If a trader, when withdrawing his undertaking, considers that there are grounds justifying a review of his position and a grant of exemption from any anti-dumping duty in spite of the withdrawal of such undertaking, it is incumbent on him to submit to the Commission appropriate evidence in support of his view.

In Joined Cases 239 and 275/82

ALLIED CORPORATION, a corporation governed by the law of the State of New Jersey (United States of America), having its office in Morristown (New Jersey), represented by Amand d'Hondt, François van der Mensbrugghe and Edmond Lebrun, all of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse-Charlotte,

MICHEL LEVY MORELLE, of the Brussels Bar, acting as liquidator of Demufert SA, a company governed by Belgian law, having its office in Brussels, represented by Amand d'Hondt, François van der Mensbrugghe and Edmond Lebrun, and by Michel Mahieu, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever,

TRANSCONTINENTAL FERTILIZER COMPANY, a corporation governed by the laws of the State of Pennsylvania (United States of America), having its office in Philadelphia (Pennsylvania), represented by Amand d'Hondt, François van der Mensbrugghe and Edmond Lebrun, with an address for service in Luxembourg at the Chambers of Tony Biever,

KAISER ALUMINIUM AND CHEMICAL CORPORATION, a corporation governed by the law of the State of Delaware (United States of America), having its office in Wilmington (Delaware), represented by Amand d'Hondt, François van der Mensbrugghe and Edmond Lebrun, and by Anthony Hooper, Barrister, of the Inner Temple, and Anthony Philip Bentley, Barrister, of Lincoln's Inn, with an address for service in Luxembourg at the Chambers of Tony Biever,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for a declaration that Commission Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America and Commission Regulation (EEC) No 2302/82 of 15 August 1982 amending that regulation are void, and applications for damages,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

In December 1979 the Commission received a complaint from the Comité Marché Commun de l'Industrie des Engrais Azotés et Phosphatés (CMC-Engrais) on behalf of the Community fertilizer industry referring to dumping practices concerning imports of certain chemical fertilizer originating in the United States of America.

Taking the view that the information supplied provided sufficient evidence to justify initiating a proceeding, the Commission accordingly announced, by a notice published on 26 February 1980 in the *Official Journal of the European Communities* (Official Journal 1980, C 47, p. 2), the initiation of a proceeding, in accordance with Article 7 of Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European

Economic Community (Official Journal 1979, L 339, p. 1), concerning imports of certain chemical fertilizer originating in the United States of America. The fertilizer in question is defined under Community law as urea ammonium nitrate solution fertilizer, falling within subheading ex 31.02 C of the Common Customs Tariff.

During its investigation the Commission established that exports of the product in question were being dumped, that there was sufficient evidence of injury caused by the entry of the product for consumption in the Community and that the interests of the Community called for immediate intervention and accordingly it adopted Regulation (EEC) No 2182/80 of 14 August 1980 imposing a provisional anti-dumping duty on certain chemical fertilizer originating in the United States of America (Official Journal 1980, L 212, p. 43). The validity of that provisional duty was extended for a period not exceeding two months by Regulation (EEC) No 3144/80 of 4 December 1980 (Official Journal 1980, L 330, p. 1).

By Regulation (EEC) No 349/81 of 9 February 1981 (Official Journal 1981, L 39, p. 4), the Council imposed a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America. The injury caused to the Community by the dumped imports is, according to that regulation, particularly serious in the case of the French fertilizer industry.

The products exported by a United States manufacturer were exempted from that duty on the ground that such products were not dumped.

By Decision No 81/35/EEC of 9 February 1981 (Official Journal 1981, L 39, p. 35), the Commission accepted the undertakings given in connection with the anti-dumping proceedings by Allied Corporation (hereinafter referred to as "Allied"), Transcontinental Fertilizer Company (hereinafter referred to as "Transcontinental"), and Kaiser Aluminium and Chemical Corporation (hereinafter referred to as "Kaiser"), all having their offices in the United States of America, to increase their prices to a level eliminating but not exceeding the dumping margins established. Accordingly, Article 2 of Regulation No 349/81 provides that the anti-dumping duty is not to apply to fertilizer exported by those three undertakings.

Three decisions adopted by the French Minister for Economic Affairs and Finance imposing pecuniary penalties on certain French undertakings in the fertilizer sector were published in the Bulletin Officiel de la Concurrence et de la Consommation — Bulletin Officiel des Services des Prix de la République Française (Official Gazette on Competition and Consumption — Official Gazette of the Prices Department of the French Republic) No 23 of 12 December 1981. Decision No 81-18/DC is concerned with the state of competition with regard to the production and marketing of fertilizer, Decision No 81-19/DC relates to the legality of the practices carried on by the Société du Superphosphate (SDS) and Decision No 81-20/DC is concerned with a restrictive agreement which had been found to exist in the fertilizer distribution sector in the département of Indre.

In reliance on those decisions and on the information contained therein, Demufert SA (hereinafter referred to as "Demufert"), whose registered office is in Brussels, and the European Fertilizer Import Association (EFIA) requested the Commission, by letters dated 1 and 22 February 1982, to review both Regulation No 349/81 and the Commission's decision to accept the undertaking concerning nitrogen solution fertilizer. Allied made a similar request by letter of

24 March 1982. The requests submitted by Demufert and the EFIA were rejected by the Commission by letters dated 22 March 1982.

By application lodged at the Court Registry on 5 May 1982 (Case 141/82), Demufert brought an action against the Commission primarily for a declaration that its decision not to review the regulation in question was void. That case was removed from the register by order of the Court of 9 November 1983, following the applicant's decision to discontinue the proceedings.

On 16 July 1982 the Commission published a notice of a review of the definitive anti-dumping duty on imports of certain chemical fertilizer originating in the United States of America (Official Journal 1982, C 179, p. 4).

Allied, Transcontinental and Kaiser subsequently withdrew their undertakings, Allied and Transcontinental by letters of 7 June and 2 July respectively, and Kaiser by telex message of 23 July 1982.

Following the withdrawal of the undertakings in question, the Commission adopted Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America (Official Journal 1982, L 214, p. 7), whereby it imposed a duty on the fertilizer in question exported by Allied and Transcontinental, and it also adopted Regulation (EEC) No 2032/82 (Official Journal 1982, L 246, p. 5) amending Regulation No 1976/82 and imposing an anti-dumping duty on Kaiser in addition to Allied and Transcontinental. The rate of the provisional anti-dumping duty imposed on Allied and Transcontinental remained fixed at 6.5% whilst, in the case of Kaiser, it was fixed at 5%.

II — Written procedure and conclusions of the parties

Allied, Demufert and Transcontinental lodged an application at the Court Registry on 22 September 1982 for a declaration that Regulations No 1976/82 and No 2302/82 were void and for damages. The application was registered under No 239/82.

Kaiser lodged a like application at the Court Registry on 15 October 1982 which was registered under No 275/82.

The applicants claim in identical terms that the Court should:

1. Declare the applications admissible and well-founded;

2. Accordingly:

   (a) Declare void Commission Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America, and Commission Regulation (EEC) No 2302/82 of 18 August 1982 amending that regulation,

   (b) Order the Commission to pay each applicant by way of damages, subject to any amendment which may be made during the proceedings, the sum of BFR

10 000 000 (10 million Belgian francs), together with interest thereon at the rate of 12.5% from the day on which the action was brought until the day on which payment is made,

(c) Order the Commission to pay the costs.

By order of 15 December 1982 the Commission joined Cases 239/82 and 275/82 for the purposes of the procedure and the judgment.

The Commission contends that the Court should:

Dismiss the applications as inadmissible and, in any event, as unfounded;

Order the applicant to pay the costs.

The written procedure followed the normal course.

By letter of 17 January 1983 the Commission requested the Court to decide the case in plenary session on the grounds that it raised important questions of principle concerning admissibility.

