in such cases, the exporter has the opportunity to sell the goods at an artificially inflated price, thus inducing the importer to sell at a loss on the Community market. The relationship between the exporter and the importer precludes reliance on the price charged in the transaction between them. It is therefore necessary to 'construct' the export price on the basis of the resale price to the first independent purchaser. Obviously, in order to determine that 'constructed' export price it is necessary to subtract from the resale price a number of elements (cost, various charges and profits) arising between import and resale.

The anti-dumping code (Article 2(5] provides that in cases where there is an association between the exporter and the importer, 'the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer'. The same terms are used in Article 2(8)(b) of Regulation No 2176/84.

The anti-dumping code (Article 2(6] again provides, for the purpose of determining how the export price is to be 'constructed' in such cases, that 'allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made'.

Regulation No 2176/84 is more analytical in that respect. In particular, it provides that the adjustments to be made to the resale price in calculating the export price are to include the anti-dumping duties. Article 2(8)(b), as well as stating that allowances to be made for 'all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin', also provides that:

'Such allowances shall include, in particular, the following:

...

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

The Commission has correctly pointed out (paragraph I.5 of its rejoinder) that the export price may be constructed for three separate purposes:

(a) the assessment of anti-dumping duties;

(b) the review of anti-dumping duties;

(c) the calculation of refunds to a related importer.

In case (a), where the anti-dumping duties have not (yet) been imposed, there is — of course — no anti-dumping duty to be deducted from the resale price charged to the first independent purchaser. In case (b), it is undisputed that the export price is constructed by deducting the amount of the anti-dumping duties paid.

As regards case (c), the Commission takes the view that the principle that the anti-dumping duties are to be deducted, as provided for in the provision mentioned earlier, is applicable also in relation to refunds of duties paid. In its notice No 86/C266/02 of 15 October 1986 (hereinafter referred to as 'the 1986 notice'), the Commission outlined its approach to this matter in the following terms (paragraph II (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 amounts eventually reimbursed.

It is clear that the 'adjustment' referred to is to be understood as a *deduction* of the amount concerned from the resale price.

The facts

The applicants, NMB Italia, NMB Deutschland and NMB UK, import into and distribute in the Community high-precision ball-bearings supplied by another member of the group, NMB Singapore. The three European companies, and likewise NMB Singapore, are wholly-owned subsidiaries of the Japanese parent company. It is therefore undisputed that the applicants are not to be regarded as independent importers but rather as importers linked by an association agreement (hereinafter referred to as 'associated importers') within the meaning of Article 2(5) of the GATT anti-dumping code and Article 2(8)(b) of Regulation No 2176/84.

In 1984, the Community imposed an anti-dumping duty on imports of ball-bearings by the applicants. Provisional duties were imposed by Commission Regulation No 744/84 of 19 March 1984 and definitive duties were imposed by Council Regulation No 2089/84 of 19 July 1984. The duties were paid as from March 1984.

In the months immediately after that date, the applicants submitted applications for refunds. The applications concerning imports in 1984 were abandoned. Those relating to imports in 1985 and 1986, on the other hand, were pursued and in response thereto the Commission adopted the three contested decisions.

It is not disputed that, following the imposition of the anti-dumping duty, the dumping margin on the imports in question was considerably reduced. The reduction is attributable both to an increase in the selling prices in the EEC introduced by the applicants and to a drop in the normal value, and to a reduction in marketing costs in the Community.

Those changes are not contested. Although the Commission did not fully grant the applications for refunds made by the applicants, that was the result not of a differing assessment of those factors but, essentially, of the manner in which the Commission took account of the anti-dumping duties paid for the purpose of determining the constructed export price and exercise of the right to a refund.

Admissibility of the objection of illegality

Before the essential issue is considered, it is necessary to dispose of a number of preliminary matters.

It has already been stated that the application is based on two separate submissions.

In the first place, the applicants maintain that the contested decisions are unlawful because they are based on a misinterpretation of the basic regulation.

In the alternative, in the event of the Court's considering that that regulation requires the Commission to treat the anti-dumping duties paid as a cost to be deducted in calculating the constructed export price, the applicants object, under Article 184 of the Treaty, that that regulation is unlawful.

The Commission objects that that alternative submission is inadmissible, on three grounds. The Commission contends: that the provisions of the regulation which the applicants wish to attack are not appropriately specified; that there is no claim relating to them in the application; and, finally, that Article 184 allows a claim to be made that the regulation is inapplicable, but not that it is invalid.

As far as the first ground is concerned, it need merely be stated that the issue in the present case is the legality — in the context of the refund procedure — of the deduction of duties, as a cost, under Article 2(8)(b) of the basic regulation. Both the applicants and the Commission have constantly and unambiguously referred only to that provision. Accordingly, there is not the slightest doubt regarding identification of the provision at issue.

As regards the second ground, it is true that no express reference is made in the application to any objection of illegality under Article 184, in so far as the applicants merely claim that the Court should 'annul' the contested decisions (and, of course, order the Commission to pay the costs).

It is also true, however, that it is absolutely clear from the documents before the Court that the applicants raised, in the alternative, an objection of illegality concerning Article 2(8)(b) of the basic regulation (see p. 7 and p. 22 of the application and p. 2 of the reply). Moreover, in the application, the applicants state expressly that the claim that the provisions of the basic regulation ought 'to be declared void' is made 'pursuant to Article 184 . . . of the EEC Treaty'. There is no doubt therefore that the objection of illegality was in fact properly raised in these proceedings.

