JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
5 June 1996 *

In Case T-162/94,

NMB France SARL, a company governed by French law, whose registered office is in Argenteuil (France),

NMB-Minebea-GmbH, a company governed by German law, whose registered office is in Langen (Germany),

NMB (UK) Ltd, a company governed by English law, whose registered office is in Bracknell, Berkshire (United Kingdom),

NMB Italia Srl, a company governed by Italian law, whose registered office is in Mazzo di Rho (Italy),

represented by Ian Forrester QC, of the Scots Bar, Jacquelyn F. MacLennan, Solicitor, and A. Kaplanidis, of the Thessaloniki Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicants,

* Language of the case: English.

Commission of the European Communities, represented by Eric L. White, of its Legal Service, acting as Agent, assisted by Claus-Michael Happe, a national civil servant seconded to the Commission's Legal Service, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

supported by

Federation of European Bearing Manufacturers' Associations (FEBMA), whose headquarters is in Frankfurt (Germany), represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

interveners,

APPLICATION for the annulment of Commission Decisions 92/332/EEC, 92/333/EEC, 92/334/EEC and 92/335/EEC of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball-bearings originating in Singapore (OJ 1992 L 185, pp. 35, 38, 41 and 44),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 6 December 1995,

gives the following

Judgment

Legal background, facts and written procedure

1 The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) (OJ 1980 L 71, p. 90, hereinafter 'the 1979 Anti-Dumping Code'), approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the multilateral agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1), provided, at Article 8(3):

'The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2 .... 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.'

2 Article 2(5) and (6) of the Anti-Dumping Code provided:

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

'In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) ... the two prices shall be compared at the same level of trade, normally at the ex-factory level .... Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.'

3 Following the adoption of the 1979 Anti-Dumping Code, the Council adopted anti-dumping rules, first by Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1, hereinafter 'Regulation No 2176/84'), then by Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'Regulation No 2423/88' or 'the basic regulation').

4 According to Article 16(1) of the basic regulation,

'Where an importer can show that the duty collected exceeds the actual dumping margin ... the excess amount shall be reimbursed. This amount shall be calculated in relation to the changes which have occurred in the dumping margin ... All refund calculations shall be made in accordance with the provisions of Articles 2 or 3 and shall be based, as far as possible, on the same method applied in the original investigation ...'.

5 The dumping margin to be taken into account for the purposes of applying Article 16(1) was defined in Article 2(14)(a) of the basic regulation as 'the amount by which the normal value exceeds the export price'.

6 As regards determination of the export price, Article 2(8)(b) of the basic regulation provided:

'where it appears that there is an association or a compensatory arrangement between the exporter and the importer ... or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer ... In such cases, allowance shall be made for all costs incurred between importation and resale, including ... a reasonable profit margin.

Such allowances shall include, in particular, the following:

...

(ii) customs duties, any anti-dumping duties [— the so-called "duty as a cost" rule —] and other taxes payable in the importing country by reason of the importation or sale of the goods;

...'.

7 The applicants, wholly owned subsidiaries of the Japanese Minebea (Nippon Miniature Bearing) Group, distribute in the Community ball-bearings supplied by the NMB and Pelmec Singapore companies, which form part of the same group.

8 By virtue of Council Regulation (EEC) No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball-bearings originating in Japan and Singapore (OJ 1984 L 193, p. 1), imports by the European subsidiaries of Minebea of ball-bearings manufactured in Singapore by *inter alia* the Minebea Group were subjected to an anti-dumping duty of 33.89% of the net price, free-at-Community-frontier, before duty.

9 After paying that duty, the applicants, with the exception of NMB France, submitted several applications for reimbursements under Article 16 of Regulation No 2176/84. The Commission partially accepted and partially rejected the applications in respect of imports in 1985 and 1986, the partial rejections being based on application of the 'duty as a cost' rule (the same rule, in Regulation No 2176/84, as that contained in Regulation No 2423/88 — see above, paragraph 6, at (ii)); when

calculating the constructed export price, the Commission deducted the anti-dumping duties paid by the three applicants.

10 The latter, considering that the 'duty as a cost' rule was contrary to superior rules of law, brought an action before the Court of Justice for annulment of the decisions partially rejecting their applications for refunds.

11 In his Opinion in that case, delivered on 21 March 1991 (Case C-188/88 *NMB and Others* v *Commission* [1992] ECR I-1689, at I-1704), the Advocate General proposed that the Court uphold the application. He took the view that, whilst in the case of review procedures application of the 'duty as a cost' rule appears perfectly justified, the application of that rule in refund procedures gives rise to consequences that are incompatible both with the essential principles of the anti-dumping rules and with certain fundamental principles of Community law. In order to bring the dumping to an end — in other words, to eliminate the dumping margin — and therefore obtain the refund, an associated importer would have to increase his resale price to an independent purchaser only by an amount equal to the dumping margin found, and no more; with a 'single jump' of that kind, the product in question would no longer be sold at an artificially low price and there would be no further need for measures to protect trade. In such circumstances, the anti-dumping duties paid would not therefore have to be regarded as a cost to be deducted from the resale price; otherwise, a dumping margin would be perceived even though in reality there was none and the associated importer would be subjected to discrimination as compared with an independent importer.

12 In its judgment in Case C-188/88 *NMB and Others* v *Commission* [1992] ECR I-1689, the Court dismissed the action as unfounded. According to that judgment, the 'duty as a cost' rule applies both to procedures for review and procedures for refund, the purpose of constructing the export price being the same in both cases:

the Court held that in both cases the purpose is to establish the actual dumping margin. The Court also stated that the alleged difference in the treatment of associated importers and independent importers was justified by the difference in their respective situations in relation to the dumping and did not therefore constitute discrimination. It also found that there was no inconsistency between Regulation No 2176/84 and the 1979 Anti-Dumping Code. Finally, it also rejected the allegations of breach of the principle of proportionality and misuse of powers.

13 The applicants, whose actions were thus dismissed, disagreed with those findings. As regards the imports in the period from January 1987 to September 1991 inclusive, each of the applicants, including NMB France, lodged, pursuant to Article 16 of the basic regulation and Article 16 of the earlier Regulation No 2176/84, fresh applications for refunds of the anti-dumping duty paid during the abovementioned period.

14 By four decisions (92/332/EEC, 92/333/EEC, 92/334/EEC and 92/335/EEC) of 3 June 1992 concerning applications for the refund of anti-dumping duties collected on certain imports of certain ball-bearings originating in Singapore (OJ 1992 L 185, pp. 35, 38, 41 and 44), notified on 15 June 1992 to NMB (UK) Ltd and on 16 June 1992 to NMB France SARL, NMB Italia Srl and NMB-Minebea-GmbH, the Commission partially granted the refund applications. The Commission recognized, in those decisions, that the anti-dumping duty collected exceeded the dumping margins as a result of a decrease in normal value on the Singapore domestic market. However, the refund applications were partially rejected because, in calculating the constructed export price, the Commission deducted the anti-dumping duty paid by the applicants, applying the rules in force, in particular the 'duty as a cost' rule, and referring to the judgment in Case C-188/88 *NMB and Others* v *Commission*.

15 It was in those circumstances that the applicants brought the present action, the application being received at the Registry of the Court of Justice on 22 August

1992. The written procedure in the case, originally registered as Case C-346/92, was completed before the Court of Justice and followed the normal course. By order of 2 July 1993, the President of the Court of Justice granted leave to FEBMA (Federation of European Bearing Manufacturers' Associations) to intervene in support of the Commission.