By judgment of 15 June 1983 the Tribunal de Commerce [Commercial Court] Brussels declared Demufert insolvent and appointed Michel Levy Morelle, Avocat, as liquidator. By a document lodged at the Court Registry on 29 September 1983 the liquidator expressed the intention of resuming the proceedings originally instituted by the insolvent undertaking.

On hearing the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

The Court invited the parties to concentrate on questions of substance in their oral argument at the hearing. The Commission was invited to reply more particularly, in its oral observations, to three questions which were communicated to it in writing.

III — Submissions and arguments of the parties during the written procedure

A — Consideration of certain factual circumstances

Before dealing with the questions of admissibility and of substance raised in the applications for a declaration of nullity and for damages, the parties set out and comment on a number of factual circumstances underlying the dispute.

According to the *applicants,* Regulation No 349/81, which imposes a definitive anti-dumping duty, is based essentially on the situation on the French market, which is by far the most important Community market for nitrogen solution fertilizer. Admittedly, the Commission maintains that, in assessing the injury pleaded by the Community producers, it also took account of the German market. However, it must be borne in mind that the German market accounts for only 7 to 8% of the entire Community market, by comparison with the French market which accounts for 68 to 70% of the Community market. Moreover, in the Federal Republic of Germany there is also a restrictive agreement on the prices of such fertilizer, as is clear in particular from the price list attached to the complaint submitted by the CMC-Engrais, and from the price list applied on the market which shows that identical prices are charged and identical conditions are applied by the only three German producers of nitrogen fertilizer. It is also appropriate to point out that Regulation No 349/81 expressly states,

as regards the injury allegedly caused, that account was taken in particular of the French fertilizer industry.

The *Commission* does not deny that the French market is the most important market in the Community but it maintains that in assessing the injury caused it also took account of the state of the German market. It strongly denies the existence of restrictive agreements on prices in Germany and offers to submit to the Court all the necessary information in that regard.

The *applicants* contend that, during the procedure which led to the adoption of Regulation No 349/81, the Community authorities were misled as regards the true state of the French market. It is clear from the decisions adopted by the French Minister for Economic Affairs and Finance in the field of competition and, more particularly, from Decision No 81-18/DC, that France's five principal producers, who were the source of the complaint, are together responsible for approximately 70% of French fertilizer production and almost the whole of France's production of ordinary nitrogen fertilizer. Between December 1976 and August 1978 the producers in question took concerted action regarding conditions of sale and discount rates for customers. Between August 1978 and May 1980, they also pursued a systematic policy of applying the same price lists and conditions of sale. In the 1978/79 and 1979/80 marketing years, the purpose and the effect of such concerted action was to distort competition and to favour the artificial increase in the prices of certain fertilizer. Those unlawful practices were proved and were penalized by the French authorities by the imposition of fines which, moreover, the parties concerned did not contest by action in the courts. Therefore the French complainants had themselves seriously infringed the rules of competition and had sought protection for their artificially distorted prices by means of an anti-dumping regulation. Their aim was to eliminate intra-Community competition by means of cartellization at national and Community level. They availed themselves of the anti-dumping procedure ostensibly to defend freedom of competition, but their real aim was to protect themselves against imports of solution fertilizer originating in the United States.

The *Commission* charges the applicants with failing to provide evidence that the practices complained of were capable of distorting the investigations conducted prior to the imposition of anti-dumping duties. The practices carried on between 1976 and 1978 cannot have had any impact on the investigations conducted in 1979 and 1980. As regards the period from 1979 to 1980, it is noteworthy that the French Decision No 81-19/DC is concerned with phosphate fertilizer, whilst the Community regulations in question relate to nitrogen fertilizer. Decision No 81-20/DC is limited as regards its geographical and temporal scope. Since it concerns a single French département and applies to practices which ceased at the beginning of 1979 it cannot have had any effect on the investigations conducted by the Commission. Decision No 81-18/DC is concerned with the fertilizer market as a whole, whereas an anti-dumping measure was adopted only in respect of nitrogen solution fertilizer. It is not sufficient to point to an artificial increase in the prices of certain fertilizer. The applicants must establish that such an

increase occurred in the case of nitrogen solution fertilizer. They must then demonstrate that the Community authorities were strongly influenced by the increases in question when they examined the difference between the export price and the normal value of the fertilizer in question and the existence of serious injury to the Community fertilizer industry as a result of imports from the United States. In the absence of the practices which are referred to in the decisions in question, French prices would have been even lower and, consequently, the losses sustained would have been even greater. In any event, the fact that certain fertilizer producers infringe the rules of competition does not have the effect of rendering a complaint on their part inadmissible.

According to the *applicants*, there is no doubt that the Commission was unaware of the situation revealed by Decision No 81-18/DC. It cannot therefore as a matter of principle claim that the decision has no effect. In order to assess the injury allegedly caused, no reliance may be placed on the prices charged in the middle of the marketing year without taking into account the discounts and rebates granted at the end of the year, to which reference is made in the French decision. The Commission has not submitted to the Court the French file concerning Decision No 81-18/DC. It has not even adduced any evidence to show that it has examined that file. Decision No 81-18/DC is concerned mainly with nitrogen fertilizer. It contains a number of findings relating to restrictive agreements on the price of ordinary nitrogen fertilizer. Those findings also apply to nitrogen solution fertilizer. The Common Customs Tariff, just like the French statistics, subdivides chemical fertilizers into only four categories: phosphatic, potassic, compound and nitrogenous, which includes nitrogen solutions. Accordingly, no purpose is served by distinguishing between the various kinds of nitrogen fertilizer. It is in principle for the Commission to produce evidence, by submitting the relevant French file, that the information which is contained in the file and of which it was unaware when carrying out its investigations, has not distorted the results thereof. Moreover, the argument to the effect that, in the absence of any restrictive agreement on prices, the prices in question would have been even lower and the losses sustained even greater cannot be accepted. Even if the infringement of the rules of competition had no effect on the admissibility of the complaint submitted, it none the less affects the question whether or not the complaint is well founded.

In reply, the *Commission* states that, even though it was unaware of the French decisions in question when it adopted Regulation No 349/81, it was aware of their existence when it adopted the contested regulations since Allied, Demufert and Transcontinental had referred to those decisions in their request for a review of Regulation No 349/81. Furthermore, prior to the adoption of that regulation, investigations were carried out by the Commission at the premises of the French producers which enabled it to obtain specific information concerning the prices charged, regard being had to the system of discounts and rebates.

Decision No 81-18/DC is concerned with the fertilizer industry in general. Furthermore, it is quite possible to draw a distinction between nitrogen fertilizer in solid form and in liquid form.

It is not for the Commission to prove that the facts mentioned in its decision were not capable of distorting its investigations. In order to establish that injury was caused to the French producers, it is sufficient for the Commission to show that imports of the products in question had grown significantly, thereby leading to a decrease in French production and to a contraction of France's share of the market and/or to sales at a loss. The existence of injury may be established as soon as there is a significant increase in dumped imports which leads either to a decline in Community production or to a slump in prices and profits. The existence of injury is not necessarily linked to the fact that Community prices are higher than those charged by importers.

B — The applications for a declaration of nullity

Admissibility of the applications

Admissibility of the application lodged by Demufert

The *Commission* contends that Demufert is an independent importer. It is not designated by name in the contested regulations which, as far as it is concerned, are in the nature of measures having general application within the meaning of the second paragraph of Article 189 of the EEC Treaty. Since their purpose is to impose an anti-dumping duty on liquid nitrogen fertilizer originating in the United States, the regulations in question apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract. That analysis is not invalidated by the applicant's assertion that in practice it is dependent on Allied.

The argument to the effect that the importers of the products in question constitute a closed category of users whose members are known to the Commission, is not relevant. The applicant came within the scope of the regulations in question solely by virtue of its objective status as an importer of the product in question.