As regards the fact that a specific claim to that effect does not appear in the conclusions set out in the application, that

omission does not seem to me to be so serious as to render the objection inadmissible — unless a formalistic approach were adopted for which there is no reasonable justification. The *petitum* contained in the conclusions set out in the application (annulment of the contested decisions) is fully consistent both with the main claim made by the applicants and with the alternative claim for an incidental finding of illegality. Indeed, whether the Court upholds the main claim or, considering the objection of illegality to be well founded, upholds the alternative claim, the result will be the annulment of the decisions adopted by the Commission on the basis of Article 16 and pursuant to Article 2(8)(b) of the basic regulation, a result which precisely reflects the *petitum* set out in the application.

As regards the third allegation of inadmissibility, it seems to me to be manifestly unfounded since it is clear that the applicants are merely asking the Court to carry out a purely *incidental* examination of the unlawfulness of the above-mentioned provision of the basic regulation, a request which falls squarely within the scope of Article 184 of the Treaty.

Other issues of admissibility

The Commission also considers that certain grounds of the application are inadmissible in so far as they fall outside the scope of Article 173. The grounds in question are those relating to infringement of obligations under GATT, the protracted nature of the refund procedure, the inconsistency between the Commission's practice and that of the EEC's international trading partners, and the illegality of the Commission's 'trade policy'. In its rejoinder, the Commission states again that the applicants have failed to demonstrate the legal basis for those challenges and that therefore 'these grounds for challenge too must be disregarded by the Court'.

I consider, however, that the submissions which the Commission considers inadmissible fall to be classified not as independent submissions rather as arguments put forward in support of other complaints made in the application, in particular the allegation of misinterpretation of the basic regulation. Thus, the delay in processing refund requests is referred to as 'exacerbating' the 'substantively unsatisfactory nature' of the system, in so far as it accentuates the lack of proportionality; the inconsistency of the Community's practice by comparison with that of its international trading partners is an element to be taken into account in interpreting the Community legislation and confirms that 'there is nothing inherently necessary or inevitable about the policy pursued by the Commission', which is based on a misinterpretation of the basic rules; the fact that the Commission system reflects an illegal trade policy, in so far as it appears 'to deter voluntary increases in price', is a further argument to show that the interpretation relied by the Commission is wholly irrational since it leads to results which contradict the very objectives of the trade protection measures.

The observations regarding infringement of the GATT rules cannot be so easily categorized: it is not at all clear whether the

applicants advocate interpretation of the Community provisions in the light of the anti-dumping code or whether they consider, as would appear from their reply, that the conflict with the anti-dumping code of itself renders the Community provisions unlawful and may therefore be relied on to found an objection under Article 184. In view of what was stated at the hearing, I am inclined to consider that the first view is the correct one. It seems to me that the applicants' reference to the GATT provisions is intended to show that the purely literal interpretation of the basic regulation contended for by the Commission is incorrect, in so far as it produces results which are incompatible with the anti-dumping code, whilst the different interpretation put forward in the application appears fully consistent with the Community's international obligations. In any event, even if it were concluded that infringement of the GATT provisions constitutes a separate ground for the objection of illegality, it would merely be a ground which should be examined as a matter of substance.

In view of the foregoing conclusions concerning the nature of the submissions made, I consider that the objections of inadmissibility raised by the Commission should be dismissed.

The substance

The issue is whether, or not, in a procedure for the reimbursement of anti-dumping duties, it is lawful for the duties paid by an associated importer to be regarded as a cost and therefore to be deducted from the resale price for determination of the constructed export price. According to the applicants, the rule that the duties should be deducted, at least in certain circumstances, leads to the determination of a dumping margin (and therefore to non-reimbursement), where in reality that margin no longer exists. Applied in that way, the system therefore goes against the basic principles of the anti-dumping rules and imposes disproportionate and discriminatory burdens upon associated importers.

Since that rule laid in Article 2(8)(b) of the basic regulation, it is necessary first to consider the interpretation of that provision (I). The merits of the applicants' objection of illegality will also be examined in that context.

However, I must immediately draw the Court's attention to the fact that the debate in these proceedings appears to have shifted the focus of the dispute towards a problem which extends beyond the rule concerning the determination of the constructed export price and the dumping margin. Having regard to the facts of the case and in particular the details that emerged at the hearing, it seems to me that the true question raised is whether an associated importer *may* take on himself the financial burden of paying the duty, until such time as it is reimbursed to him, or whether, on the other hand, that burden *must in all cases be passed on to the purchaser* by the associated importer. If the burden of the duty must fall upon the independent purchaser, that appears to represent a separate, additional condition for the availability of

the refund. This is the question which will be considered in the second part of the present opinion (II).

Finally, I shall briefly consider the remaining criticisms made against the contested decisions (III).

I — Interpretation of the basic regulation

(a) The views of the parties

The applicants state that, in conformity with the anti-dumping code, Article 16 of Regulation No 2176/84 makes entitlement to reimbursement of the duty subject to one condition only: proof that the amount of the duty paid exceeds 'the actual dumping margin'.

In the second place, they maintain that if an associated importer has increased the resale price in the Community by an amount equal to the dumping margin previously found, that increase is necessary and sufficient to bring the dumping to an end and therefore provide the basis for entitlement to reimbursement of the duties paid. All other relevant factors (normal value, selling expenses) remaining unchanged, where a resale price is increased by an amount equal to the dumping margin, the constructed export price is equal to the normal value: the dumping is therefore eliminated.

