1. A natural or legal person is individually concerned by a provision of a regulation where that provision in fact constitutes a collective decision relating to named addressees.
2. The fact that the implementation of a provision contained in a regulation necessitates implementing measures adopted by the national authorities does not prevent such provision from being of direct concern to the natural or legal persons to whom it applies where such implementation is purely automatic. This is even more the case where implementation is effected in pursuance not of intermediate national rules but of Community rules alone.
3. It follows from Article 14 of Regulation No 459/68 of the Council that the acceptance by the Commission of an undertaking from the exporter or exporters to revise their prices entails the termination of the anti-dumping procedure. It is accordingly unlawful for an anti-dumping procedure to be terminated on the one hand by such an acceptance and on the other hand by a decision adopted by the Council under Article 17 of the same regulation involving the definitive collection of the amount which, in pursuance of Article 15 of the Regulation, has been determined by the Commission by way of provisional anti-dumping duty and security for which has been provided by the exporter or exporters concerned.

   The arguments as to the effectiveness of this combination for the purpose of monitoring the observance of the undertaking and being able to penalize any infringement of it cannot be accepted since the provisions of the regulation and in particular those of Article 14 (2) (d) provide that in such a case the Commission must recommence the examination of the facts in accordance with Article 10.
4. The Council, having adopted a general regulation with a view to implementing one of the objectives of Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies.
5. It follows from the wording of Article 17 of Regulation No 459/68 that a decision to collect the amounts secured by way of provisional duty may be adopted only at the same time as the imposition of a definitive anti-dumping duty.

   It follows in particular that the Commission may propose a decision to collect the amounts secured only if it proposes "Community action", in other words, the introduction of a definitive anti-dumping duty.

In Case 113/77

NTN Toyo Bearing Company, Ltd., Osaka (Japan),

NTN Bearings — GKN Ltd., Burntwood (United Kingdom),

NTN Wälzlager (Europa) GmbH, Erkrath-Underfeldhaus (Federal Republic of Germany),

NTN Sidag, Schweighouse (France),

represented by Messrs W. Stoecker and Malte Sprenger, Advocates at the Düsseldorf Bar, Dr Werner von Simson, Professor of Law, University of Freiburg-im-Breisgau, and Mr Martin von Simson, Barrister, of the Middle Temple, London, with an address for service in Luxembourg at the Chambers of Mr Claude Penning, Advocate, 43, Avenue du Dix-Septembre,

applicants,

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Mr H.-J. Lambers, acting as Agent, Messrs Francis Patrick Neill, Queen's Counsel, of Gray's Inn, Mark Waller, Barrister, of Gray's Inn, and Lawrence Collins, Solicitor, of Messrs Herbert Smith & Co., London, Advisers, with an address for service in Luxembourg at the office of Mr Van de Houten, European Investment Bank, Place de Metz,

defendant,

and

FEBMA (Federation of European Bearing Manufacturers' Associations), Frankfurt, represented by Mr Dietrich Ehle, of the Cologne Bar, assisted by Terence M. Lane, Solicitor, London, with an address for service in Luxembourg at the offices of Mrs Jeanne Housse, Huissier, 21, Rue Aldringen,

intervener,

APPLICATION for the annulment of Article 3 of Council Regulation (EEC) No 1778/77 of 26 July concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan (Official Journal 1977, L 196, p. 1),

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

(a) The framework of the legislation

(1) Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), amended by Regulation (EEC) No 2011/73 of the Council of 24 July 1973 (Official Journal 1973, L 206, p. 3), lays down the detailed rules and the procedure for the arrangement of anti-dumping measures. These measures come entirely within the jurisdiction of the EEC by virtue of the transfer of powers carried out by the Member States under Article 113 of the Treaty. The EEC system is based on Article 113 of the EEC Treaty and is in conformity with the General Agreement on Tariffs and Trade Anti-dumping Code (United Nations Treaty Series, Volume 651, No 840 p. 321 *et seq.* and Official Journal 1968, L 305, p. 12).

In accordance with the provisions of the General Agreement on Tariffs and Trade, Article 2 of the regulation specifies that an anti-dumping duty may be applied to a dumped product whose introduction into Community commerce causes, or threatens to cause, material injury to an established Community industry or materially retards the setting-up of such an industry. Article 3 defines the concept of dumping, providing that the "price of the product when exported to the Community is less than the comparable price ... in the exporting country of origin"and explains this definition. Article 4 limits the concept of injury.