16 By order of 18 April 1994, the Court of Justice referred this case to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom/ECSC/EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), in the version contained in Council Decision 94/149/ECSC, EC of 7 March 1994, amending Decision 93/350 (OJ 1994 L 66, p. 29).

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) adopted measures of organization of the procedure and called on the parties and — pursuant to the second paragraph of Article 21 of the Statute of the Court of Justice of the European Community — the Council to produce certain documents and to reply to a number of questions. On 10 March 1995 the applicants submitted their replies. As regards the economic aspects of the dispute, in particular, first, the extent to which the applicants effected a 'single jump' or a 'double jump' or something between the two, and, secondly, the extent to which their resale prices and onward selling prices in the Community were actually increased, the applicants produced computer lists in which three invoices were chosen to show the calculation method used.

18 By order of 12 June 1995, the President of the First Chamber, Extended Composition, granted a request for confidential treatment, vis-à-vis FEBMA, made by the applicants regarding certain parts of their replies to the questions put by the Court and certain parts of the Commission's observations on those replies. By decision of the Court of First Instance of 19 September 1995 the Judge-Rapporteur was assigned to the Second Chamber, Extended Composition, and the case was therefore allocated to that Chamber.

19 In the meantime, the multilateral trade negotiations of the GATT Uruguay Round commenced in 1986 had resulted in the adoption in 1994 of a new Anti-Dumping Code (see Council Decision 94/800/EC of 22 December 1994 on the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, pp. 1 and 103). The 1994 Code repeats, in Article 2.3 concerning construction of the export price by reason of an association between the exporter and the importer, the old rules of the 1979 Code and repeats, in Article 2.4, that in such cases 'allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made'. With respect to the refund of anti-dumping duties, the 1994 Code contains the following rule:

'Article 9.3.3

In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.'

20 On 22 December 1994, the Council adopted Regulation (EC) No 3283/94 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1), which, according to Article 24 thereof, entered into force on 1 January 1995 and, according to the fourth recital in its preamble, is intended to transpose the new 1994 Anti-Dumping Code into Community law.

21 Article 11(10) of Regulation No 3283/94 reads as follows:

'In any investigation carried out pursuant to this article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2(9), it shall calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.'

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided, on 10 October 1995, to open the oral procedure without any preparatory inquiry. However, it put to the parties further questions concerning the new 1994 rules, to which they gave their replies at the hearing.

23 The parties presented oral argument and answered questions put to them by the Court at the hearing on 6 December 1995.

Forms of order sought

24 In their application, the applicants claim that the Court of First Instance should:

— annul Decisions 92/332, 92/333, 92/334 and 92/335 in so far as they deny to the applicants refunds of anti-dumping duties collected in 1987, 1988, 1989, 1990 and 1991 on imports of ball-bearings from Singapore, declaring Article

2(8)(b)(ii) of Regulation No 2423/88 inapplicable under Article 184 of the EEC Treaty to the extent necessary for this purpose;

— take such other steps as justice may require;

— order the Commission to pay the costs;

— order FEBMA, the intervener supporting the Commission, to bear the costs of its intervention.

25 The Commission contends that the Court of First Instance should:

— dismiss the action as inadmissible or, in the alternative, unfounded;

— order the applicants to pay the costs.

26 FEBMA, the intervener, claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs incurred by it as intervener.

Admissibility of the application

Arguments of the parties

27 Without raising a formal objection of inadmissibility, the Commission submits that the bringing of this action constitutes an abuse of procedure. Although purporting to contest measures different from those at issue in Case C-188/88 *NMB and Others* v *Commission*, the applicants have not, on their own admission, put forward in this case any argument not already raised in that case. They merely challenge the judgment in Case C-188/88 *NMB and Others* v *Commission*. Consequently, the Commission considers that the Court should dismiss this action, if not on the ground of inadmissibility then on the ground that no argument has been put forward that was not put forward in Case C-188/88 *NMB and Others* v *Commission* and there is therefore no basis for challenging that judgment. It adds that if this action were declared admissible, the applicants would be able to avoid the strict conditions laid down for the extraordinary remedy of applying for revision of a judgment under Article 41 of the Statute of the Court of Justice of the European Community.

28 The Commission submits, as a matter of principle, that a decision by the Court to overrule a previous judgment is a serious matter which should be taken only in exceptional circumstances. Not only would such a decision signify that irreparable injustice had been done in the previous case and in many other similar cases but it would also put into question the very authority of the Court's judgments and would be liable to undermine the stability and certainty of the law and encourage innumerable attempts to have decided cases reconsidered.

29 In response to the applicants' attempt to justify their request for reconsideration of the judgment in Case C-188/88 *NMB and Others* v *Commission* by reason of the extraordinarily unfair nature of the contested administrative decisions and the allegation that there were lacunae in the judgment, the Commission states, first, that the measures complained of are required by the applicable legislation and are necessary to combat the unfair practice of dumping and, secondly, that in Case

C-188/88 the arguments were well and exhaustively put forward and the Court fully understood them, as is clear from the Report for the Hearing, the Opinion of the Advocate General and the judgment.

30 Finally, the applicants refer to the commencement of GATT proceedings which might result in a finding condemning the contested Community practice, in response to which the Commission contends that such proceedings cannot alter the legal situation in the Community. The nature of the GATT dispute settlement procedure is fundamentally different from court judgments: the GATT is essentially a system of law by consensus. Consequently, even if such a settlement procedure were to be commenced, its results would not be decisive in character but would merely be recommendations to the Community which would not be binding on the Community judicature.

31 FEBMA, the intervener in support of the Commission, considers that the applicants have no legitimate interest in judicial review, their complaints having already been dealt with in the judgment in Case C-188/88. That judgment settles all the matters raised in the present action, which is based on exactly the same pleas in law as those put forward in the first proceedings and therefore constitutes a disguised appeal against the first judgment.

32 The applicants state in reply that the purpose of their action is to secure the annulment of Commission Decisions 92/332/EEC to 92/335/EEC, which are of direct and individual concern to them in that they were denied reimbursement of the anti-dumping duties collected between 1987 and 1991 to which they consider themselves duly entitled. Those decisions were based on fundamentally illegal considerations. The applicants therefore consider that they are entitled to request judicial review, particularly since there is no rule that an application is rendered inadmissible on the ground that, if an earlier judgment were followed, the action would be held unfounded.

33 Although they concede that the reasoning set forth in their application is similar in several respects to that put forward in Case C-188/88 *NMB and Others* v *Commission*, the applicants maintain that the bringing of this action is justified by the extraordinary unfairness of the contested decisions, by the fact that there are a number of lacunae in the judgment in Case C-188/88, and by the initiation of proceedings within GATT which may lead to the condemnation of the Community's practice. For those reasons, the applicants consider that the Court should give fresh attention to the points raised in the present action.

34 Still with respect to GATT, the applicants state that the 1992 Uruguay Round negotiations led to an informal agreement in the form of a set of draft rules, the 'Dunkel draft'. Those rules are likely to amend the Anti-Dumping Code in a manner which confirms their viewpoint. Article 9.3.3 of that document expressly provides for calculation of the export price without any deduction of the anti-dumping duties paid.

35 The applicants give their views, finally, on the alleged risk, mentioned by the Commission, that unsuccessful applicants might frequently return to the Community court requesting a re-hearing of their previous grievances. They insist that there is little justification for that concern, since litigation is expensive, time-consuming and rarely embarked on lightly: in general, an applicant has no interest in burdening itself unnecessarily with the extra costs and delays involved in legal proceedings. Moreover, it would be extremely unusual for a party to be able to raise once more before the Community judicature a challenge to the legality of a new measure similar to the one already upheld as legal. According to the applicants, there is thus a double filter: the burdensome nature of litigation and the very limited number of situations where particular parties are the addressees of acts identical to previously challenged acts.