However, that result is arrived at only if the duties paid are not treated as a cost incurred between import and resale and therefore are not deducted in calculating the constructed export price. According to the applicants, therefore, Article 2(8)(b) of Regulation No 2176/84 should be regarded as narrower in scope than its wording implies. In other words it should be acknowledged that provision is made for the duties paid to be deducted, in calculating the constructed export price, only in review procedures and not in refund procedures.[1] Any other solution would produce the illogical, and

1 — It should be noted that the parties to these proceedings referred to a simplified case: that of an associated importer who, following the imposition of an anti-dumping duty, decided to increase the resale prices by an amount equivalent to the dumping margin previous ascertained, the other factors (other costs, profit margin, normal value) remaining unchanged. The applicants' situation, to which the contested decisions relate, is somewhat different. In their case, there was not only an increase in the resale prices but also a decrease in the other costs incurred between import and resale, together with a drop in the normal value.
However, these are differences which have no importance for the purposes of the present analysis. In the present proceedings, the fundamental issue is whether or not it is true that dumping is brought to an end where the constructed export price (without deduction of the duties paid) is increased to an extent equal to the dumping margin and, therefore, becomes equal to the normal value. The precondition, therefore, is that, as a result of application of the duty, an increase has occurred in the constructed export price; it is of little importance whether that increase derived from an increase in the resale prices or (inter alia) from a drop in the importer's costs: what is important is that, without deduction of the duty, the constructed export price has risen by an amount equal to the dumping margin and finally corresponds to the normal value. Whatever the reason for the increase in the constructed export price (increase in resale prices and/or decrease in costs), the question, as indicated, remains unchanged: essentially it must be ascertained whether such an increase is sufficient to eliminate the dumping (as the applicants maintain) or whether an even greater increase is necessary (the latter being the necessary solution if the rule that duties must be deducted in order to determine the constructed export price were in fact applied).
That having been said, reference will be made hereinafter to the simplified hypothesis described at the outset, where the increase in the constructed export price derived only from a change in the price factor (an increase equal to the dumping margin), the other important factors remaining unchanged.

indeed unlawful, result whereby a wholly artificial dumping margin was determined, giving rise to an absolutely disproportionate and discriminatory financial loss.

For its part, the Commission does not deny that a refund is available where the dumping has been eliminated. However, it observes that, in the case of associated importers, in order to establish whether a dumping margin still exists in relation to particular imports it is necessary to apply strictly to the letter the rule for calculating the constructed export price laid down in Article 2(8)(b) of the basic regulation. That rule requires in general — and thus also in relation to the refund procedure — that the constructed export price be determined by deducting the amount of the duties paid from the resale price charged by the importer to the first independent purchaser. It is on the basis of that interpretation of Article 2(8)(b) of the basic regulation that the Commission issued the 1986 notice which, specifically with respect to refund procedures initiated by an associated importer, states that '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'. The same literal interpretation is an essential feature of the reasons on which the contested decisions are based. [2]

2 — In the preamble to the decision, the Commission states: (The Commission) is of the opinion that the wording of Article 2(8)(b) is clear: all duties, including anti-dumping duties, have to be deducted from the resale price. The Commission would therefore, by granting the applicants' request, infringe the express requirements of Article 2(8)(b) and of part II(b) and (c) of the notice. Regulation (EEC) No 2176/84 establishes different rules for the determination of the export price in different situations depending on whether the importer is related to the exporter or not. This cannot be considered discriminatory.

If the constructed export price is calculated by *also* deducting from the resale price the duties paid, it necessarily follows that the associated importer, who was required to pay the duties, must, in order to bring the dumping to an end and obtain the refund, increase the resale prices by *twice* the dumping margin, rather than merely by the same amount as the dumping margin.

(b) A 'single jump' or a 'double jump'?

There is thus no doubt as to the differences which arise depending on whether one calculation rule or the other is applied to determine the constructed export price.

If the applicants' arguments is upheld, an increase in the resale price of *the same amount* as the dumping margin brings the dumping to an end and therefore gives rise to entitlement to reimbursement of the duties paid. A *single jump* therefore — to adopt a useful expression employed by the applicants — is all that is required.

If, on the other hand, the Commission's view is followed, then an increase of *twice*

the dumping margin — a *double jump* — is necessary to bring the dumping to an end and create entitlement to reimbursement. [3] It is also clear that the two approaches are entirely alternative to each other. Where there is a given increase in the resale price to the first independent purchaser, with every other important factor remaining unchanged, either there is or there is not dumping.

We must therefore ask what price increase is necessary and sufficient to bring the dumping to an end. In that respect, it should be noted in the first place that Article 2(8)(b) of the basic regulation, in providing that the anti-dumping duties paid by the importer are to be treated in the same way as a cost and are therefore to be deducted in calculating the constructed export price, does not limit the application of that calculation rule to a particular case. The letter of the provision appears therefore to support the Commission's interpretation whereby the duties are to be deducted from the resale price regardless of the procedure (review procedure or refund procedure) under which it becomes necessary to determine the constructed export price.

It should be observed however that, whilst in the case of the review procedure application of the rule that the anti-dumping duty must be deducted appears perfectly justified and, moreover, is accepted by the

3 — A numerical example may perhaps better clarify the repercussions on determination of the dumping margin and the right to reimbursement arising from deduction or non-deduction of the duties.
Take for example a situation where:

normal value	100	
resale price	120	
costs, profits,	40	
constructed export price	80	(120-40)
dumping margin	20	(100-80)

Then suppose that, following the introduction of an anti-dumping duty of 20, the importer concerned increases the resale price to the first independent purchaser by an amount exactly equivalent to the dumping margin of 20: the resale price is raised from 120 to 140.
Nevertheless, if, in such circumstances, the duty paid is considered as a cost incurred between importation and resale, it will have to be concluded that the importer, who increased the resale price in an amount equal to the dumping margin, has not brought the dumping to an end. If the duty paid is deducted from the resale price, in the same way as a cost, the result will be that, notwithstanding the increase in the resale price, the difference between the normal value and the export price has remained wholly unchanged.
If from the new resale price of 140 there is deducted not only an amount of 40, equivalent to the costs and profits, but also the additional amount of 20, corresponding to the duty paid, we arrive at a constructed export price of 80 (140 — 40 — 20) and therefore there is still a dumping margin of 20 (100 — 80). From this it must be concluded that, although the resale price has been raised from 120 to 140, the dumping continues to exactly the same extent as previously and that therefore the importer must continue to pay the duty previously imposed on him.
What should the importer in question do in order to bring the dumping to an end and obtain a refund of the duties paid? On the basis of the reasoning thus far put forward, the answer is simple. The importer must increase the resale price by twice the dumping margin, not merely by an amount equal to it. In fact, if the importer raises the resale price from 120 to 160, thus incorporating an increase equal to twice the dumping margin of 20, the constructed export price, after deduction of the anti-dumping duty of 20, will be equal to the normal value of 100 (constructed export price = 160 — 40 — 20).
Conversely, if it is considered that the duties paid do not constitute a cost to be deducted in order to determine the constructed export price the results arrived at are entirely different. It will be sufficient for the associated importer to increase the resale price by only the same amount as the dumping margin for it to be concluded that the dumping has been completely eliminated and that consequently the duties paid must be refunded. In the example given it will therefore be sufficient for the resale price to be raised from 120 to 140: at a price of 140, after deduction of costs and profits of 40, an export price of 100 is obtained, which is equivalent to the normal value.