The normal procedure begins with the lodging of a complaint by a natural or legal person or an association submitted either to a Member State or to the Commission (Articles 6 and 7). A Member State may also alert the Commission (Article 8). If the complaint seems to be serious the Commission, in co-operation with the Member States, commences an examination of the matter which covers both dumping and injury (Article 10(1)). The other provisions of Article 10 and those of Article 11 regulate that examination. Article 10 (4) provides that: "The Commission shall provide opportunities for the complainant and the importers and exporters known to be concerned ... to see all information that is relevant to the defence of their interests and not confidential within the meaning of Article 11 and that is used by the Commission in the anti-dumping investigation".

Articles 12 and 13 provide for an advisory committee to be set up consisting of representatives of each Member State with a representative of the Commission as Chairman. Consultations cover in particular the existence and margin of dumping, the existence and extent of injury and the measures appropriate to remedy the effects of dumping.

If it becomes apparent from consultation, unanimously, that protective measures are unnecessary, the proceedings stand terminated. Otherwise the Commission submits to the Council forthwith a report "on the results of the consultation" together with a proposal that the proceeding be terminated. If the Council "acting by a qualified majority, approves the proposal ... the proceeding shall stand terminated. It shall likewise stand terminated if within one month the Council has taken no decision or made no request by a qualified majority to the Commission asking it to resume its examination of the matter" (Article 14 (1)).

Article 14 (2) provides as follows:

"The provisions of the foregoing paragraph shall also apply where, during examination of the matter, the exporters give a voluntary undertaking to revise their prices so that the margin of dumping is eliminated or to cease to export the product in question to the Community, provided that the Commission, after hearing the opinions expressed within the Committee, considers this acceptable."

Regulation No 2011/73 (Official Journal 1973, L 206/3) adds to this the following provisions:

"(d) Where the Commission finds that the undertaking of exporters is being evaded or no longer observed or has been withdrawn and that, as a result, protective measures might be necessary, it shall forthwith so inform the Member States and shall recommence the examination of the facts in accordance with Article 10."

The representatives of the exporting country and the directly interested parties are informed of the termination of the proceeding which must, with certain exceptions, be published in the Official Journal.

Under Article 15 of Regulation (EEC) No 459/68, the Commission may take "provisional action" consisting in fixing a (percentage of) anti-dumping duty in respect of which payment is not claimed but importers must provide security to that amount, "collection of which shall be determined by the subsequent decision of the Council under Article 17".

Article 17 concerns the lot of the provisional duty and provides as follows:

"1. Where the facts as finally established show that there is dumping and injury, and the interests of the Community call for Community intervention, the Commission shall, after hearing the opinions expressed within the Committee, submit a proposal to the Council. Such a proposal shall also cover the matters set out in paragraph 2.

2. (a) The Council shall act by a qualified majority. Where Article 15 (1) has been applied, the Council shall decide, subject to the provisions of Article 15 (2), what proportion of the amounts secured by way of provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there is material injury (and not merely threat of material injury or of material retardation of the establishment of the Community industry) or that such injury would have been caused if provisional action had not been taken."

Anti-dumping duties are imposed by regulation (Article 19 (1)). Article 20 (1) of Regulation No 459/68 provides, in accordance with Article 8 (b) of the General Agreement on Tariffs and Trade Anti-dumping Code, that the products referred to are described indicating the name of the supplier. Article 20 (2) provides that the only exception to this rule is where it is impracticable to name all the suppliers.

Importers who wish to show that products, although subject to anti-dumping duties, were not dumped, have the means of administrative appeal (Article 19 (4)).

(b) Facts

By document of 15 October 1976, the Committee of the European Bearing Manufacturers' Associations, at that time without legal personality, whose members were the three German, British and French trade organizations, submitted a complaint to the Commission concerning dumping by Japanese roller bearing manufacturers.

After consultation with the Member States, the Commission decided on 9 November 1976 to carry out an official anti-dumping investigation. It informed the Japanese mission of this and sent questionnaires to all the known importers and exporters and published the required notice in the Official Journal of 13 November 1976, C 268, p. 2.

When the replies to the questionnaires had been received, the European and Japanese manufacturers met on 18 and 19 January 1977 so that each side could put its views and arguments to the other.

The Commission imposed a provisional anti-dumping duty of 20 % on ball bearings and tapered roller bearings and parts thereof originating in Japan by Regulation (EEC) No 261/77 of 4 February 1977 (Official Journal 1977, L 34, p. 60), which was extended by Council Regulation (EEC) No 944/77 (Official Journal 1977, L 112, p. 1). However, the percentage was fixed at 10 % for the products manufactured and exported by Nachi Fujikoshi Corporation and Koyo Seiko Company Ltd.