Findings of the Court

36 It must be borne in mind at the outset that the Court of First Instance is only bound by the judgments of the Court of Justice, first, in the circumstances laid down in the second paragraph of Article 54 of the Statute of the Court of Justice of the European Community, and, secondly, pursuant to the principle of *res judicata*.

37 Consequently, it is necessary to consider in this case whether the status of *res judicata* of the judgment in Case C-188/88 *NMB and Others* v *Commission*, in which the Court dismissed as unfounded the action brought by NMB (Deutschland) GmbH, NMB Italia Srl and NMB (UK) Ltd, is such as to bar the admissibility of the present action. It is settled case-law that this can be the case only if the proceedings disposed of by the judgment in Case C-188/88 *NMB and Others* v *Commission* were between the same parties, had the same purpose and were based on the same submissions as the present case (judgment of the Court of Justice in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9, the order of the Court of Justice in Joined Cases 159/84, 267/84, 12/85 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraph 3, the judgment of the Court of Justice in Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12, and the judgment of the Court of First Instance in Case T-28/89 *Maindiaux and Others* v *ESC* [1990] ECR II-59, paragraph 23), those conditions necessarily being cumulative.

38 The application in Case C-188/88 *NMB and Others* v *Commission* sought the annulment of Decisions 88/327/EEC, 88/328/EEC and 88/329/EEC (OJ 1988 L 148, pp. 26, 28 and 31) by which the Commission had rejected requests for reimbursements in an aggregate amount of about ECU 2.9 million in respect of anti-dumping duties collected in 1985 and 1986 on imports of certain ball-bearings, whereas the present action concerns different, later decisions relating to other quantities and import periods and reimbursements of different amounts. As the Court of First Instance held in *Maindiaux and Others*, cited above (paragraph 23), the act whose annulment is sought is an essential element of the subject-matter of the action. Consequently, since their action is directed against acts other than those at issue in Case C-188/88, it cannot be considered that the two actions have the same

subject-matter. It follows that the status of the judgment in Case C-188/88 as *res judicata* cannot affect the admissibility of the action in this case.

39 Moreover, even if the complaints put forward in support of this action largely coincide with those in Case C-188/88 *NMB and Others* v *Commission*, they nevertheless display significant differences. It must be borne in mind that, since judgment was delivered in Case C-188/88 *NMB and Others* v *Commission*, the legal context of this dispute has changed in terms of both international and Community law: first, the Uruguay Round negotiations resulted in 1992 in the drawing up of the 'Dunkel draft' and a new draft Anti-Dumping Code which has been adopted in the meantime and in which Article 9.3.3 marks a slight relaxation of the 'duty as a cost' rule (see below, paragraphs 84 and 104); secondly, the decisions contested in this action were taken pursuant to a basic Community regulation, namely Regulation No 2423/88, different from that at issue in Case C-188/88 *NMB and Others* v *Commission*, namely Regulation No 2176/84, and those two regulations diverge on various points, in particular the wording of the provision at the centre of this dispute concerning reimbursement of anti-dumping duties paid. Accordingly, there are factors in this case which mean that it cannot be deemed to be a mere replication of Case C-188/88.

40 As to the applicant NMB France, it need merely be stated that it was not an applicant in Case C-188/88 before the Court of Justice.

41 It follows that this action is entirely admissible and that the Court of First Instance must therefore examine its merits. In so doing, it should take account simultaneously of the judgment in Case C-188/88 *NMB and Others* v *Commission* and of the new issues raised by these proceedings (see the judgment of the Court of Justice in Joined Cases 311/81 and 30/82 and Case 136/82 *Klöckner-Werke* v *Commission* [1983] ECR 1549 and 1599 respectively, paragraph 5).

The subject-matter of the action

42 In the course of the proceedings, the applicants indicated, in response to the questions put to them by the Court, that the anti-dumping duties introduced by Regulation No 2089/84 were abolished for products originating in Singapore by Council Regulation (EEC) No 2553/93 of 13 September 1993 amending Regulation No 2089/84 (OJ 1993 L 235, p. 3), but only with effect from 21 September 1990. They stated that, as a result, the anti-dumping duties which they had paid on imports of ball-bearings from Singapore as from 21 September 1990 were reimbursed in their entirety at the end of 1993 and the beginning of 1994. From this the applicants concluded that their application had become entirely devoid of purpose in relation to NMB France and partially so as far as the other three applicants are concerned in so far as it relates to their requests for reimbursement in respect of imports from 21 September 1990.

43 The Commission confirmed that the action has become devoid of purpose in these respects.

44 In this connection, it must be held, with particular respect to NMB France, that Decision 92/332/EEC by which the Commission partially refused to grant the reimbursement requested by that applicant relates only to imports in the period October 1990 to September 1991. Since the applicants and the defendant agree that the anti-dumping duties paid by NMB France in respect of that period have been fully reimbursed, including those of which reimbursement had been refused by Decision 92/332, the Court notes that the action has become devoid of purpose in so far as it is brought by NMB France. In these circumstances, it is unnecessary to give judgment on the action brought by that applicant.

45 It follows that, as regards the three applicants other than NMB France, the action has also become devoid of purpose in so far as it relates to the non-reimbursement of anti-dumping duties collected in respect of imports made in the period from

21 September 1990 to September 1991. Consequently, it is also unnecessary to give judgment in these proceedings as far as that period is concerned.

46 It follows that the remaining forms of order sought by those three applicants now relate only to Decisions 92/333, 92/334 and 92/335 in so far as they refuse to refund to the applicants anti-dumping duties collected from January 1987 to 20 September 1990 on imports of ball-bearings from Singapore.

The substance

The subject-matter and scope of the complaints on which the action is based

47 In their application, the applicants indicate that — in contrast to Case C-188/88 *NMB and Others* v *Commission*, in which they pleaded *inter alia* that the Community regulation in force should be interpreted as meaning that the 'duty as a cost' rule does not apply to reimbursements — the present action is limited to the objection, based on Article 184 of the Treaty, that the basic regulation is illegal in that it breaches the general principles of proportionality and non-discrimination, and also the fundamental principle, embodied in the 1979 Anti-Dumping Code, that anti-dumping duties must never exceed the actual dumping margin.

48 Before going into the detail of those complaints, the applicants make clear, in the introductory part of their application, that the present dispute is concerned only with a question of principle, the facts of the case not being disputed by the parties. The issue relates only to one point of law, namely the legality of the 'duty as a cost' rule. In particular, the applicants do not allege that the contested decisions contain material errors of calculation.

49 The Court of First Instance invited the applicants to produce specific examples of the calculation method used in the reimbursement procedure, to enable it to appraise the way in which the contested rule operates. The applicants furnished that information but did not supply the Court with all the figures on which the contested decisions were based. In reply to a question on this point, they stated at the hearing that it would be extremely difficult to supply precise figures and give a general picture. Since the anti-dumping duties were imposed on imports of ball-bearings with effect from 1984 and about 25 million such products had been sold since then, the production of precise figures would be a disproportionate task since they would have to be examined not invoice by invoice but by reference to tens of thousands of computer print-outs. The Commission also drew attention at the hearing to the complexity of the task and the volume of the calculations.