applicants,[4] the application of that rule in the refund procedure gives rise in certain circumstances to illogical consequences which are incompatible both with the essential principles of the anti-dumping rules and with certain fundamental principles of Community law.

In fact, as already indicated, strict application of the criterion in question requires the associated importer to increase the resale prices by *twice* the amount of the dumping margin, in order ensure that the constructed export price, after deduction of duties, corresponds to the normal value: in other words, there will be a dumping margin until a *twofold increase* in the resale price has been made.

However, such a *twofold increase* appears wholly unjustified.

It should be borne in mind that, because of its very purpose of protecting trade, anti-dumping rules, as stated earlier, are intended to have a strictly 'compensatory' effect. Those rules are designed to ensure that products are not imported and marketed in the Community at an artificially reduced price. In those circumstances, application of the duty, as a trade protection measure, is intended essentially to restore fair conditions of competition as regards export prices.

The key factor is therefore the *dumping margin.* It is that margin which must be offset. The fundamental principle therefore applies that the duty should not exceed the dumping margin, as I have stressed from the outset.

Whilst that is true, it is nevertheless consistent with the logic of those rules to conclude that the dumping has been eliminated when the sale price in the Community has been increased to an extent which corresponds to the dumping margin found. Once that increase has been made,

4 — As already pointed out, the parties agree — the applicants confirmed that fact of the hearing — that in the review procedure the export price is to be constructed by deducting the amount of the anti-dumping duties paid. The reason for this will be better illustrated by an example.
Let us consider once again the situation where:

normal value	100	
resale price	120	
costs, profits,	40	
constructed export price	80	(120-40)
dumping margin	20	(100-80)

Let us suppose that an anti-dumping duty of 20 is applied. Let us then suppose that, not withstanding collection of the duty, the resale price of the product remains unchanged, at 120. In that case, it is seen that the duty imposed has not had any effect on the prices, which must indicate that the dumping has not only not been eliminated, following application of the duty, but instead has been intensified. To the dumping margin already existing before the imposition of the duty is added a further margin, of the same magnitude, equal to the financial effort made to neutralize the duty in its entirety, thus ensuring that it does not give rise to an increase in price — which would have otherwise been the result.
When that happens, the situation must be re-examined and a change in the measures adopted. It will be necessary to apply a further duty which takes account of the increase in the dumping margin which has taken place.
In order to calculate the constructed export price for the purposes of that re-examination, account must be taken of the fact that the associated importer is already bearing an anti-dumping duty, whilst continuing to apply the same resale price. From the accounting point of view, that can be done by deducting the said duty from the resale price, together with the other costs and profits. Thus, in the example given above, the new constructed export price will become 60 (and no longer 80), thus being equal to the difference between the resale price (which remained 120), on the one hand, and, on the other, the anti-dumping duty already borne (20) and the profits and other costs (40).
Where the constructed export price is reduced from 80 to 60, the dumping margin will be increased from 20 to 40: the Community will be able to increase the anti-dumping duty, raising it from 20 to 40, unless a lower duty is sufficient to eliminate the harm caused to the Community industry.

the product in question is no longer sold at an artificially low price and there is no further need for measures to protect trade.

In the case of an associated importer, the price to be taken into consideration is the resale price to the first independent purchaser. It is at that stage that the imported product encounters competition from Community products. It is therefore on the basis of that price that it is necessary to determine whether the product is being dumped, and also whether any dumping has been eliminated.

Where at a particular resale price a dumping margin is found to exist, and consequently a duty is imposed, the objective which may be legitimately pursued by that trade-protection measure is that of obtaining a price increase which will *bring that price to the level at which no dumping would ever have existed.*

That increase (and likewise the trade-protection measure) *may not exceed the dumping margin.* If a greater increase were required, it would no longer be a question of merely restoring a proper price level but of pushing the price of the product up to a level at which it was unfairly placed at a disadvantage by comparison with the competing Community product. In other words, there would be a shift from defence of trade to protectionism.

In short, therefore, I consider that in order to bring dumping to an end an associated importer must increase his resale prices to an independent purchaser by an amount equal to the dumping margin found to exist, and no more.

(c) The Commission's practice

It is important to note that *this conclusion is confirmed by the practice of the Commission itself,* as described in the 1986 notice and the documents produced in the proceedings, provided that the analysis is taken beyond the criterion laid down in the notice and the actual functioning of the refund system is taken into consideration.

Let us start with the pleadings. In paragraph IV.3 of the defence — that is to say in the final summary of its arguments — the Commission makes it clear that an associated importer is required to increase the resale price by twice the dumping margin *only temporarily*:

'the associated importer is required temporarily to raise his price by twice the dumping margin in order to obtain a refund, which he may then pass on to his purchaser'.

The same view is reiterated a little latter, where it is stated that the situation in which the resale price is initially increased by twice the dumping margin is 'purely temporary' (paragraph IV.5).