In the meantime the Commission carried out an investigation at the European (French, British and German) subsidiaries of the Japanese companies during the months from February to April 1977. Because those subsidiaries were associated with the producer companies, it based its calculations of the export prices on the "price at which the imported product is first resold to an independent buyer" (Article 3 (3)). Because of the great variety of categories of products on the market it adopted for each undertaking a sample of representative products and determined the average price. Finally, the prices determined were reduced by fixed percentages so as to reconstruct the export price to be adopted for the purpose of comparison with domestic prices.

From 18 to 28 April 1977 an investigation was held in Japan at the four major producers by a group of experts from the Commission with the collaboration of a chartered accountant, an expert from the United Kingdom and an expert from the Federal Republic of Germany.

From the end of May until the end of June 1977 meetings were held between the Commission and the Japanese roller bearing producers on the possibility of an undertaking as to prices. After four weeks of discussion the four major

Japanese producers signed on 20 June 1977 undertakings that they would increase prices.

On 26 July 1977 the Council adopted definitive measures by issuing Regulation (EEC) No 1778/77 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings originating in Japan.

Article 1 of Regulation (EEC) No 1778/77 imposes a definitive anti-dumping duty of 15% whose application is however suspended. Article 2 orders the Commission, in collaboration with the Member States, to monitor the undertakings given by the major Japanese producers and provides that if the Commission finds that these undertakings are being evaded, are not being observed or have been withdrawn it must forthwith, after consulting the Member States within the Advisory Committee provided for in Article 12 of Regulation (EEC) No 459/68, convened within a period of five days, terminate the suspension of the application of the definitive duty.

In application of Article 17 (2) (a) of Regulation (EEC) No 459/68, Article 3 of Regulation No 1778/77 provides as follows:

"The amounts secured by way of provisional duty under the provisions of Regulations (EEC) No 261/77 extended by Regulation (EEC) No 944/77, in respect of products manufactured and exported by the following producers, shall be definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation: Koyo Seiko Company Limited; Nachi Fujikoshi Corporation; NTN Toyo Bearing Company Limited; Nippon Seiko KK."

Regulation (EEC) No 1778/77 was published in the Official Journal on 3 August 1977 (L 196, p. 1).

On the same date the Commission accepted the undertakings given by the Japanese producers on 20 June 1977.

(c) The subject-matter of the dispute

The applicants have lodged the present application against Article 3 of Council Regulation (EEC) No 1778/77. They claim that during the discussions which followed the entry into force of Regulation (EEC) No 261/77 imposing a provisional anti-dumping duty they undertook by agreement of 20 June 1977 no longer to have recourse to practices considered unacceptable by the Commission and that by telex message of 3 August 1977 the Commission declared that it was satisfied with the undertakings given.

In those circumstances, Article 3 of Regulation (EEC) No 1778/77 is not justified. More generally, the applicants claim that dumping complained of has not been sufficiently established in law and in accordance with the requirements both of the rules of the General Agreement on Tariffs and Trade and of the Community rules.

(d) Procedure

The application, dated 19 September 1977, was entered in the Court Register on 20 September 1977.[1] On 28 September 1977, the applicants requested the Court to adopt interim measures. On 14 October 1977, the President of the Court of Justice ordered, as an interlocutory decision, *inter alia* that the application to the applicants of Article 3 of Regulation No 1778/77 should be suspended until the final judgment in Case 113/77, on condition that and for so long as the applicant companies continued to provide security for the performance of their obligations in the amounts which they were required to

1 — The lawyers representing the applicants lodged proof of their authority on 20 September 1977 and 12, 16 and 17 May 1978.

pay in pursuance of the aforementioned Article 3 ([1977] ECR 1721).

Following its application, which was entered on the Court Register on 5 October 1977, the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as "FEBMA") was allowed, by order of the Court of 26 October 1977, to intervene in support of the submissions of the Council, the defendant.

By document lodged on 30 September 1977, the Council, pursuant to Article 91 of the Rules of Procedure, requested the Court for a decision as to the admissibility of the application before examining the substance of the case. The intervener lodged its observations on the objection of inadmissibility on 15 February 1978 and the applicants lodged their observations on 21 February 1978.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided by order of 12 April 1978 to reserve its decision on the objection of inadmissibility for the final judgment.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without a preparatory inquiry.