50 As regards the statements of the reasons on which the contested decisions were based, the applicants explained in their observations on the Report for the Hearing and at the hearing that the partial reimbursement of the anti-dumping duties made by the contested decisions can be accounted for by a combination of the following three elements: an increase in the applicants' resale prices, a reduction in their costs between importation and resale, and a decrease in the normal value on the Singapore domestic market; as regards certain transactions, the applicants even made a 'double jump', a fact which the Commission conceded at the hearing. It is also apparent from the examples of reimbursements for which the applicants gave figures that the anti-dumping duties paid were in fact refunded only to the extent to which the 'single jump' was exceeded, which therefore limits total reimbursement of the anti-dumping duties to cases where there was a 'double jump' previously.

51 It is apparent from the application (see paragraph 48 below) that the applicants, have not, however, described in detail the specific ramifications for their economic and financial situation of the entirety of the reimbursement operations at issue. Consequently, it must be held that the applicants have limited their action to the question of the legality of the 'duty as a cost' rule, and thus to a point of law which they have submitted to the Court of First Instance without contesting the various calculation methods and the figures arrived at by the Commission in the contested decisions.

52 The Court is not therefore in a position to assess, as part of its review of legality, the real impact of the contested 'duty as a cost' rule on the possibilities of disposal of the products, or the applicants' profit margins and general competitive situation. The Court's review will thus be limited to considering solely a question of law which the applicants have separated from the economic context of the case (see the judgment in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraphs 11 to 13).

53 In order to define the ambit of the review of legality for the purposes of this case, it must also be made clear that, although the applications for reimbursement rejected by the contested decisions were in part submitted to the Commission under Regulation No 2176/84 — before the entry into force of Regulation No 2423/88 on 5 August 1988 — only the legality of the latter regulation is in issue in this case, even in relation to the applications for reimbursement concerning the period prior to its entry into force. That regulation, which, in the first paragraph of Article 18, repeals Regulation No 2176/84, states, in the second paragraph of Article 19, that it 'shall apply to proceedings already initiated', which includes proceedings for reimbursement of anti-dumping duties paid. Moreover, the contested decisions, which the Commission adopted in 1992 and which cover the period from January 1987, are based only on Regulation No 2423/88.

The allegation as to breach of the principle of proportionality

Arguments of the parties

54 The applicants state that the aim pursued by the Community anti-dumping legislation is to lay down rules and procedures which permit the adoption of measures to offset or prevent dumping. The effect of the 'duty as a cost' rule is to ensure the collection of anti-dumping duties at a level which is much higher than is necessary to meet that objective. For this reason, the applicants maintain that the 'duty as a cost' rule contravenes the principle of proportionality, the aim of which, according to settled case-law of the Court of Justice (see, for example, its judgment in Joined Cases 26/79 and 86/79 *Forges de Thy-Marcinelle et Monceau* [1980] ECR 1083,

paragraph 6), is to ensure that the burdens that commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish.

55 As regards the Commission's explanation that the difference of treatment is justified by the fact that an associated importer, being a dumping party, has every incentive not to raise his prices, or, if he does raise his prices, to pass on to his customer the benefit of the reimbursement of anti-dumping duty, the applicants consider that that reasoning amounts to an irrebuttable presumption that, if an associated importer obtains a refund, he will inevitably pass it on to the original customer, thereby granting what amounts to a disguised rebate with respect to the original price.

56 The applicants add that many products, including ball-bearings in particular, are sold in a manner which, because of the thousands of sales made and individual invoices issued, makes passing on refunds to customers as rebates on the original sale price impracticable. That difficulty is increased by the considerable period of time which generally passes between the sale to the customer and the receipt of the rebate. In those circumstances, it is pointless to offer contingent rebates to customers in the form of a hypothetical future reimbursement. Indeed, if such rebates were made, it would be more appropriate to consider them as rebates in respect of sales made at the time the rebates were made, not in respect of the original sales underlying the refund requests made years previously.

57 In response to the measures of organization of procedure adopted by the Court, the applicants stated that there are numerous less strict procedures designed to prevent the payment of disguised rebates, both in the basic regulation, in particular in Articles 13(11) and 14, and in national customs procedures for the detection and penalization of customs fraud. Those appropriate means of resolving the problem may prove very effective: customs fraud is a criminal offence and the Commission

is in a position to, and does in fact, carry out 'anti-absorption' inquiries under Article 13(11) of the basic regulation and re-examination procedures under Articles 14 and 15 of that regulation.

58 The applicants stated in particular that new circumstances relevant to the determination of this dispute have emerged since the entry into force of Regulation No 3283/94. The new Community anti-dumping rules have abandoned the old practice of requiring a 'double jump' before granting full reimbursement of the anti-dumping duties paid. The implementation of this new rule allowing full reimbursements to be granted to associated importers who demonstrate a 'single jump' shows that the arguments put forward in support of the Commission's earlier practice were unfounded. The new rules thus confirm that the Commission's earlier fears concerning disguised rebates were exaggerated and that the Commission imposed a disproportionate restraint on the applicants by refusing to reimburse duties except where there was a 'double jump'. At the hearing, the applicants added that Article 9.3.3 of the new 1994 Anti-Dumping Code shows, of itself, that the contested rule applied by the Commission is disproportionate.

59 The Commission points out that in Case C-188/88 *NMB and Others* v *Commission* the Court expressly referred to the principle of proportionality in paragraph 51 of its judgment and rejected the arguments based on that principle. In so doing, the Court took the view that, because the contested regulation did not require a price rise in excess of the actual dumping margin, the claim that it was disproportionate failed. As regards the possible risk of the associated importer passing on the reimbursed anti-dumping duties to its customers by means of disguised rebates, the Commission did not advance this argument in its defence, although it was put forward in Case C-188/88 (see the Report for the Hearing, [1992] ECR I-1691, at I-1699).

60 In its replies of 17 February 1995 to the questions put to it by the Court (p. 8), the Commission stated that it no longer maintains that the 'duty as a cost' rule is

justified to avert the danger of secret rebates granted by importers associated with their customers following the reimbursement of anti-dumping duties. It stated that 'it does not base its justification [of the contested rule] on whether or not refunded anti-dumping duties are in fact rebated to customers and "disguised dumping" takes place'. Accordingly, whether or not this happens or is practicable in a given case is irrelevant. At the hearing, the Commission made it clear that the justification for the contested rule is not to be based on a presumption of fraud or of dishonesty on the part of the applicants.

61 Instead of invoking the risk of fraud, at the hearing the Commission gave the following reasons for the 'duty as a cost' rule: the introduction of anti-dumping duties is designed to provoke a radical and permanent change of market behaviour, and more precisely to influence the market price and thus eliminate any injury to the Community industry. So long as the anti-dumping duties serve their purpose in situations in which the original dumping on the market has not disappeared (thus, in cases of a 'single jump'), they should remain in force. In order for duties paid to be refunded, the market situation must have changed in a definitive manner (by means of a 'double jump').

62 The Commission added that it is necessary to check whether an importer associated with an exporter receives a price equal to the normal value, which is not the case where the associated importer increases the resale price to eliminate dumping ('single jump'), whilst paying the same amount by way of anti-dumping duty. In those circumstances, there has been no change compared with the pre-existing dumping situation; if the associated importer already obtained at that stage a refund of the duties paid, he would receive an unjustified profit. It is only by increasing that price a second time by the same amount ('double jump') that an importer associated with an exporter would receive a price identical to the normal value.

63 The Commission then took the view, with the support of FEBMA, that Articles 13(11) and 14 of the basic regulation are not relevant to this case since they pursue purposes different from those of the provisions on reimbursements. Those

provisions are designed to allow the permanent adaptation of anti-dumping measures to changes in circumstances after anti-dumping measures have been imposed, whereas refund procedures can only look to the past and serve different purposes.