It may perhaps even be superfluous to point out that such a *purely temporary* increase is indicative merely of the fact that the *final*, and therefore *actual*, price charged in the transaction between the importer and the independent purchaser incorporates, at the end of the day, an increase which is *merely the same as* the dumping margin: a *single jump*, therefore, as stated by the applicants themselves. That is in fact the price which is arrived at once the importer has subsequently passed on to the purchaser the amount of the refunded duty, in so far as that refund constitutes no more nor less than a *discount* granted *ex post facto* on the sale price.

This is clearly confirmed by the numerical examples given by the Commission in its pleadings (see in particular paragraph III. B.3.1 of the rejoinder).

Those examples show that in both cases in which the entitlement to reimbursement is recognized by the Commission, that is say:

both the case of an associated importer who sells 'duty unpaid' to the first independent purchaser;

and the case of the associated importer who sells 'duty paid' to the first independent purchaser;

the independent purchaser's *net balance*, that is say after payment of the refund and possible passing on of the duty, is *one debit unit*. That unit corresponds precisely to the increase made to the purchase price of an amount *equal to* the dumping margin.

Those examples, moreover, refer to the two cases already envisaged in the Commission's 1986 notice. In both cases, the actual and final price at which the goods are resold to the independent purchaser incorporates an increase equal to *only the same amount* as the dumping margin, not *twice* that amount.

In the first case:

the importer in question increases the resale price by *an amount equal to* the dumping margin;

the importer sells 'duty unpaid', which means that it is the purchaser who pays the duty and applies for an obtains the refund;

in practice, the purchaser bears a double burden only *temporarily*, represented by payment of the increased price and payment of the duty; and in fact that duty is subsequently repaid: the actual price paid by the purchaser incorporates an increase of an amount which is *only equal to* the dumping margin.

Similarly, in the second case:

the importer in question increases the resale price by *twice* the dumping margin;

the importer pays the duty;

the importer applies for and obtains a refund of that duty;

the importer *transfers* to his purchaser the amount of the refunded duty;

therefore, the purchaser — only *temporarily* — bears a double burden (represented by the *double jump* in the purchase price); subsequently, the amount of the duty repaid to the importer is transferred by the importer to the purchaser who, therefore, in fact receives *ex post facto* a discount on the purchase price of the goods: in practice, once again, the actual price paid by the purchaser incorporates, at the end of the day, an increase of an amount which is *only equal to* the anti-dumping margin.

It is important to note that specifically at that price the anti-dumping duty paid (by anyone) is refunded. This confirms that at that price it must be concluded that the dumping has been eliminated.

The practice of the Commission itself is to consider that, in order to bring the dumping to an end, the associated importer, who has paid the duties involved, must increase the resale prices to the independent purchaser by an amount equal to the dumping margin, and no more.

(d) The approach adopted at international level

The international approach seems to support that conclusion. In the present proceedings, discussion has focused above all on the system applied in the United States of America. The Commission contends that reference to that system is irrelevant in view of its differences from the Community system.

It is true that the United States system is 'retrospective' in that, after an estimated amount of duty is deposited, a calculation is made *ex post facto* to determine the actual dumping margin for each import transaction and therefore the definitive duty to be paid, an adjustment thereupon being made to offset the positive or negative balance (a refund is granted or an additional sum is levied).

As far as the problem in these proceedings is concerned, however, that difference does not seem to me such that comparison with the United States system is unjustified.

Undertakings seeking a refund of the duties paid to the Community must show that, for a given reference period, the duty levied

exceeded the actual dumping margin. Those undertakings seek a *subsequent* adjustment of the duty levied at the time of importation, to reflect the real situation obtaining when the product was imported. That procedure does not seem to me to differ essentially from that followed, under the United States system, in determining the definitive duty. In both cases, a determination is made *ex post facto* for a given reference period of the export price and the normal value, and then any dumping margin arrived at from those figures is compared with the duty levied on importation. It is thus clear that, as regards the export price, where associated importers are involved, in both cases a 'constructed' price must be determined, in accordance with the GATT anti-dumping code.

That having been said, I shall merely point out that, as appears from a research note prepared by the Research and Documentation Department of the Court:

in practice, anti-dumping duties are not deducted in the United States, by virtue of Section 1677a (d) of the Tariff Act;

in its judgment of 27 January 1986 (*PQ Corp* v *US*, CIT 1987, Slip Opinion No 87-11, US International Trade Reports, New Series, vol. 2), the Court of International Trade gave a clear ruling condemning deduction of the amount deposited in respect of estimated dumping duty, aligning itself with the view of the Department of Commerce that 'if deposits of estimated anti-dumping duties entered into calculation of present dumping margins, then the deposits would work to open a margin where none otherwise exists';
the practice of the Department of Commerce is to be regarded as well established, as appears from the Notice of Final Results of Anti-dumping Duty, Administrative Review (July 1, 1988), Color Television Receivers from Korea, 53 FR 24975, where it is stated that 'adding these estimated duties to the dumping margins would artificially inflate them'.

It is also apparent — from the same research note — that in view of the lack of clarity of the relevant provision of the GATT anti-dumping code, the question was raised in the Uruguay Round negotiations. It is worth noting that from the views so far expressed, it emerges that:

in principle, anti-dumping duties are not treated as costs;

if, as occurs in the present case, the constructed export price, *without deduction of the anti-dumping duties*, is equal to or greater than the normal value, the duty is refunded in full, which means that if the other factors have remained unchanged (normal value, other costs and profits of the associated importer) an increase in the resale price equal to the dumping margin is sufficient to bring the dumping to an end and make a refund available;

there are differing views as to the need to deduct the anti-dumping duties in cases where, by virtue of the first calculation, made without deduction of the anti-dumping duties, it appears that the constructed export price is *lower* than the normal value; in such a case, however, it is clear that there is no entitlement to a refund in any event, but instead it is necessary to determine whether or not account should be taken of the anti-dumping duties paid in establishing, in a review procedure, whether the dumping margin has increased (see above, footnote 4).