In a recent judgment the Court recalled that a measure does not cease to be a regulation because it is possible to determine the number or the identity of the persons to whom it applies at any given time as long as such application takes effect by virtue of an objective legal or factual situation defined by the measure. The Court pointed out that importers may contest before the national courts individual measures taken by the national authorities in application of a Community regulation. The fact that the applicant may have to institute proceedings in the courts of different countries is not, in the Commission's view, a factor capable of calling in question that solution.

Demufert relies upon the judgment of the Court as regards the admissibility of its application.

However, the following factors must be borne in mind:

The contested regulations are expressly applicable to Allied. Demufert imports products exclusively and directly from Allied. Although it may not be legally dependent on Allied, in fact it is unquestionably economically dependent on that company.

Since Demufert exports fertilizer to five different Member States, it would be obliged, if its application were declared inadmissible, to institute proceedings in five different national courts which might need to refer questions to the Court of Justice for a preliminary ruling. In those circumstances, is it still possible to maintain that the applicant's rights enjoy effective judicial protection?

If the other applications are declared admissible, what purpose would there be in drawing a distinction between those applications and that lodged by Demufert which, as the debtor in respect of the contested duties, is the main party concerned?

Admissibility of the other applications

The *Commission*, without formally raising an objection of inadmissibility, expresses certain doubts regarding the admissibility of the application lodged by the exporting undertakings in question. Regulations No 2182/80 and No 349/81 imposed a provisional anti-dumping duty, which later became definitive, on all imports of nitrogen solution fertilizer from the United States. The sole purpose of the contested regulations was to abolish the exemptions enjoyed by the applicants and to subject the latter to the general system previously established. The contested measures supplement the basic regulation and have the same legal characteristics as that regulation. They are not of direct and individual concern to the applicants any more than Regulation No 349/81 is of concern to other exporters of the product in question.

The result of adopting a different line of reasoning would be to accord preferential treatment to exporters who gave undertakings and subsequently withdrew them as compared with exporters who were subjected to anti-dumping duties from the outset.

The Community anti-dumping legislation constitutes an instrument of commercial policy which is intended to protect the Community against imports from non-member countries. It is not directed against certain specific undertakings, even though the pricing policy pursued by the exporting undertakings in question constituted a fundamental reason for the introduction of that legislation. In the cases concerned with dumping which it has so far had occasion to deal with, the Court has upheld the admissibility of the application on the basis of the very special characteristics of the contested measures which, in relation to the applicants, amounted to a specific individual measure or an additional penalty. The Court reserved its position as to what the nature of a measure imposing an anti-dumping duty might be in other cases. The fact that certain exporters are identified during the preliminary investigation does not justify the conclusion that the legislation in question is of direct and individual concern to them. According to the Court, the distinction between a regulation and a decision is based on the nature of the measure and the legal effects which it produces and not on the procedures for its adoption.

The regulations in question are not of a uniform nature. The view may be taken that the introduction of a duty constitutes a penalty against an exporter found guilty of dumping. In accordance with that view, the exporter is identified, on the basis of the preliminary investigation, in the preamble to the regulation and this entitles him to contest the measure adopted. In one of the dumping cases, the Advocate General

referred to the hybrid nature of the regulation in question. That view entails the risk of allowing parallel means of redress before the national courts and the Court of Justice, thereby giving rise to procedural complications and to the risk of divergent judicial decisions.

Admittedly, exporters cannot themselves bring an action in the national courts. Yet a direct action seems more satisfactory from the point of view of securing legal protection. However, to declare admissible a direct action brought before the Court by the exporting undertakings would be tantamount to ascribing a dual character to anti-dumping measures, namely the character decisions *vis-à-vis* undertakings which have been the subject of investigations and which are referred to in the regulations in question and the character of regulations in relation to all other legal subjects who may be affected by them. In a case concerned with agriculture, the Court refused to countenance the possibility that a measure may display a "dual character" of that kind.

As regards the difference between the general rate and the specific rate of duty, a question which is more particularly of concern to Kaiser since the anti-dumping duty imposed on it is lower than the general rate of duty, it is appropriate to observe that it does not follow from that factor that the measure is of individual concern to the undertaking in question, within the meaning of the second paragraph of Article 173 of the EEC Treaty, since the measure in question is not deprived of its character as a regulation by the possibility of establishing the number or the identity of the natural or legal persons to whom it applies.

The admissibility of the applications seems all the more questionable since they are directed against the imposition of a provisional duty. The adoption of a measure of that kind does not produce legal effects since only the adoption of the final measure can give rise to such effects. In a recent case concerned with competition, the Court held that acts are open to review only if they are measures definitively laying down the position of the Commission or the Council on the conclusion of the relevant procedure, and not provisional measures. Provisional duties are not collected definitively. What is concerned is a provisional measure, of a protective nature, and it is followed by an investigation on completion of which the Council decides whether it is necessary to confirm the provisional measure by retaining definitively the sums paid by way of security.

The *applicants* consider that the admissibility of their applications is not open to doubt.

The Commission wrongly centred the debate on the question of the admissibility of applications directed against the imposition of anti-dumping duties in general, without distinguishing between the case of a general rate of duty and that of a specific rate of duty.

The Commission wrongly regards the contested measures as basic regulations imposing an anti-dumping duty in respect of a specific product. All the judgments upon which it relies are concerned with measures of that kind. In the present case, the contested measures are specific regulations which apply expressly and exclusively to the applicants.

The Court has upheld the admissibility of proceedings instituted by an individual directed against a measure which, even though adopted in the form of a regu-

lation, in fact constitutes a decision which is of direct and individual concern to him. The mere fact that the form of a regulation is chosen cannot alter the nature of the measure in question. The regulations in question are decisions which are of direct, individual and exclusive concern to the applicants, both as regards the event giving rise to their adoption, namely the withdrawal by the applicants of their undertakings, and as regards the operative part of those regulations.

The Commission endeavours in vain to link the contested regulations to the basic regulation, No 349/81. The imposition of a provisional anti-dumping duty on parties who have withdrawn their undertakings cannot be the automatic consequence of, or the automatic legal penalty for, such withdrawal. It is clear from Article 10 (6) of Regulation No 317/79 that the imposition of a provisional anti-dumping duty following the withdrawal of an undertaking is subject to the condition that the interests of the Community call for the imposition of a duty of that kind, which entails the need to carry out checks to determine, on the basis of the information available, whether the requirements concerning the existence of dumping and injury within the meaning of Article 4 of that regulation are complied with. Since they are distinct from the basic regulation and are autonomous in relation to it, the contested measures may be vitiated by the legal defects inherent in them. The contested regulations may, at the very most, be linked to Article 2 of Regulation No 349/81 which exempts the applicants, who are designated by name, from anti-dumping duty. Since the contested measures are addressed to the applicants and were adopted by reference to considerations peculiar to them, the applications are admissible.

In the alternative, the applicants argue that their applications must be declared admissible inasmuch as they are directed against the imposition of anti-dumping duties in general.

It is incontestable that a direct action by exporters against a regulation imposing a duty of that kind is admissible.

Exporters are named in regulations of that kind not only because of their involvement in the preliminary investigation but also because of a situation which is peculiar to them and which leads to the adoption of the regulation in question. Their position differs from that of importers who, according to the Court, are liable to duty solely by reference to the objective criterion that they are importers of the product in question. They are concerned by reference to a subjective criterion, in the light of a specific practice, namely the charging of a price so low as to constitute dumping. Furthermore, in the present case, Regulation No 349/81 exempts by name an exporter from anti-dumping duty on the ground that the undertaking in question is not charged with practising dumping. Consequently, the regulation is necessarily of direct or indirect concern to those who are deemed to carry on practices of that kind.

It is also appropriate to take account of the fact that it is impossible for the exporters themselves to contest the imposition of anti-dumping duties in the national courts, that they may at the very most intervene in the proceedings alongside importers and that, from their point of view, a direct action is a better guarantee of legal protection.