64 As regards the acceptance of undertakings under Article 10 of the basic regulation, being a less burdensome method, the Commission observed that an undertaking not to dump in the future, subject to penalties, would always be less burdensome for exporters and their related importers than the imposition of anti-dumping duties. However, that solution was not adopted in the Community legislation as a solution to dumping, an approach endorsed by the Court (Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraph 45, and Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 70).

65 As regards the new anti-dumping regulation, Regulation No 3283/94, the Commission stated that the applicants are wrong to state that that regulation abandons the former practice of requiring a so-called double jump before granting a full refund. The new regulation merely lays down certain more precise rules in that respect and provides that in some cases a 'double jump' will not be necessary. The Commission also rejects the applicants' reasoning that a refinement in the legislative provisions demonstrates that the previous provisions were not indispensable and were therefore disproportionate.

66 Finally, the Commission considered that the new GATT rules are not relevant in deciding whether or not the old rule at issue was disproportionate. The new Anti-Dumping Code is much more voluminous than its predecessor and contains a series of new, more detailed rules. It would not be permissible to consider that, whenever the legislature makes changes, the old rules become invalid as being disproportionate.

67 In response to the Commission's final defence submissions (see paragraphs 61 and 62 above), the applicants stated at the hearing that the purpose of anti-dumping duties is not to penalize but to correct market behaviour. The duties constitute not a definitive fine but a neutral corrective factor which should be refunded in the event that the dumping has been eliminated. It is not therefore legitimate for the Community to hold on to money which should be paid to the associated importers once the dumping margin has been eliminated. As far as proportionality is concerned, it is necessary to assess the legitimate goals of the legislation in force. The legitimate goal that the Community can pursue is ensuring that prices in the Community go up by the amount of the dumping margin found and ensuring that there is no evasion of the effectiveness of this protective measure. Any measure going further than ensuring that dumping has in fact been eliminated is disproportionate.

68 In response to the measures of organization of procedure adopted by the Court, FEBMA stated that the companies belonging to the Minebea group, including the applicants, have, as regards certain types of ball-bearings, practically negated the anti-dumping measures in that the duties imposed have not been passed on in the resale prices and that price undercutting in the Community market remains unchanged. That shows that the applicants do not really feel affected by the requirement of the 'double jump'.

Findings of the Court

— The limits of the review by the Community judicature of the exercise of the Council's discretion

69 It must be borne in mind that the principle of proportionality, as expressed, after the adoption of the contested decisions, in the third paragraph of Article 3b of the EC Treaty, had already been recognized by settled case-law as one of the general principles of Community law. By virtue of that general principle, the legality of Community rules is subject to the condition that the means employed must be appropriate to attainment of the legitimate objective pursued and must not go further than is necessary to attain it, and, where there is a choice of appropriate

measures, it is necessary, in principle, to choose the least onerous (see, most recently, the judgment of the Court of Justice in Case C-426/93 *Germany* v *Council* [1995] ECR I-4973, paragraph 42, and the judgment of the Court of First Instance in Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 107).

70 However, it is also settled case-law that, in an area in which the Community legislature has a broad discretion which corresponds to the political responsibilities given to it by the Treaty, only if a measure is 'manifestly inappropriate' having regard to the objective which the competent institution is required to pursue, can its lawfulness be affected (see, in relation to the common agricultural policy, the judgment of the Court of Justice in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 90 and 91, and *O'Dwyer and Others*, cited above, paragraph 107).

71 The basic anti-dumping regulation was adopted by the Council on the basis of Article 113 of the Treaty, that is to say as part of common commercial policy. As the Court of First Instance has already pointed out in its judgment in Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 85, the common commercial policy is characterized by a wide discretion enjoyed by the Community legislature, which is necessary for its implementation. That discretion necessarily extends to the adoption and amendment of the basic regulation at issue in this case. Faced with several options for implementation (within the limits laid down by the Anti-Dumping Code — see paragraph 99 et seq. below) of anti-dumping action, the Council must, in drawing up that regulation, mediate between divergent interests.

72 The considerable latitude enjoyed by the Community legislature in this area corresponds to the latitude which, according to settled case-law, the Community institutions have when adopting specific anti-dumping measures pursuant to basic regulations (see, for example, the judgments of the Court of Justice in Case 191/82

FEDIOL v *Commission* [1983] ECR 2913, paragraph 30, Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 16, Case C-156/87 *Gestetner Holdings* v *Council and Commission*, cited above, paragraph 63, Case C-179/87 *Sharp Corporation* v *Council* [1992] ECR I-1635, paragraph 58, and the judgment of the Court of First Instance in Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraphs 70 and 113). The Court of Justice has held, in particular, that the choice between the different methods of calculation indicated in a basic regulation requires an appraisal of complex economic situations, which means that the review of that appraisal by the Community judicature is correspondingly limited (Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 21).

73 It follows that review by the Community judicature must be limited, in the sphere of anti-dumping action, to determining whether the measures adopted by the Community legislature, in this case the 'duty as a cost' rule, are manifestly inappropriate having regard to the objective pursued.

— The proportionality of the contested rule

74 In the present case, the allegation of breach of the principle of proportionality is based on two arguments. The applicants claim first of all that the contested rule is in itself disproportionate. They then point to the greater flexibility of the subsequent Community and international provisions (of 1994) as evidence that the contested rule is excessive. It is therefore necessary to consider those two arguments.

75 As regards the contested 'duty as a cost' rule, the Community legislature, by Articles 16 and 2(8) of the basic regulation, expressly declared the rule applicable to the reimbursement of anti-dumping duties. By doing so, it made the position clearer than was the case under Article 16 of the earlier regulation, Regulation No 2176/84, taking account of the interpretation of the latter provision given in the judgment in

Case C-188/88 *NMB and Others* v *Commission*. As a result, therefore, under the contested rule an associated importer has no right to full reimbursement of the anti-dumping duties paid unless, first, he has brought to an end the original dumping that gave rise to the imposition of anti-dumping duties and, secondly, passed on the amount of those duties. However, the elimination of dumping and the passing on of the duties must have been brought about through a reduction of the normal value, an increase of selling prices in the Community, a reduction in marketing costs in the Community or a combination of those three factors.

76 As to the aim of this system, it must be observed, first, that the general purpose of anti-dumping measures is to protect Community industry against the adverse effects of dumping. It is against this background that the provisions on the reimbursement of anti-dumping duties pursue the specific objective of reimbursing those duties to the extent to which they were collected in excess of the actual dumping margin, since the Community industry would otherwise be afforded protection exceeding, to that extent, the dumping actually practised.

77 In that connection, it must be borne in mind that, in the proceedings before this Court, the Commission expressly abandoned the argument — which it had advanced in Case C-188/88 *NMB and Others* v *Commission* before the Court of Justice — that the 'duty as a cost' rule is necessary to ensure that associated importers did not abusively pass on to their customers the benefit of the reimbursement of anti-dumping duties by granting 'disguised rebates'. Consequently, it is no longer necessary to consider that argument.

78 Nevertheless, according to the explanations given by the Commission at the hearing, the contested rule, being a means of calculating the actual dumping margin, makes reimbursement of the anti-dumping duties paid by an associated importer conditional upon a prior 'double jump', on the ground that the requirement of only a 'single jump' would not be sufficient to ensure that, as far as possible, the dumping found to have been carried out by the group made up of the associated importer

and his exporter was radically and permanently abandoned, and that only a 'double jump' would secure a definitive change in market behaviour.