It is true that the approach so far described has emerged only in negotiations which are still pending; however, it should not be undervalued or indeed ignored for that reason, in so far as the guidance which it provides is sufficiently unambiguous and pertinent.

(e) Article 2(8)(b) of the basic regulation: restrictive interpretation or illegality?

All the foregoing observations thus prompt me to conclude that, in order to bring the dumping to an end and therefore obtain a refund, an associated importer who has paid anti-dumping duties must increase the resale prices only by an amount equivalent to the dumping margin.

With a *single jump* of that kind, the dumping ceases and the importer acquires, under Article 16(1) of the basic regulation, a *right to reimbursement of the duties paid.*

In the situation just described, therefore, the duties paid must not be regarded (and are not in fact so regarded by the Commission) as a cost to be deducted from the resale price for calculation of the constructed export price. If such a deduction were made, the result would be determination of a dumping margin at a resale price level at which, in fact, *no dumping margin exists.*

It follows that, in a situation like the one at issue in the present case, it is unacceptable to apply the rule contained in Article 2(8)(b) of the basic regulation in so far as it leads to maintenance of trade protection measures, even though the essential precondition for it (the dumping margin) has disappeared. It is similarly unlawful for the importer, under the same rule, to be subjected to a burden which has no lawful basis and, consequently, for the Community improperly to withhold duties collected without justification, retaining for itself sums which form part of the legitimate income of the associated importer.

It should also be emphasized that such a system is discriminatory in that, in the case of an associated importer who has increased the resale price by an amount equal to the dumping margin, it leads to the conclusion that, *at that price level,* a dumping margin exists which is equal to the margin found to exist prior to that increase, whereas, in the case of an independent importer who has passed on to his resale prices an increase in the export price of the same amount, that is

to say equal once again to the dumping margin (a perfectly lawful thing to do), it is undisputed that the dumping is regarded as eliminated. In practice, all things being equal, at the same resale price the product sold by the associated importer is still being dumped whereas the product sold by the independent importer is no longer dumped.

In short, application of the rule that anti-dumping duties are to be deducted in calculating the constructed export price, in the case of an associated importer who has increased the resale prices by an amount equal to the dumping margin and applies subsequently for reimbursement of the duties paid, has unlawful consequences.

Therefore, a choice must be made. Either it must be decided that Article 2(8)(b) makes that deduction absolutely mandatory, in which case the applicants' objection of illegality will have to be upheld; or else it must be decided that the rule can be interpreted restrictively, whereby the deduction of duties is limited to the procedure for the review of the dumping margin.

In practice, the result is the same: partial illegality or a restrictive interpretation of the provision, so that in any event the deduction is not applicable in the present case and, therefore, the contested decisions are unlawful.

Personally, of the two options, I prefer the second. I consider that the Court should define the scope of the provisions so as to render them consistent with the system of which they form part and to ensure that they do not operate (even if only partially) unlawfully. The principle that legislation should be interpreted systematically and the principle *ut res magis valeat quam pereat* call for an approach of that kind, whereby the letter of the provisions is merely a point of departure and not of arrival.

In the light of those principles, a restrictive interpretation of Article 2(8)(b) appears to me to be permissible, since, in any case, it does not deprive the provision of all legislative effect. The parties agree that the rule whereby duties should be deducted is, in any event, applicable to the review procedure; and they agree that, in such circumstances, deduction of the duties to be regarded as consistent with the logic of protection of trade underlying the anti-dumping rules. Moreover, a restrictive interpretation of that kind seems to me to be favoured by the fact that the Commission itself, whilst *declaring* that it is necessary to adhere to the rule that anti-dumping duties are to be deducted under the refund procedure, has not, as should be apparent from the foregoing considerations, applied it consistently and strictly in practice.

II — The conditions for entitlement to a refund

To summarize, the foregoing analysis leads to the conclusion that the rule that duties should be deducted is not applicable where a decision is to be given on an application for a refund made by an associated importer who has increased the resale prices by an

amount equal to the dumping margin previously determined.

It follows that in such circumstances there is no reason to refuse to recognize an associated importer's entitlement to reimbursement of the duties paid.

It must nevertheless be observed that the Commission has endeavoured to defend the legality of the contested decisions on grounds other than those so far considered here.

According to the Commission, in circumstances like those of the present case, the right to a refund is to be refused in any event for two reasons:

to avoid the risk of 'disguised dumping' by the associated importer;

to avoid differences of treatment as between independent importers and associated importers.

It must first be stated that those arguments are put forward to justify a practice which is not in conformity with consistent application of the rule on deduction of duties contained in Article 2(8)(b) of the basic regulation. The circumstances in which, according to the 1986 notice, the Commission grants refunds of duties are not, from the essentially economic point of view, different from those relied on by the applicants. It should be borne in mind, once again, that according to the applicants an associated importer is unconditionally entitled to a refund where he has sold the product, in respect of which he has paid anti-dumping duty, at a price increased by an amount equal to the dumping margin. It should also be repeated that that situation appears identical to the two cases envisaged in the 1986 notice with respect to the actual price at which the transaction takes place between the associated importer and the independent buyer. In any event, the resale price includes an increase equal to a *single jump*.

The *only* difference is as follows. In the two situations envisaged in the 1986 notice, it is the *independent buyer* who temporarily supports the burden of payment of the duty:[5] a purely temporary burden, since, at a later stage, the buyer receives, either from the Community (in the case of a 'duty unpaid' purchase) or from the importer (in the case of a 'duty paid' purchase) a sum of a corresponding amount.