Substance

First submission

The *applicants* claim that the Commission has infringed the EEC Treaty, and in particular Article 190 thereof, Regulation No 3017/79, and in particular Articles 4, 10 (6) and 11 thereof, and essential procedural requirements, inasmuch as the contested measures do not state the reasons on which they are based or, at the very least, do not contain an adequate statement of reasons.

(a) So far as the law is concerned, it should be borne in mind that, in order to enable the Court to exercise its power of review, it is not enough to provide the statement of reasons referred to by Article 190. The statement of reasons must be sufficient, consistent and relevant.

According to Article 4, 10 (6) and 11 of Regulation No 3017/79, the imposition of an anti-dumping duty presupposes verification not only of the existence of dumping but also of the existence of injury — consisting either of serious injury to Community production, or of an appreciable delay in the establishment of such production — and of the need for Community intervention to protect the interests of the Community. The statement of reasons must focus on those three points.

Even on the assumption that the contested measures are based exclusively on Article 10 (6) of Regulation No 3017/79, the duty to state the reasons on which they are based cannot be discharged merely by reference to the interests of the Community. The provision in question provides that the Commission is to apply provisional measures "where warranted".

The contested measures refer in particular to Article 10 of Regulation No 3017/79 which must be set in its context and viewed in conjunction with other provisions of that regulation.

According to Article 2 (1), which is concerned with the principle of the imposition of an anti-dumping duty, and Article 11, which is concerned more particularly with the imposition of provisional duties, the adoption of such measures is permitted only if the requirements relating to the interests of the Community, to the existence of dumping and to the existence of injury resulting therefrom are fulfilled.

The purpose of the duty to state the reasons on which a measure is based is to enable the Court to exercise its power of review and to indicate clearly and unequivocally to those concerned the reasons on which the measure in question was based. The statement of reasons must be particularly rigorous in the case of individual decisions.

It is not permissible to use urgency as justification for reducing the duty to state the reasons on which a measure is based to a mere cipher. It is necessary to state the reasons on which the condition of urgency itself is based. Once the need for urgent action has been recognized, the Commission must indicate the reasons which make it necessary to adopt the particularly strict measures which the imposition of provisional duties involve.

The contested measures do fit into the context of an established practice in the matter of decision-making by virtue of which no more than a concise statement of reasons is required. The view that the imposition of provisional duties follows automatically from the withdrawal of undertakings given is unacceptable. Moreover, the Commission tends to confuse the absence or inadequacy of a statement of reasons with a concise statement of reasons.

(b) As regards the facts, it must be observed that the reasons on which the contested regulations are based do not contain any reference to the injury which is said to have been caused by the

imports alleged to have been dumped. A mere reference to Regulation No 349/81 is insufficient. Moreover, the recitals in the preamble to that regulation are based on an investigation which was closed in 1980, whilst the contested measures were adopted in 1982.

Nor do the contested regulations refer to the interests of the Community which call for the imposition of duties. Those regulations merely refer to the possibility of injury. The Commission proceeds on the mistaken assumption that the withdrawal of the undertakings previously given justifies the imposition of provisional duties, the need for which arises merely from the dumping practices previously established viewed in conjunction with the withdrawal of the undertakings given. It wrongly treats the possibility of injury to Community producers as equivalent to a threat to the interests of the Community, although Regulation No 3017/79 clearly distinguishes those two conditions. Moreover, the interests of the Community cannot be restricted to the interests of producers alone. At the very least, the Commission must indicate the reasons for which this may possibly be the case.

As far as the requirement relating to the existence of dumping is concerned, the Commission incorrectly affirms that the information which it had at its disposal showed no change between the situation in 1980, when it adopted Regulation No 349/81, and the situation in 1982 when the provisional duties were imposed. At the same time the Commission decided, in the light of new information, to review the situation. It is not sufficient for the Commission to argue, in order that it may rely exclusively on the previous investigations, that the information which it received was contradictory and that certain information provided grounds for imposing anti-dumping duties at a rate higher than that applied in 1980. In fact the Commission availed itself only of the information provided by the complainants. It therefore prejudged the matter, although it had no reason to treat either party more favourably than the other before undertaking any review.

The reasons on which the contested measures are based are inconsistent as regards the requirement relating to the existence of dumping. Regulation No 1976/82 establishes that the average dumping margin has not changed significantly, whereas Regulation No 2302/82 refers to the likelihood of dumping.

The *Commission* considers the submission does not stand up to examination in fact or in law.

(a) So far as the law is concerned, it must be remembered that the contested regulations are based not on Article 11 (1) of Regulation No 3017/79 but on Article 10 (6) thereof which provides that where the Community interests call for such intervention, the Commission is immediately to apply provisional measures where warranted using the information available.

The Commission does not deny that the imposition of provisional duties presupposes not only the existence of a threat to the interests of the Community, but also the existence of dumping and injury. However, according to Article 10 (6) of Regulation No 3017/79, checks to ensure that those requirements have been fulfilled may be carried out exclusively on the basis of the information available

at the time when the undertakings were withdrawn. Since that information largely corresponds to the information available at the time when Regulation No 349/81 was adopted, the reasons on which the contested regulations are based could be stated by reference to those on which the basic regulation is based.

Article 11 (1) which makes the imposition of provisional duties conditional on a prior investigation showing the need for their imposition, is irrelevant in the present case which is concerned with the immediate imposition of provisional duties following the withdrawal of an undertaking. Article 10 (6) which refers to the latter possibility does not require further investigations to be carried out.

As regards measures adopted as a matter of urgency, the statement of reasons, which must be consistent with the nature of both the measure in question and the power exercised, may therefore be concise and may refer to the reasons stated in earlier measures. The contested regulations which fit into the context of an established practice in the matter of decision-making may state concisely the reasons on which they are based, in particular by reference to that practice.

The Commission cannot be required to indicate the reasons for which it refrained, in the exercise of its discretionary powers, from taking measures other than those which it actually adopted.

(b) With regard to the facts, it must be observed that Regulation No 1976/82 refers to the existence of injury. As far as the constituent elements of such injury are concerned, that regulation could validly refer to the basic regulation, No 349/81, which sets out in substance the information available. Furthermore, consideration of the actual state of affairs obtaining at the time when the contested measures were adopted did not disclose any new factors.

Since the sole purpose of Regulation No 2302/82 was to supplement and amend Regulation No 1976/82, there was no need for it to contain a reference to the injury caused.

The reasons relating to the requirement concerning the protection of the interests of the Community are sufficient. Regulation No 349/81 established the existence of dumping practices. The withdrawal of the undertakings previously given warranted the conclusion that Community producers were exposed to the risk of injury, thereby jeopardizing the interests of the Community.

The concept of "interests of the Community" is imprecise and does not contain any criteria amenable to judicial review. The application of that concept, which is a matter for the Commission in connection with the exercise of a broad power of discretion that is political and economic in nature, does not need to be based on specific reasons, as the Court has held in a recent judgment.

It is stated in Regulation No 1976/82 that the information available to the Commission does not indicate that the average dumping margin established in 1980 has changed significantly. That statement is not inconsistent with the publication of a notice of review concerning definitive anti-dumping duties which contains fresh information on dumping margins.

The fact that the duties fixed in 1980 were retained demonstrates that the Commission had no intention of prejudging the matter. The information received by it emanated from various parties. Certain information warranted the conclusion that existing dumping margins were higher than the rate established in 1980 and made it possible

to justify the imposition of anti-dumping duties at rates higher than those ultimately adopted. There is no contradiction between the adoption of provisional measures which are necessary following the withdrawal of undertakings and the publication of a notice of review concerning definitive duties, since Article 10 (6) permits such measures to be applied immediately, irrespective of any procedure for review.