79 In order to assess whether, having regard to the abovementioned aims, the contested rule should be regarded as 'manifestly inappropriate' within the meaning of the judgments cited above (see paragraph 70), it must be borne in mind that anti-dumping duties, levied on imports, are borne by the importer and therefore increase his import costs. Consequently, where, after imposition of those duties, the dumping margin initially found has not been eliminated or even reduced — that is to say, where there has been no change in the conduct of the associated importer or in that of its group as a whole, the anti-dumping duty levied having been absorbed within their group — the dumping margin will not merely remain the same but will even be increased through absorption of the duties levied. That reasoning, adopted by the Advocate General with regard only to re-examination procedures under Article 14 of the basic regulation (Opinion in Case C-188/88 *NMB and Others* v *Commission* [1992] ECR I-1713 and I-1714, and in particular footnote 5), is also valid for reimbursement procedures under Article 16 of the same regulation. As the Court of Justice held in Case C-188/88 (paragraphs 32 and 33), the purpose in both cases is to establish whether or not there is still an actual dumping margin, and nothing to show that such a process should be carried out in accordance with different calculation methods has come to light in the course of the proceedings before this Court.

80 In those circumstances, where an associated importer, after anti-dumping duties are levied, takes a first step by eliminating only the initial dumping margin ('single jump'), there is no obvious reason why the Community legislature should as a result provide for full reimbursement of those duties. The fact that the associated importer avoids, by means of a 'single jump', an increase in the initial dumping does not mean that that importer has actually changed his market behaviour definitively. For this reason, it is not imperative that he be rewarded by the grant of a reimbursement.

81 Moreover, it is not disputed that a 'double jump' eliminates dumping: if an associated importer passes on the double amount of anti-dumping duties paid as part of the resale price or if the normal value falls by an amount corresponding to the 'double jump' (in the country of export or of origin), then the dumping has, in any event, ceased. In those circumstances, it does not seem manifestly inappropriate for the Community legislature to have limited reimbursement of anti-dumping duties to 'double jump' cases where refusal to grant a reimbursement would in fact be disproportionate.

82 It follows that the 'duty as a cost' rule appears, in the light of the present examination, which is limited to pure questions of law, to be a mechanism with a reasonable basis. The Court cannot therefore find that in adopting that rule the Community legislature exceeded the discretion available to it. Consequently, the contested rule can under no circumstances be regarded as a measure which is 'manifestly inappropriate' to the aim of affording the Community industry fair protection against dumping.

83 Whilst it cannot thus be ruled out that other less onerous means than the contested rule might have been envisaged — as contended by the applicants and denied by the defendant and the intervener — the Court cannot substitute its judgment for that of the Council as to the appropriateness or otherwise of the said rule adopted by the Community legislature, given that it has not been established that the rule is 'manifestly inappropriate' to attainment of the objective pursued (Case C-280/93 *Germany* v *Council*, cited above, paragraphs 93 to 95).

84 As regards the consequences, for determination of this dispute, of the new GATT and Community provisions adopted whilst proceedings have been pending before the Court, the applicants here rely on Article 11(10) of Regulation No 3283/94 and Article 9.3.3 of the 1994 Anti-Dumping Code, claiming that the fact that the contested rule was abandoned in those new provisions demonstrates its excessive nature. However, since it has not been established that the rule is manifestly inappropriate, the new provisions relied on by the applicants cannot be regarded as different options which might have been adopted by the Community legislature, and

the Court cannot therefore find that the Council was under an obligation, in 1988, to adopt similar provisions, more favourable to the applicants than the contested rule. The argument based on the existence of new Community and international provisions cannot therefore be upheld.

85 It must be added that, even if review by the Court were not limited to the manifestly inappropriate nature of the contested rule, the Court's examination could not lead to a different result. The applicants have confined their case to a purely legal question (see paragraph 51 above). Consequently, the Court's examination cannot take account of the economic context in which the contested rule was applied.

86 It follows that the Court cannot find that, by adopting the contested rule, the Community legislature exceeded the limits of its discretion and thereby contravened the principle of proportionality. The plea of breach of that principle must therefore be rejected.

The alleged breach of the 1979 Anti-Dumping Code

Arguments of the parties

87 The applicants consider that the Court should find that the 'duty as a cost' rule is unlawful in that it infringes Article 2(6) of the 1979 Anti-Dumping Code, since anti-dumping duties do not constitute costs, duties and taxes incurred between importation and resale. The application of the rule leads to the finding of a dumping margin where in reality none exists, whereas the Community is required, by virtue of a fundamental principle embodied in the Anti-Dumping Code, to levy anti-dumping duties only in the amount necessary to offset or prevent dumping

and to refund duties paid if their amount exceeds that of the actual dumping margin. Such a refund is, by definition, necessary if the duties have had their intended effect of inducing the cessation of the dumping, whether by increases in the price of export sales or by other changes in the elements of the dumping calculation. A refusal to grant the reimbursements necessary to ensure that the amount of anti-dumping duty collected does not exceed the actual dumping margin is therefore illegal.

88 The applicants reject the view that the anti-dumping duty paid can be regarded as a cost in the same sense as the costs of an associated importer, like customs duties. Even the definitive anti-dumping duty is by its nature provisional: it is intended to neutralize the foreseeable dumping approximately, the approximation being based on findings of dumping made in the original investigation period (in 1984 in the case of the NMB group). It is the function of the refund procedure to reach a final determination of the actual dumping margin for the imports which are the subject of the application for reimbursement and, therefore, of the actual duty it is permissible to collect on those imports. In such a system, the interim, approximate duty cannot itself be a factor counting in favour of a higher actual dumping margin. It would be equally absurd if a payment required to be made in advance on account of a tax liability remaining to be finally determined at a later date could be taken as a factor increasing the amount of that same tax liability, as finally determined.

89 The applicants consider that the view that the 'duty as a cost' rule is in breach of the Community's obligations under the Anti-Dumping Code is confirmed by an examination of the practices of the Community's trading partners. In that context, they emphasize that they have no wish to suggest that the Community is bound to follow the practices or rules of its trading partners. However, useful insights may be gained from studying those rules and practices. Under the anti-dumping rules in the United States, Australia and Canada, the anti-dumping duties charged do not serve to increase the actual dumping margin. It is therefore sufficient, in order to obtain reimbursement of those duties, simply to increase the resale price so as to eliminate the dumping margin. They refer again to the Opinion of the Advocate

General in Case C-188/88 *NMB and Others* v *Commission*, in which he observes that the inconsistency between the Community's practice and 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 ([1992] ECR I-1709).

90 The applicants also rely on the 'Dunkel draft', Article 9.3.3 of which requires the competent authorities to take account of 'any movement in the resale price which is duly reflected in subsequent selling prices' and then to 'calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided'. That text clearly does not allow deduction of anti-dumping duty as a cost. The reference to movements in resale prices to the customers of associated importers is accounted for by the argument that, if that price does not increase even though the apparent price of the associated importer has risen, the impression is given that a disguised rebate has been paid.

91 In their replies to the measures of organization of procedure adopted by the Court, the applicants conceded that Article 2(5) and (6) of the Anti-Dumping Code, taken in isolation and interpreted according to purely linguistic criteria, do not exclude the 'duty as a cost' rule. They emphasized however that, if the Code is fairly read and account is taken of the logic of its refund provisions, it may be concluded that the contested rule is incompatible with the Code.

92 They added that the plain words of the new 1994 Anti-Dumping Code indicate that there is no requirement to treat anti-dumping duty as a cost. The new Code shows in particular that, for the purpose of interpreting the old Article 2(5) and (6), anti-dumping duties are not among the obligatory allowances to be deducted when constructing the export price.