On the other hand, in the circumstances outlined by the applicants, it is the *importer* who bears, until reimbursement, the burden of payment of the duty.

5 — That is obvious where it is the buyer who pays the duty subsequently refunded to him. But the same situation arises where the duty is paid by the importer. In that case, according to the Commission, the resale price (temporarily) incorporates a twofold increase. Within that twofold increase, one unit corresponds to the actual increase in the sale price whereas the second reflects the amount of the duty, the burden of which is thus placed on the buyer. The latter, therefore, will subsequently obtain the reimbursement, as a result of the transfer to him by the associated importer.

That is the sole difference. And it is that sole difference — let it be repeated — which appears to be the only real reason for which the requested refund has not been granted to the applicants.

In other words, having regard to all the information placed before the Court, the description — most accurately representing the facts — of the system adopted by the Commission regarding the refund of duties appears to me to be as follows: for the purposes of the refund, the Commission does not require an increase in the actual resale price in excess of a *single jump*; however, as a further necessary condition, it requires the duty to be borne, until reimbursement, by the buyer and not by the associated importer. It is hardly necessary to repeat that such a practice has very little to do with deduction of duties as a cost. If the duties were in fact deducted like all the other cost elements borne by the importer, then not only an increase twice the size of the dumping margin would be absolutely necessary to obtain a refund but, in addition, a *double jump* of that kind would clearly have to be permanent, not merely temporary. For the purposes of a finding of dumping, it is the actual price charged in the transaction in question which counts: in order to determine that price it is necessary to take account not only of the sale price first charged but also of any discount, rebate or transfer subsequently made by the seller to the buyer.

If that is the real effect of the system operated by the Commission — and on the basis of the information provided I do not think that any other conclusion can be reached — the following observations are appropriate.

In the first place, the statements of the reasons on which the contested decisions are based appear to me to be insufficient in so far as they do not give the real reasons for which the application for a refund was (partially) rejected.

In the second place — above all — the system appears incompatible with Article 16(1) of the basic regulation. That provision makes entitlement to a refund subject to a single condition, namely proof that the dumping margin has been eliminated. Having regard to the rationale of that provision — which I have considered already — I do not think it is lawful to introduce further conditions which frustrate the entitlement to reimbursement. Once it has been shown that the increase in the resale price is sufficient to bring dumping to an end, the importer enjoys a full and unconditional right to refund of the amount of duties paid; and that amount — it is as well not to overlook the fact — forms an integral part of the importer's lawful income. The additional condition imposed by the Commission, whereby the refund is granted only if the independent buyer has borne the burden of the duty in the meantime, is in breach of Article 16(1) of the basic regulation.

But even if those elements are disregarded — which, frankly, I think would be difficult — I must point out in any event that the reasons relied on by the Commission to introduce that additional condition do not appear convincing or such

as to justify such an extensive reduction of the rights of the importers concerned.

As far as the risk of disguised dumping is concerned, the Commission contended that, if the importer, who was paid the duty and increased the price by an amount equal to the dumping margin, were allowed to obtain a refund of that duty there would be a serious risk that the importer would transfer downstream, to his buyer, the amount of the refunded duty, thus evading the trade-protection measure. On the other hand — the Commission argues — if the importer is required temporarily to increase the resale price by twice the dumping margin, then, even if the refunded duty is transferred to the buyer, the definitive price charged in the transaction will meet the requirements of trade protection.

This reasoning clearly confirms once again — if confirmation be needed — that a *single jump* (provided that it is genuine) is necessary and sufficient to bring the dumping to an end. But that is not the point. The Commission's reasoning takes two factors for granted, namely that the associated importer will endeavour to evade the anti-dumping measures by making concealed transfers to his customers (the Commission gives the example of transfers to current accounts in foreign banks or discounts purporting to relate to other supplies); and that there is no realistic possibility of controlling such conduct. If that — as it seems to be — is the real reason for which the twofold price increase is required, I find it difficult to see any connection between the means chosen and the aim pursued. If one takes as a starting point the presumption that an importer intends to frustrate the law in the knowledge that he will remain unpunished, then a double increase in the resale price is not the way to resolve the problem: whatever the price increase imposed, the importer will have exactly the same opportunity to grant disguised discounts to his customers so as to allow them to sell at dumped prices — all that will happen is that, with a higher increase in the apparent sale price, the hidden discounts will be proportionally larger. But apart from that one difference, the risk of disguised dumping or other fraudulent collusion remains exactly the same.

As regards the need to avoid discrimination between associated importers and independent importers, the Commission contended in its rejoinder that even buyers who purchase from an independent importer are in a way temporarily subjected to a twofold increase in the purchase price. The Commission 'supposes' that an independent importer who has paid the duty and has purchased from the exporter at a price which exceeds the initial price by an amount equal to the dumping margin will pass that double increase on to its customer in full (rejoinder, paragraph III. A.3.5). The Commission concludes that 'the buyer from the independent importer, or from the first independent buyer who has paid the duty, will almost certainly pay the original price plus twice the dumping margin . . . unless and until the dumping duty is reimbursed to that importer or first buyer, and that party chooses to reimburse his buyer' (rejoinder, paragraph III. A.3.6). The Commission's thinking is clearly set out in the Report for the Hearing, where it is stated that 'the requirement that (the associated importers) 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'.

However, the Commission's reasoning is open to a number of objections.

In the first place, the Commission 'supposes' that where the exporter has increased the export price by an amount equal to the dumping margin (in order to bring the unfair practice to an end), an independent importer, who may at that point receive reimbursement of the duty paid, almost certainly passes on to the resale prices the double burden represented by the increase in the purchase price and the duty paid — at least until the duty has been reimbursed.