Second submission

The *applicants* claim that the Commission has infringed Regulation No 3017/79, in particular Article 10 (6) thereof, and has contravened the general principles and rules of law, especially the principles of equality, objectivity, distributive justice and proper administration, and the principle that every administrative measure must be based on grounds which are both permissible in law and relevant.

The Commission wrongly took the view that the imposition of a provisional anti-dumping duty was an automatic consequence of the withdrawal of the undertakings previously given and that it did not entail an obligation to carry out a fresh investigation to ensure that the legal requirements were satisfied. The Commission incorrectly affirmed that the information gathered in 1980 was still valid in July and August 1982.

Moreover, Kaiser criticizes the Commission for having taken the view that, after withdrawing its undertaking, Kaiser imported fertilizer into the Community at prices lower than those stipulated in the undertakings.

(a) So far as the law is concerned, it is clear from Article 10 (6) of Regulation No 3017/79 that the imposition of a provisional anti-dumping duty cannot be the automatic consequence of, or the automatic penalty for, the withdrawal of undertakings previously given. The imposition of a duty of that kind presupposes that checks have been carried out to ensure that the three requirements referred to in connection with the first submission are fulfilled. In determining whether such is the case, recourse must be had to the information available. There is a contradiction in claiming from a legal point of view that only one requirement, namely that relating to the protection of the interests of the Community, must be fulfilled and in justifying from a factual point of view the measures adopted by the consideration that the fresh information available supported the view that in July 1982 the dumping margin may have been higher than the average margin established in 1980. An administrative measure tainted by an error of law or by an error of fact, or both, or based on irrelevant information is unlawful.

(b) With regard to the facts, it should be observed that the reasons on which the contested measures were based do not contain a single reference to the requirement relating to the existence of injury and merely state the requirement relating to the need for Community intervention to safeguard the interests of the Community.

As regards the requirement relating to the existence of dumping, Regulation No 1976/82 merely refers to the investigation conducted in 1980, which is not permissible for the purpose of imposing a duty in July 1982 particularly since at the time the Council published a notice of review concerning Regulation No 349/81. The Commission therefore prejudged the matter before undertaking any review and acted as if the re-

quirement relating to the existence of dumping did not exist.

Regulation No 2302/82 merely refers to the possibility of dumping, inasmuch as the applicant Kaiser in all likelihood imported fertilizer at prices so low as to constitute dumping after withdrawing its undertaking. That argument is both unacceptable and incorrect.

The Commission has evidently confused the possibility of injury with the possibility of dumping without, moreover, carrying out an investigation into dumping practices.

A plea of urgency cannot relieve the Commisson of the duty to carry out the most elementary preliminary checks.

Before adopting the contested measures the Commission failed to make use of the information available, in particular the information referred to in its notice of review. Since the economic situation had changed in the meantime, the adoption of the regulation in those circumstances raises the presumption that they are based on incorrect facts. In any event, the action taken by the Commission constitutes a breach of the principle of proper administration. The Commission should have made sure that the information already at its disposal was updated, in the light of the fresh information which it had gathered.

In particular there were three new facts which were brought to the Commission's attention and which unquestionably constituted significant evidence for the view that the imposition of provisional duties was unjustified.

First fact: The decisions adopted by the French Minister for Economic Affairs and Finance which are referred to in the notice of review and more particularly Decision No 81-18/DC relating to the state of competition with regard to the production and marketing of fertilizer. That decision reveals that France's five principal producers enjoyed and still enjoy a large measure of control over the entire distribution system for nitrogen fertilizer on the French market. That stands in contradiction with the apparent finding in 1980 that those producers had lost part of their share of the market. The French decision refers to concerted action by French producers the purpose and effect of which was to distort competition and to bring about an artificial increase in prices. How can the Commission take as a basis the French market price recorded in the middle of the marketing year, when the decision makes it clear that it was virtually impossible to determine the selling price of a specific fertilizer in view of the system of discounts, rebates and guaranteed reductions? That state of affairs casts doubts on the adverse effect on prices alleged to have been established in 1980, as a result of the imports alleged to constitute dumping.

Second fact: The substantial rise in the value of the dollar in relation to the French franc and the German mark since 1980 has raised the cost of imports from the United States. This is an important new fact which demonstrates that the situation had changed since the investigation conducted in 1980.

Third fact: The decline in imports of nitrogen solution fertilizer into the EEC. Regulation No 2182/80 states that the

market share held by those imports increased from nil in the 1976/77 marketing year to approximately 50% in the marketing year 1979/80 in France and in the Federal Republic of Germany. In the notice of review, the Commission took the view that for the period from June 1981 to May 1982, imports from the United States would hold a market share of approximately 58% in the Federal Republic of Germany and 25% in France. Accordingly, since 90% of United States exports are intended for France, the market share held by the United States product in the Community fell from 50% in 1979/80 to 28.5% in 1981/82.

The Commission wrongly bases itself on an alleged substantial increase in imports in the first quarter of 1982. Account must be taken of the results of the 1981/82 agricultural marketing year as a whole and, throughout that year, the imports in question decreased by almost 50% by comparison with the level of such imports in the 1979/80 agricultural year.

There is a fourth fact: the adoption on 14 June 1982 of price-freezing measures by the French Minister for Economic Affairs and Finance. The Commission failed to consider the impact of those measures which — it has been established — have the effect of distorting competition and of influencing the formation of prices on the French market. Since the prices stipulated in the undertakings given by the applicants were at the time higher than the French selling prices which were frozen, how is the Commission's finding of injury to be accounted for?

The contested regulations also contravene the principles of equality, objectivity and distributive justice.

There is a manifest imbalance between the dumping margins applied to the applicants and those applied at the same level to other importers. Moreover the Commission has failed to justify the differences in the rates of duty applied to Transcontinental and to Kaiser respectively, particularly since Transcontinental imports Kaiser products.

The *Commission* considers that the second submission put forward by the applicants is like the first, unfounded in law or in fact.

(a) Checks to ensure compliance with the requirements for the imposition of provisional anti-dumping duties are carried out in the light of the information available, in view of the need for the application of provisional measures forthwith and not after the commencement of a fresh investigation.

(b) So far as the facts are concerned, the duties in question were imposed in the light of the results of the investigations conducted in 1980, the relevance of which was checked in 1982 by reference to the information available at the time.

Regulation No 1976/82 states that the information at the Commission's disposal does not point to a significant change in the dumping margin.

The Commission had at its disposal information which it had received both from the applicants and from the CMC-Engrais. It did not by any means give preference to the information provided by the latter. There were certain factors which indicated that the dumping margin

was greater than the provisional duties fixed at the level of the rates established by Regulation No 349/81.

As far as Regulation No 2302/82 is concerned, the likelihood of dumping, to which reference is made in the regulation, is sufficient in view of the fact that the threat of injury justifies the imposition of an anti-dumping duty and warrants the adoption of provisional measures as a matter of urgency in accordance with Article 10 (6).

Furthermore, it is unacceptable that by withdrawing its undertakings Kaiser should be in a more favourable position than that of the undertakings subject to the general system established by Regulation No 349/81.

As regards the new facts relied upon by the applicants, it must be borne in mind that the Commission enjoys a broad power of discretion in this area. The applicants have failed to discharge the burden of proving that the Commission has committed a manifest error of fact.

With regard to the French decisions, the checks carried out on the premises of the French producers in no way support the conclusions arrived at by the applicants.

The rate of the dollar cannot have had any effect on the dumping margin since the prices stipulated in the undertakings were expressed in the same currency. Moreover, this is a general problem which has no immediate impact on the validity of an anti-dumping duty or *a fortiori* on the validity of a provisional duty.

As regards the volume of nitrogen solution fertilizer imported into the Community, the Commission was entitled to take account of the fact that such imports increased by more than 60% in the first four months of 1982, an increase which amounts to injury or, at least, a threat of injury. The injury may be caused by sporadic dumping, that is to say by massive dumped imports of a product in a relatively short period. *A fortiori,* a threat of injury justifying the adoption of provisional measures as a matter of urgency may be detected where a growth in imports occurs over a relatively short period.