93 At the hearing, the applicants stated that the provisions of the 1979 Anti-Dumping Code are clear and simple in that the anti-dumping duties which exceed the dumping margin are to be refunded as quickly as possible (Article 8(3)). As regards the new 1994 Anti-Dumping Code, they submit that Article 9.3.3 thereof has abandoned the 'duty as a cost' rule. That new provision was one of the most controversial issues in the negotiations; it represents a last-minute compromise. The Community was isolated on this point in the negotiations: indeed, no other contracting party applies the 'double jump' principle.

94 The Commission states that all the arguments put forward by the applicants were already advanced in Case C-188/88 *NMB and Others* v *Commission*. In its judgment in that case, the Court examined all the arguments to the extent necessary for its reasoning and reached correct conclusions. In paragraph 17 of the judgment, the Court expressly referred to the Report for the Hearing for a fuller account of the facts and arguments. The applicants' arguments were duly summarized in the Report for the Hearing annexed to the judgment, which shows that they were fully considered by the Court. For that reason, the Commission refers, in its defence, to the reasoning set forth by the Court in the judgment in question.

95 In response to the applicants' reference to the 'basic principle' that the anti-dumping duty should not exceed the actual dumping margin and that, if it does so, the excess should be refunded, the Commission states that, since that principle was not contested by anyone, it is not surprising that the Court did not expressly deal with it. The real question which the Court had to examine was what constitutes the 'actual dumping margin' which the anti-dumping duty may not exceed. That question was considered in paragraphs 36 to 40 and 46 to 58 of the judgment. In fact, the applicants are claiming that the 'actual dumping margin' must be different from that provided for in Article 2(8)(b)(ii) of the basic regulation.

96 Finally, the Commission considers that the applicants' reference to the practices of the Community's trading partners is irrelevant in this case. Whilst it is true that three of the Community's trading partners have anti-dumping rules which the applicants regard as less rigorous for associated importers than the Community rules, it should be emphasized that the differences between the ways in which those three anti-dumping regimes operate render any comparison difficult. Moreover, the Community's trading partners have recognized that adoption of the formula advocated by the applicants would create unacceptable difficulties in the enforcement of anti-dumping rules. That is why the 'Dunkel draft' envisages the inclusion of a provision in the new Anti-Dumping Code specifically to allow in certain circumstances deduction of anti-dumping duties paid by associated importers in the construction of the export price.

97 At the hearing, the Commission stated that Article 9.3.3 of the new 1994 Anti-Dumping Code, although relaxing the 'double jump' requirement, confirms the 'duty as a cost' rule. This new text does not appear in the general provisions concerning calculation of the dumping margin and construction of the export price but constitutes a derogating rule concerning reimbursement. The general provisions of Article 2.4 of the new Code, concerning construction of the export price, have not departed from the old 1979 Code. Consequently, the very existence of Article 9.3.3 shows that anti-dumping duties are included in the duties mentioned in Article 2.4, for otherwise Article 9.3.3 would be superfluous. Moreover, all the contracting parties to the new Anti-Dumping Code were unanimous on this point.

98 FEBMA, the intervener, points out that in its judgment in Case C-188/88 *NMB and Others* v *Commission* the Court stated that the 'duty as a cost' rule is not incompatible with the Anti-Dumping Code. That Code lays down the principle that adjustments must be made for costs incurred between import and resale, including anti-dumping duties and taxes. The applicants have not advanced any fresh legal argument against that decision.

Findings of the Court

99 With regard to the alleged infringement of the 1979 Anti-Dumping Code, it must be borne in mind at the outset that it is apparent from paragraph 31 of the judgment of the Court of Justice in Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069 that such an infringement may be relied on in a review of the legality of the basic Community regulation.

100 It must also be borne in mind that the Community reimbursement system criticized by the applicants is, essentially, the same as the previous system considered in the judgment in Case C-188/88 *NMB and Others* v *Commission*. Article 16 of Regulation No 2423/88, in so far as it refers expressly to the contested 'duty as a cost' rule, merely clarified Article 16 of Regulation No 2176/84 and, moreover, did so in a manner conforming with the interpretation of that provision upheld by the Court of Justice in that judgment.

101 As the Court of Justice held in that judgment (paragraphs 46 and 47), the only difference, concerning construction of the export price, between the relevant Community regulation and the 1979 GATT Anti-Dumping Code — also at issue in the case — is that, whereas the Code merely lays down the principle that due allowance should be made for costs incurred between importation and resale, 'including duties and taxes', the Community regulation specifies certain duties and other costs, including in particular anti-dumping duties, for which allowance must be made when the adjustment is carried out. The Court inferred from this that there is no inconsistency between the Community rules and the Anti-Dumping Code.

102 The wording of the 1979 Anti-Dumping Code is indeed clear in that, in Article 8(3), it provides that the amount of anti-dumping duty must not exceed the dumping margin and that any duty in excess of that margin must be refunded as quickly as possible. However, there is no comparable stipulation concerning construction of the export price, which is needed in order to determine the actual dumping

margin. In particular, Articles 2(5) and (6) and 8(3) do not deal explicitly or implicitly with the question of the legality of the 'duty as a cost' rule.

103 Consequently, it must be held that the contracting parties to GATT did not deal with this specific problem, with which they were familiar, in the Anti-Dumping Code. On this point too, therefore, the Code evinces great flexibility. It cannot therefore be interpreted as imposing a particular obligation on the Community (judgment of the Court of Justice in Case C-280/93 *Germany* v *Council*, cited above, paragraph 111) not to introduce, in implementation of the Code, a 'duty as a cost' rule (see also the judgment of the Court of Justice in Case 187/85 *FEDIOL* v *Commission* [1988] ECR 4155, paragraph 12). The applicants' view that the contested rule contravenes the Anti-Dumping Code must therefore be rejected as unfounded.

104 That conclusion is not affected by Article 9.3.3 of the new 1994 Anti-Dumping Code or by the corresponding provision in the Code set out in the 'Dunkel draft', both of which impose some restriction on the freedom of the contracting parties in the application of a 'duty as a cost' rule. On the contrary, the 1994 Anti-Dumping Code presupposes, in the fourth sentence of Article 2.4, the existence of a 'duty as a cost' rule and it is only in Article 9.3.3 that provision is made for a flexible approach to its application.

105 Furthermore, each of the successive Anti-Dumping Codes is the result of multilateral trade negotiations undertaken as part of the successive GATT rounds; far from forming part of a system of consistent provisions, the different codes reflect world economic developments and the relative strengths of the parties at the material time. Consequently, the application of the 1979 Anti-Dumping Code cannot be substantially influenced by an interpretation arrived at in the light of a subsequent code, still less a mere draft code.

106 As regards the applicants' reference to the practices of the Community's trading partners, it need merely be borne in mind that, as the Court of Justice has already held in Case C-188/88 *NMB and Others* v *Commission* (paragraph 49), the fact that the Community's trading partners adopt other methods does not render the 'duty as a cost' rule, as embodied in the contested basic regulation, unlawful.

107 It follows that the applicants cannot rely on the provisions of the 1979 Code to contest the legality of that rule. Consequently, the plea of infringement of that Code must be rejected.

The plea of breach of the principle of non-discrimination

Arguments of the parties

108 The applicants claim that the 'duty as a cost' rule illegally discriminates against associated importers compared with independent importers and contest the opposite proposition that not to apply that rule would bring about illegal discrimination against independent importers. They refer to the Opinion of the Advocate General in Case C-188/88 *NMB and Others* v *Commission*, who also expressed the view that the system defended by the Commission discriminates against associated importers ([1992] ECR I-1719 and I-1720).