However, there is reason to doubt the well-foundedness of that 'supposition'. If the independent importer is in competition with other suppliers in the Community, it is probable that he will endeavour to keep his selling prices at the lowest possible level. In those circumstances, therefore, the independent importer (no differently from an associated importer) will pass on to his resale prices only the increase previously made to the purchase price, but not the charge relating to the duty paid, which is a temporary burden in so far as it will subsequently be refunded. Moreover, it should be borne in mind that if the importer (independent or otherwise) passes on only the increase made to the purchase price (which is also the increase needed to bring the dumping to an end), his resale price will then be at the level at which the goods are offered in the Community; on the other hand, if he passes on a larger amount, even if only temporarily, it is probable that the product will be offered at a higher price than that of competing Community products, with the risk that he will be forced out of the market. [6]

But, quite apart from the question whether the Commission's 'supposition' is well founded, another point is puzzling. It is important to note that an independent importer is not *compelled* by the Community rules to increase his prices by twice the dumping margin. In particular, in a case — which is anything but improbable — where the buyer was not prepared to purchase the product at a price which had undergone a twofold increase, the independent importer would effect a single increase, *without thereby prejudicing his right to reimbursement in any way.*

If applied to that hypothetical case, the system adopted by the Commission with respect to associated importers seems to me to involve wholly unjustified discrimination. If the buyer does not accept the twofold increase (even if it is only temporary) in the price, then the associated importer who, *unlike the independent importer,* effects a

6 — Naturally, the situation would be different if the importer was in a strong market position, in that he was able to determine the prices without excessive regard to the conduct of competitors. But it is clear that in such a situation — which has not been invoked in the present case — an independent importer and an associated importer would act according to the same logic, and both would seek to pass on to the buyer the temporary burden of payment of the duty (quite apart from the fact that where the trader was in a strong market position he would probably have less interest in engaging in dumping).

single increase, loses the right to reimbursement. In those circumstances, the practical effect is that the associated importer has his income curtailed by the amount of the duty, even though it is undisputed that, at the price charged by him, there is no longer any dumping; at the same time, *the Community withholds from him sums to which it is not entitled and indeed is specifically required to repay to him* under Article 16(1) of the basic regulation.

There is a last consideration. I find it difficult to understand the logic of a system which *compels* an associated importer to endeavour to make the buyer bear the temporary burden (at least, until a refund is granted) of payment of the duty. It is quite usual that it should be the importer, associated or otherwise, who pays the duties and, if appropriate, submits applications for reimbursement. On the other hand, successive buyers in the Community, who operate at a lower commercial level, normally have no interest in becoming involved in procedures connected with the import of goods into the Community. There is no apparent reason why they should agree to bear the burden of an anti-dumping duty and obtain reimbursement thereof subsequently. Moreover, I do not think it is unreasonable to conclude that the buyer in many cases has insufficiently detailed, and in any event very indirect, knowledge of the conditions for obtaining reimbursement.

Therefore, even if the duration of the procedure is disregarded, the possibility cannot be ruled out that the purchaser will consider the prospect of reimbursement as insufficiently certain for him to bear the temporary burden of paying the duty. Thus, it is probable that the buyer in the Community will have less information than the importer concerning the normal value of the product; moreover, the importer is aware of the costs borne by him between importation and resale, whereas the buyer can have only an approximate idea of those details. Admittedly, if the buyer agrees to pay the duty (temporarily), the issue does not arise. But if — as is quite possible, — the buyer does not agree, why must the associated importer who has paid the duty lose the right to reimbursement, whereas the independent importer, in the same circumstances, does not lose that right?

In that regard, the Commission has placed great emphasis on the need to be suspicious of associated importers who have participated in an unfair commercial practice. That suspicion, if founded, makes it necessary to make absolutely certain that the price increases are of such a kind as to bring the dumping to an end. But once it is agreed that the prices are increased to the requisite extent, I do not see how the traders concerned can be denied the right to reimbursement simply because they were unable or even unwilling to pass on to their trade customers the temporary burden of paying the anti-dumping duties; in other words, I do not see how the right to reimbursement can be made subject to additional, more onerous conditions not provided for in Article 16(1) of the basic regulation, simply because that right is exercised by undertakings which have opted for vertical integration for their trade imports into the Community.

In conclusion, I consider that, even if we take account of the manner in which the Commission system appears to function, it must be concluded that that system infringes Article 16(1) of the basic regulation and gives rise to wholly disproportionate and discriminatory burdens. In so far as they reflect that system, the contested decisions must be annulled.

III — Other submissions

I do not consider, however, that the other submissions made against the contested decisions are well founded.

As far as the inadequacy of the statements of the reasons on which the decisions are based, I have said that that claim may be upheld, in so far as the decisions do not state that the request for a refund was (partially) rejected, not because the applicants increased the resale prices to an insufficient extent to bring the dumping to an end, but only because, in fact, although making the requisite increase, they did not comply with the separate obligation of passing on to the buyer the temporary burden of payment of the anti-dumping duty. Other matters raised by the applicants in connection with the statements of reasons — set out in the Report for the Hearing — in fact merge with the criticisms concerning misinterpretation of the basic regulation, infringement of Article 16(1) of that regulation and breach of the principles of proportionality and non-discrimination.

As regards the alleged misuse of powers by the Commission, I do not consider that any such misuse has occurred. Rather, as is apparent from the foregoing considerations, it must be concluded that the Commission has infringed the basic rules and certain fundamental principles or has merely applied provisions which, for their part, are unlawful.

As regards breach of the principle of the protection of legitimate expectations, the Commission, without being challenged by the applicants, stated in its defence that the applicants were informed by letter of 6 March 1985 that the Commission had decided that the rule that anti-dumping duties should be deducted as a cost was applicable to the refund procedure. It is not therefore true that, at least until publication of the 1986 notice, the applicants had no way of knowing what the result of their applications for refunds would be.

Conclusion

On the basis of the foregoing observations, I propose that the Court uphold the application and order the Commission to pay the costs.