The price-freezing measures cannot have had any effect on the dumping margin since that margin is determined by a comparison between the normal value of the product and its export price, without reference to the selling price of the Community product. Since the measures in question did not enter into force until a few weeks before the adoption of the contested regulations, they cannot have had any influence on the injury.

As regards the arguments concerning the alleged breach of certain general legal principles, it must be borne in mind that the differences between the dumping margins applied in relation to the applicant and those imposed on other importers are justified by the consideration that the present case is concerned with producers who imported in exceptional circumstances fertilizer purchased from producers with whom they have ties. In those circumstances account must be taken not of the export price actually paid but of the price charged when the imported product was resold for the first time to independent resellers, after deduction of the costs and profits.

The difference in the rates of duty applied to Transcontinental and to Kaiser is explained by the fact that Transcontinental acts as a broker and does not sell fertilizer in the United States. Accordingly, the dumping margin was fixed on the basis of the average dumping margins recorded elsewhere. The fact that Transcontinental imported at a given time products which it purchased from Kaiser does not detract from the validity of that reasoning.

C — The application for damages

The *applicants* consider that the illegality of the contested regulations amounts to fault in so far as it reveals that the Commission was guilty of negligence.

The contested measures were not adopted as part of the Commission's legislative activity. They amount to decisions of direct and individual concern to the applicants or, at the very least, to Allied, Transcontinental and Kaiser.

In any event, in the present case, there is a serious breach of a superior rule of law.

The damage resulting from the fault consists in the substantial loss of profit sustained by the applicants as a result of the very considerable obstacles to exports in the first six months of 1982 and the harmful effect on the positions established on the Community fertilizer market.

The *Commission* questions the admissibility of the application for damages in the light of the requirements of Article 38 of the Rules of Procedure. The applicants have given no particulars of the alleged fault and have confined themselves to contending that the contested regulations are unlawful.

Those regulations were adopted as part of the Commission's legislative activity. The applicants must therefore prove that the Commission has committed a serious breach of a superior rule of law.

Moreover, the applicants have failed to adduce any evidence of the existence or the extent of the damage which they claim to have suffered. The only information provided by them relates to the first six months of 1982, that is to say a period which preceded the adoption of the regulations in question.

The applicants have also failed to establish the existence of a causal connection between the alleged fault and the damage which they claim to have suffered.

IV — Oral procedure

At the sitting on 8 November 1983 the applicants Allied, Michel Levy Morelle and Transcontinental, represented by Mr Lebrun and Mr D'Hondt, the applicant Kaiser, represented by Mr Hooper, the Commission of the European Communities, represented by Mr Gilsdorf and Mr Jacob, presented oral argument and answered questions put to them by the Court.

The *applicants* contended that the judgment of the Court of 4 October 1983 in Case 191/82 *(FEDIOL* [1983] ECR 2913) established that their applications were admissible.

Enlarging on their submission that the statement of reasons on which the contested measures were based is defective, the applicants maintained as regards the formal duty to state reasons, that the contested decisions did not

contain any grounds relating to dumping and to an adverse effect on the interests of the Community and, as regards the validity of the reasons stated, that imports from the United States had plummeted during the period in question and had at present ceased altogether.

The Commission has incorrectly applied in the present case the principle that the imposition of provisional anti-dumping duties follows automatically from the withdrawal of undertakings.

The notice of review published on 16 July 1982 resulted in the adoption of Council Regulation (EEC) No 101/83 of 17 January 1983 imposing a definitive anti-dumping duty on certain chemical fertilizer originating in the United States of America (Official Journal 1983, L 15, p. 1), Commission Regulation (EEC) No 290/83 of 2 February 1983 imposing a provisional anti-dumping duty on imports of urea ammonium nitrate solution fertilizer originating in the United States of America (Official Journal 1983, L 33, p. 9) and Council Regulation (EEC) No 2192/83 of 29 July 1983 accepting an undertaking given in connection with the anti-dumping review proceeding on imports of urea ammonium nitrate solution fertilizer (UAN) originating in the United States of America and terminating the proceeding (Official Journal 1983, L 211, p. 1). At present, liquid fertilizer imported from the United States was covered by four different systems and that applied to the applicant undertakings was truly penal in nature.

As a result of successive increases in the value of the American dollar, as reflected in the price and in the volume of imports from the United States, American prices were no longer competitive.

The three companies which had given an undertaking and had not withdrawn it had in fact abandoned the European market.

The *Commission*, whilst maintaining its objection of inadmissibility as regards the application originally submitted by Demufert, took the view that the arguments put foward in favour of and against the admissibility of the applications submitted by the other undertakings were nicely balanced. In any event, review of the substance of the case by the Court should be particularly limited in scope since the anti-dumping measures at issue were provisional.

As regards the action taken in the light of the notice of review published on 16 July 1982, it was appropriate to distinguish between two types of proceedings, one concerning the companies which had withdrawn their undertakings and the other concerning companies which had got given any undertakings.

The volume of United States fertilizer exports did not fluctuate between 1980 and 1982 in the manner indicated by the applicants.

As regards the statement of reasons on which the contested regulations were based, it was appropriate to take account, on the one hand, of the fact that the regulations were adopted as a matter of urgency and that the applicants refused to cooperate in providing the Commission with information and, on the other hand, of the fact that the Community authorities enjoyed a very broad power of discretion of an economic and political nature as regards the concept of the interests of the Community and that that concept did not call for a specific statement of reasons, particularly where the imposition of a provisional duty was concerned.

The Commission was justified in adopting the contested measures on the basis of the information available to it at the time of the adoption of Regulation No 349/81. The validity of that information was confirmed subsequently.

The rise in the value of the dollar cannot have had any effect on the dumping margin since the factors to be taken into account in that regard are all expressed in dollars. Moreover, the undertakings given by certain exporters contributed in themselves towards curbing imports from the United States. The prices of fertilizer exported by the United States were still broadly competitive by comparison with the prices of fertilizer produced in the Community.

None of the companies which honoured their undertakings had engaged in exportation since the adoption of the first regulation imposing a definitive duty; the undertakings given were still valid.

The Advocate General delivered his opinion at the sitting on 10 January 1984.

Decision

1 By application lodged at the Court Registry on 20 September 1982, Allied Corporation, a corporation governed by the law of the State of New Jersey (United States of America), having its office in Morristown (hereinafter referred to as "Allied"), Demufert SA, a company governed by Belgian law, having its registered office in Brussels and now in liquidation (hereinafter referred to as "Demufert"), and Transcontinental Fertilizer Company, a corporation governed by the law of the State of Pennsylvania (United States of America), having its office in Philadelphia (hereinafter referred to as "Transcontinental"), brought an action under the second paragraph of Article 173 of the EEC Treaty in which they request the Court to declare void Commission Regulation (EEC) No 1976/82 of 19 July 1982 imposing a provisional anti-dumping duty on certain imports of certain chemical fertilizer originating in the United States of America (Official Journal 1982, L 214, p. 7) and Commission Regulation (EEC) No 2302/82 of 15 August 1982 (Official Journal 1982, L 246, p. 5) amending Regulation No 1976/82 and adopted pursuant to Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1), and seek an order for damages against the Commission.

2 By application lodged at the Court Registry on 15 October 1982, Kaiser Aluminium and Chemical Corporation, a corporation governed by the law of the State of Delaware (United States of America), having its office in Wilmington (hereinafter referred to as "Kaiser"), brought an action for the same relief as that sought by the other applicants. The applications were joined for the purposes of the procedure and the judgment by order of 15 December 1982.