109 In that context, the applicants first describe the conditions prevailing on the Community market in ball-bearings. It is extremely competitive: on the supply side there is a significant number of major multinational producers and on the demand side there are numerous major manufacturing companies having a considerable degree of economic power. In those circumstances, buyers would not accept a

double price increase of the kind required of associated importers under the 'duty as a cost' rule and their attitude would not be altered by the offer of a rebate linked with a possible reimbursement at an uncertain date in the future.

110 An associated importer can obtain a refund only if he makes a double increase in his price. For an independent importer, on the other hand, a single price increase is the only condition; as far as the anti-dumping duty collected is concerned, he has an economic choice: he may either bear the cost of the duty during the time it takes to obtain the refund or he may pass the cost of the duty on to his customer immediately.

111 The applicants contest the view that, in order to put the associated importer on the same footing as the independent importer, it is necessary legally to oblige him to make a double price increase. They contest the reasoning of the Court of Justice in Case C-188/88 *NMB and Others* v *Commission* (paragraphs 37 and 38) according to which independent importers may be expected to pass on the anti-dumping duties to their customers since otherwise, first, they would incur a loss of interest on the amount paid and suffer the effects of any currency devaluation and, secondly, since they have no knowledge of the facts on the basis of which the dumping margin was established, they would run the risk of not being granted the refund despite the increase in the export price.

112 The applicants consider that the first two factors mentioned by the Court of Justice appear irrelevant since the risks referred to apply in exactly the same way to both associated and independent importers. The third factor is extremely theoretical. The associated importer does indeed form part of a group which has full knowledge of all the information which it believes to be relevant to the refund application, whereas the independent importer will not normally know some of the elements of the dumping calculation necessary for him to obtain a refund. However, the exporter normally supports the application of a refund made by the independent importer by giving him the appropriate information. Thus, as regards the

information needed for a such an application, the position of an independent importer is not appreciably different from that of an associated importer.

113 The Commission points out, first, that the suggestion of discrimination against associated importers as compared with independent importers was rejected in the Court's judgment in Case C-188/88 *NMB and Others* v *Commission* on the ground that associated and independent importers are not in comparable situations and that any difference of treatment is justified since otherwise it would be the independent importers who were discriminated against. In other words, the formal difference of treatment is necessary in order to ensure that the two categories of importer are in substance treated equally in that they must both increase their prices by the same amount.

114 In that regard, the Commission states that the independent importer seeks to make a profit by purchasing a product from whoever can supply him on the most favourable terms. The objectives of importers associated with a dumping manufacturer are entirely different since their legal and economic situation requires that they carry out policies controlled by their parent which will serve its objectives as a manufacturer and exporter and may include dumping large quantities of its products in the Community. Whether the activities of associated importers are profitable or not is unimportant so long as the long-term interests of the group are being served. Associated importers need not make a profit from their import and resale operations, whereas the very existence of independent importers depends on profits.

115 FEBMA maintains that the 'duty as a cost' rule is a condition vital to the effectiveness of the basic regulation and protection against dumping. It states that associated importers usually refrain from passing on anti-dumping duties in their prices and this frustrates the true objectives of the anti-dumping measures, which are to protect Community production by increasing the price of the products concerned and at the same time to reduce the market shares for those products. A refund can be justified only if the buyer in the Community has definitively been charged with

the first price increase corresponding to the anti-dumping duties. The customers of associated importers in the Community therefore have to bear the effect of anti-dumping duties on import prices twice. In such circumstances, there is a much higher probability that associated importers will irreversibly pass on the anti-dumping duties, with the effect of increasing prices in the Community.

Findings of the Court

116 The principle of non-discrimination has been consistently held to be one of the fundamental principles of Community law. That general principle means that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (see, for example, the judgment of the Court of Justice in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraphs 50 and 51, and *O'Dwyer and Others* v *Council*, cited above, paragraph 113). Moreover, where the conditions for the application of that principle are being reviewed by the Court, it must be repeated that, in matters of common commercial policy, the Community legislature enjoys a broad discretion.

117 As the Court of Justice held in Case C-188/88 *NMB and Others* v *Commission* (paragraphs 34 and 35), the alleged difference in the treatment of independent importers and associated importers with respect to the refund of anti-dumping duties is justified by the difference in their respective situations in relation to dumping and does not therefore constitute discrimination. Whereas independent importers are not involved in dumping, importers who are associated with the exporter are thereby placed on the other side of the 'dumping fence', in the sense that they participate in the practices which constitute dumping and, in any event, are in a position to have full knowledge of the circumstances underlying it.

118 Moreover, it cannot be denied that the anti-dumping duties which an independent importer pays upon importation constitute an additional cost which it must cope with in one way or another. In these circumstances, the fact that, as a result of the contested rule, those duties are treated as a cost for the associated importer merely places these two categories of trader on the same footing (on this point, see Case C-188/88 *NMB and Others* v *Commission*, paragraph 39).

119 It must be added that both the 1979 Anti-Dumping Code and the 1994 Anti-Dumping Code allow the contracting parties to apply special treatment to the situation where it is impossible to take the export price as a basis owing to the existence of an association between the exporter and the importer (Article 2(5) of the 1979 Code and Article 2.3 of the 1994 Code). It is therefore at the GATT level that the situation of importers associated with their exporters is made subject to special rules shaped by doubts as to the reliability of the export price actually charged. In these circumstances, the Community legislature cannot be criticized for breach of the principle of non-discrimination by providing for application of the 'duty as a cost' rule only with respect to associated importers.

120 In so far as the applicants still appear to be claiming that the contested rule, applied only to associated importers, goes beyond the lawful limits of special treatment for that category of traders, the Court considers that, on this point, the review of legality is coextensive with that already carried out in relation to the principle of proportionality. As it is, the Court has rejected the plea that that principle was contravened.

121 Consequently, the plea of breach of the principle of non-discrimination cannot be upheld either.

122 Since none of the pleas on which it is based has been upheld, the objection that the basic regulation is illegal must be rejected in its entirety. It follows that the action must be dismissed as unfounded.

Costs

123 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants NMB-Minebea-GmbH, NMB (UK) Ltd and NMB Italia Srl have been unsuccessful with their claims in so far as they relate to the anti-dumping duties collected from January 1987 to 20 September 1990, and since the Commission has applied for costs, the applicants must be ordered to pay the costs relating to those claims.

124 Since the action has become devoid of purpose as far as NMB France SARL is concerned and, as far as the other three applicants are concerned, with respect to the anti-dumping duties collected in the period from 21 September 1990 to September 1991, it must be borne in mind that, under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, costs are to be in the discretion of the Court.

125 The Court finds that the elimination of anti-dumping duties brought about by Regulation No 2553/93, which had the effect of rendering this action partially devoid of purpose, was carried out not because the Council or the Commission accepted the applicants' view that the 'duty as a cost' rule was unlawful but because

those institutions considered that there would be no repetition of material damage to the Community industry (29th recital in the preamble). In the circumstances, the Court considers that it is fair for the applicants also to bear the costs of those parts of the action which have become devoid of purpose.

126 As far as the intervener is concerned, the Court considers that it is fair, in the circumstances of this case, for it to bear its own costs, pursuant to Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Declares that it is unnecessary to give judgment on the action brought by NMB France SARL;

2. Declares that it is unnecessary to give judgment on the action brought by NMB-Minebea-GmbH, NMB (UK) Ltd and NMB Italia Srl to the extent to which it relates to the reimbursement of anti-dumping duties collected in relation to the period from 21 September 1990;

3. Dismisses the remainder of the action;

4. Orders the applicants jointly and severally to bear the costs, with the exception of those of the intervener, which shall bear its own costs.

Kirschner Vesterdorf Bellamy

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 5 June 1996.

H. Jung H. Kirschner

Registrar President