Legislative background and purpose of the applications

3 It is necessary to bear in mind that, following a complaint submitted by the organization representing the European nitrogen and phosphate fertilizer industry, the Commission initiated a proceeding in 1980 concerning imports of certain chemical fertilizer originating in the United States of America and adopted Regulation (EEC) No 2182/80 (Official Journal 1980, L 212, p. 43), imposing a provisional anti-dumping duty on the products in question.

4 By Decision No 81/35/EEC of 9 February 1981 (Official Journal 1981, L 39, p. 35), the Commission accepted the undertakings given in connection with the anti-dumping proceeding by the applicants Allied, Transcontinental and Kaiser, to increase their prices to a level eliminating the dumping margins which had been established at 6.5% in respect of the firt two applicants and at 5% in respect of Kaiser. By Regulation (EEC) No 349/81 of the same date (Official Journal 1981, L 39, p. 4), the Council imposed a definitive anti-dumping duty on urea ammonium nitrate solution fertilizer falling within subheading ex 31.02 C of the Common Customs Tariff and corresponding to Nimexe code ex 31.02-90, originating in the United States of America and fixed the rate of duty at 6.5% on the basis of the customs value. The 23rd recital in the preamble to that regulation states that Allied, Kaiser and Transcontinental have voluntarily undertaken to increase their prices to a level eliminating the dumping margins found and that the Commission has accepted those undertakings. Accordingly, Article 2 of that regulation exempts from anti-dumping duty fertilizer exported by certain United States undertakings, including Allied, Kaiser und Transcontinental.

5 It is clear from the documents before the Court that the Commission, in the light of the applications for review submitted to it, in the first place by a

"major United States exporter" and by Demufert and subsequently by the organization representing the European fertilizer industry, published on 16 July 1982 a notice of a review of the definitive anti-dumping duty on imports of certain chemical fertilizer originating in the United States of America (Official Journal 1982, C 179, p. 4).

6 Allied and Transcontinental withdrew their undertakings at the same time by letters of 7 June and 2 July 1982 respectively, whereupon the Commission adopted Regulation No 1976/82 imposing a provisional anti-dumping duty on fertilizer exported by those two undertakings at the rate of 6.5% of the customs value. Following Kaiser's withdrawal of its undertaking, by telex message of 23 July 1982, the Commission adopted Regulation No 2302/82 amending Regulation No 1978/82 so as to confirm the levying of an anti-dumping duty of 6.5% on exports by Allied and Transcontinental and to impose a duty of 5% on exports by Kaiser. Those are the two regulations which are at issue in this case.

Admissibility

7 The Commission raises an objection of inadmissibility against the application lodged by Demufert. The Commission contends that Demufert, in its capacity as an independent importer, has no *locus standi,* under the provisions of the second paragraph of Article 173 of the EEC Treaty, to apply for a declaration that two regulations whose validity is contested are void. According to the Commission, the anti-dumping duty imposed by the regulations at issue — which merely supplement Regulation No 349/81 imposing a definitive anti-dumping duty — is of concern to Demufert only in its objective capacity as an importer. As such, Demufert does not therefore according to the consistent case-law of the Court (see, most recently, the judgment of 6 October 1982 in Case 307/81, *Alusuisse Italia,* [1982] ECR 3463, paragraph 9 of the decision), meet the requirement, stipulated by the second paragraph of Article 173, that the measures in question should be of direct and individual concern to it.

8 As far as the other applicants are concerned, the Commission merely expresses doubts as regards the admissibility of their applications. In the first place, it concedes that there is a very specific reference to the applicants in question both in Regulation No 349/81 and in the contested regulations,

which were adopted following the withdrawal of the undertakings given individually by those applicants. The Commission also acknowledges that, in their capacity as producers and exporters, those undertakings are not guaranteed legal protection in the Member States of the Community and since the sole factor which gives rise to the collection of anti-dumping duty is importation, the applicants may bring an action before the Court only through undertakings which import their products. Secondly, however, the Commission maintains that the sole effect of the contested regulations is to bring the applicants, following the withdrawal of their undertakings, within the scope of the general system established by Regulation No 349/81, a measure which is in substance unquestionably a regulation inasmuch as it applies to all imports of the product in question originating in the United States. From the point of view of avoiding a needless duplication of legal remedies, the Commission considers it undesirable to make available a means of redress parallel to the proceedings which may be instituted in the national courts against the collection of anti-dumping duty in the wake of complaints by importers. Finally, the Commission draws attention to the "unusual" consequences which would follow if the applications were declared admissible, since the effect of such a declaration would be to ascribe a dual character to anti-dumping measures, inasmuch as the same measures would have to be classified as "decisions" in relation to certain undertakings and as "regulations" in relation to all the other undertakings.

9 During the oral procedure, the Commission, after indicating once again its opposition to the admissibility of Demufert's application, informed the Court that, on balance, it was in favour of the admissibility of direct actions brought by undertakings from non-member countries and, in any event, of those brought by the applicant undertakings on the ground that they were expressly mentioned in the statement of the reasons for, and in the provisions of, the contested measures. The Commission considers that such an approach would have a beneficial effect on the interests of Community undertakings in non-member countries in the event of the initiation of anti-dumping proceedings against them, particularly in the United States of America where the means of redress are to a large extent available to undertakings from other countries. The Commission takes the view that, in the interests of reciprocity, it is appropriate to provide similar guarantees under the judicial system of the Community.

10 The questions of admissibility raised by the Commission must be resolved in the light of the system established by Regulation No 3017/79 and, more particularly, of the nature of the anti-dumping measures provided for by that regulation, regard being had to the provisions of the second paragraph of Article 173 of the EEC Treaty.

11 Article 13 (1) of Regulation No 3017/79 provides that "anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by regulation". Although it is true that, in the light of the criteria set out in the second paragraph of Article 173, such measures are, in fact, as regards their nature and their scope, of a legislative character, inasmuch as they apply to all the traders concerned, taken as a whole, the provisions may none the less be of direct and individual concern to those producers and exporters who are charged with practising dumping. It is clear from Article 2 of Regulation No 3017/79 that anti-dumping duties may be imposed only on the basis of the findings resulting from investigations concerning the production prices and export prices of undertakings which have been individually identified.

12 It is thus clear that measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations.

13 As the Commission has rightly stated, to acknowledge that undertakings which fulfil those requirements have a right of action, in accordance with the principles laid down in the second paragraph of Article 173, does not give rise to a risk of duplication of means of redress since it is possible to bring an action in the national courts only following the collection of an anti-dumping duty which is normally paid by an importer residing within the Community. There is no risk of conflicting decisions in this area since, by virtue of the mechanism of the reference for a preliminary ruling under Article 177 of the EEC Treaty, it is for the Court of Justice alone to give a final decision on the validity of the contested regulations.

14 It follows that the applications lodged by Allied, Kaiser and Transcontinental are admissible. All three applicants gave an undertaking under Article 10 of Regulation No 3017/79, they were accordingly referred to individually in Article 2 of Regulation No 349/81 and, after withdrawing their undertakings, their individual circumstances formed the subject-matter of the two regulations contested in the applications.

15 However, the position is different in the case of Demufert, since that applicant is an importer established in one of the Member States and is not referred to in any of the measures which are contested in the applications before the Court. As such, therefore, Demufert is concerned by the effects of the contested regulations only in so far as it comes objectively within the scope of the provisions of those regulations. The uncontested fact that Demufert acted as importing agent for Allied does not alter that conclusion. In contrast to the situation considered by the Court in its judgment of 29 March 1979 in Case 113/77 *(NTN Toyo Bearing Company Ltd and Others,* [1979] ECR 1185, paragraph 9 of the decision), in the present case the existence of dumping has been established, as is stated in the 10th recital in the preamble to Regulation No 349/81, by reference to the export prices of American producers and not by reference to the retail price charged by European importers, with the result that the findings relating to the existence of dumping are not of direct concern to Demufert, whereas they are of direct concern to the producers and exporters. It must be pointed out that, in so far as it was compelled to pay anti-dumping duties, it is open to the applicant to bring an action in the competent national court in the context of which it can put forward its argument against the validity of the regulations at issue.

16 It follows that the application submitted by Demufert must be declared inadmissible.

Substance

17 The applicants put forward two groups of submissions in order to contest the validity of the regulations which subjected the importation of their products to anti-dumping duties. In the first place, they consider that the statements of the reasons on which the contested regulations were based are deficient in various respects. Secondly, they consider that the Commission has failed to take account of the fact that after anti-dumping duties were imposed by Regulation No 349/81 the situation changed in various respects and the Commission was therefore wrong in accepting that dumping was still being practised.

The submission concerning the deficiency of the statements of reasons

18 The applicants contend that, after they withdrew their undertakings, the Commission adopted Regulations No 1976/82 and No 2302/82 imposing an

anti-dumping duty on them on purely formal grounds, without having conducted a fresh investigation to make sure that the levying of that duty from them was justified in relation to them. They point out in particular that, in the preamble to Regulation No 2302/82, the Commission refers to the "likelihood" that following the withdrawal of its undertaking the fertilizer produced by Kaiser was imported at prices below those agreed in its undertaking and therefore at levels so low as to constitute dumping.

19 That contention must be assessed in the light of the requirements laid down by Article 10 (6) of Regulation No 3017/79, which it is appropriate to set out in full:

"Where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated and that further investigation is warranted, it shall forthwith inform the Member States and reopen the proceeding. Furthermore, where the Community interests call for such intervention, it shall immediately apply provisional measures where warranted using the information available."

20 That provision must be interpreted in the light of the 15th recital in the preamble to that regulation, according to which "it is necessary that the Community's decision-making process permit rapid and efficient action, in particular through measures taken by the Commission, as for instance the imposition of provisional duties".

21 It follows from the aforementioned provision that where an undertaking has been withdrawn the Commission must promptly apply provisional measures if it considers that the interests of the Community call for such action. By specifying that such measures are to be introduced by the Commission "using the information available", the regulation makes it clear that the Commission is not required to conduct a further investigation but must normally take a decision on the basis of the information which was at its disposal when the undertakings which have been withdrawn in the meantime were given. Since the very fact that an undertaking is given warrants the assumption that dumping actually exists, the Commission cannot be required to conduct a further investigation when such an undertaking is withdrawn. In

such circumstances, it is quite normal that the Commission should extend to the undertakings in question the provisions which would have been applicable to them if no undertaking had been given.

22 If a trader, when withdrawing his undertaking considers that there are grounds justifying a review of his position and a grant of exemption from any anti-dumping duty in spite of the withdrawal of such undertaking, it is incumbent on him to submit to the Commission appropriate evidence in support of his view.

23 It is not apparent from the documents before the Court that, at the material time, the applicants submitted fresh evidence to the Commission. The Commission cannot therefore be criticized for having taken into account the interests of the Community and for having summarily reappraised the situation when it imposed on the applicants the anti-dumping duties which seemed to be justified in the course of the investigation which resulted in the adoption of Regulation No 349/81.

24 As regards the use of the term "likelihood" in the preamble to Regulation No 2303/81 in relation to Kaiser, it is sufficient to point out that, since a provisional duty was involved, the Commission was entitled, in the light of the facts previously established, to confine itself to taking into consideration the mere possibility of imports in order to impose a duty corresponding to the dumping margin previously established, with a view to preventing sales at abnormally low prices.

25 Those submissions must therefore be rejected.

New facts relied upon by the applicants

26 The applicants contend that, after the adoption of Regulation No 349/81, a number of new facts arose which the Commission failed to take into account when it adopted the contested measures. They refer in this connection to three separate sets of circumstances:

(a) the adoption of a series of decisions on 7 December 1981 by the French Minister for Economic Affairs and Finance following an opinion of the Committee on Competition relating to the state of competition with

regard to the production and marketing of fertilizer (Bulletin Officiel de la Concurrence et de la Consommation [Official Gazette on Competition and Consumption], No 23, 12 December 1981) which revealed the existence at the material time of a restrictive agreement on prices on the French market in fertilizer. Furthermore, the applicant Kaiser refers to the price-freezing measures adopted on 14 June 1982 by the French Government. The applicants consider that in those circumstances the selling prices of fertilizer on the French market were distorted with the result that it is no longer possible to establish the existence of dumping;

(b) the consistent increase in the value of the dollar on the foreign exchange market resulting in a continuing increase in the cost of imports from the United States of America on the European market;

(c) the decline at the material time of imports of liquid fertilizer on the European market. Kaiser, in particular, states that its exports to the Community have ceased altogether.

27 Those arguments call for an initial observation of a general nature. According to Article 2 of Regulation No 3017/79, the dumping margin is established by means of a comparison between the export price of the product exported to the Community and the "normal value" of the product in question, that is to say, primarily, the price paid for the like product intended for consumption in the country of origin. The applicants have not submitted any evidence which might furnish a basis for the view that there have been any variations in the dumping margin, defined in the above terms, since the entry into force of the definitive anti-dumping duty imposed by Regulation No 349/81. In particular, it must be pointed out that, since all the prices used to calculate the dumping margin in the present case are expressed in dollars, fluctuations in that currency in relation to European currencies have no effect on the determination of the dumping margin. It is therefore clear that the "new facts" relied upon by the applicants are relevant only as regards the determination of "injury", within the meaning of Article 4 of Regulation No 3017/79, caused to the European producers.

28 As far as the measures adopted by the French Government are concerned, the Commission has convincingly demonstrated that those measures did not exert a decisive influence on the assessment of the question whether injury

was caused to the European fertilizer industry. Without contesting the fact that the French market constitutes the most important outlet for the imports in question in the Community, the Commission maintains that it established the existence of injury as a result of investigations carried out independently of those conducted by the French authorities. It points out that the opinions of the Committee on Competition and the decisions adopted in pursuance thereof by the French Minister for Economic Affairs and Finance are concerned with the fertilizer market in its entirety, not with the specific market in relation to which the practice of dumping was established, and that they relate to a period which coincides only partially with the period in respect of which the investigations which resulted in the adoption of the contested measures were conducted.

29 As regards the increase in the value of the dollar and the decline in imports, the Commission draws attention to the fact that, although it is true the volume of imports of nitrogen solution fertilizer originating in the United States into the Community fell in 1981/82, imports of that product increased substantially in the first quarter of 1982, in spite of the increase in the value of the dollar. It follows that this factor has not had the effect of compensating for the injury caused to European producers.

30 The arguments put forward by the applicants are not of such a nature as to constitute proof that the Commission committed a number of manifest errors in its assessment of the question whether injury was caused to the European fertilizer industry as a result of the practice of dumping, established by reference to the criteria laid down by Article 2 of Regulation No 3017/79. Consideration of the facts put forward by the applicants therefore warrants the conclusion that the Commission could properly take the view that, after the applicants had withdrawn their undertakings, the interests of the Community called for the adoption of provisional measures forthwith, in order to prevent injury to Community producers.

31 Consequently those submissions must also be rejected.

32 It is clear from all the foregoing considerations that the applications of Allied, Transcontinental and Kaiser must be dismissed as unfounded. Consequently, the applications for damages, which are linked to the applications for a declaration of nullity, are devoid of purpose and must also be dismissed.

Costs

33 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have been unsuccessful in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application of Michel Levy Morelle, Avocat, acting as liquidator of Demufert SA, as inadmissible and the applications of Allied Corporation, Transcontinental Fertilizer Company and Kaiser Aluminium and Chemical Corporation as unfounded.**

2. **Orders the applicants to bear the costs.**

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore Mackenzie Stuart O'Keeffe Bosco Everling

Delivered in open court in Luxembourg on 21 February 1984.

For the Registrar

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President