However, the Court requested the parties and the Commission of the European Communities to answer certain questions, pursuant to Article 21 of the Protocol on the Statute of the Court of Justice of the EEC.

II — Conclusions of the parties

The applicants claim that the Court should:

— Declare Article 3 of Regulation (EEC) No 1778/77 inapplicable to them.

The defendant contends that the Court should:

— Declare the application to be inadmissible;

— Further or alternatively, dismiss the application;

— Order the applicants to pay the costs of the Council.

The intervener claims that the Court should:

— Declare the application to be inadmissible;

— Further or alternatively, dismiss the application;

— Order the applicants to pay the costs, including the costs of the intervener.

III — Submissions and arguments of the parties

Admissibility

The *defendant* considers that the application is not admissible, on the ground that is does not fulfil the conditions laid down in the second paragraph of Article 173 of the EEC Treaty.

1. Legislative character of Regulation No 1778/77

The defendant emphasizes that the adoption of anti-dumping measures is at the entire discretion of both the Council and the Commission. Regulation No 459/68 is based on the principle according to which the imposition of duties must not constitute *per se* an obligation even if dumping and injury have been ascertained. This shows, because of its very objective, the intrinsically legislative character of Regulation No 1778/77.

Moreover, Regulation No 459/68 provides expressly that anti-dumping duties must be imposed by regulation.

Because those duties are an instrument of commercial policy, the defendant considers that a regulation has to apply

to all actual or potential importers whether or not they are known or identifiable when the measures are adopted.

Regulation No 1778/77 is a genuine generally applicable measure of a legislative nature. Article 1 of that regulation applies a definitive anti-dumping duty on certain generally defined products originating in Japan. The fact that products are identified cannot prevent the regulation from having a general normative character (judgment of 5 May 1977 *Koninklijke Scholten Honig* v *Council and Commission,* Case 101/76 [1977] ECR 808). Paragraph 2 of Article 1 suspends the duty quite generally.

Article 2 expresses the duties of the Commission. By directing the Commission to perform certain functions and giving it appropriate power and authority to exercise them the true nature of that article is legislative.

Article 3 is a general provision imposing anti-dumping duty and applies generally to products manufactured and exported by four named manufacturers. The manufacturers are named because Article 8 (b) of the General Agreement on Tariffs and Trade Anti-dumping Code requires the parties to the Code to ensure that the authorities should name the suppliers of the product concerned. The duty is payable quite generally by all importers of such products and the fact that the importers may be potentially identifiable would not affect the generality of the regulation in question.

The *intervener* observes that by not attacking the validity of Articles 1 and 2 of Regulation No 1778/77, the applicants recognize that those articles are of general application and are not of direct and individual concern to them. The general applicability of the regulation is not limited simply because the major Japanese manufacturers are named in Article 3, in conformity with the provisions of Article 20 of Regulation No 459/68, for the sole purpose of identifying products in respect of which amounts secured by way of provisional duty are to be definitively collected. The regulation is obligatory and involves judicial consequences for categories of persons specified in a general and abstract way, that is, all importers of roller bearings originating from the four major sources of supply.

The *applicants* observe first of all that they challenge one act only, in other words the pronouncement in Article 3 of Regulation No 1778/77 that certain provisional duties should be definitively collected.

They consider that the steps to be taken under Regulation No 459/68 are clearly of an administrative nature. Those measures presuppose an evaluation of facts and circumstances peculiar to each individual company. They aim at undertakings to be given by each enterprise individually.

Article 3 of Regulation No 1778/77 is a decision. Article 15 (1) (a) and (2) (b) of Regulation No 459/68 uses the words "subsequent decision of the Council" and "that the Council has not decided to collect". The order issued in Article 3 obliges and commits a limited number of persons, namely the customs authorities with whom security has been lodged, to collect the respective amounts. On the other hand, that provision has an

immediate legal effect on a limited and known number of specially named persons, namely the four enterprises who had put up security under the provisions of Regulation No 261/77. The order to collect is not an abstract and objectively determined ruling. It is a concrete and specific decision made, as Regulation No 1778/77 itself terms it, in consideration of "the facts as finally established".

The *defendant* replies that Article 19 (1) of Regulation No 459/68 provides for anti-dumping duties to be imposed by regulation. The use of expressions elsewhere in that regulation cannot affect the legal nature of the regulation in question.

The imposition of an import duty placing obligations on customs authorities to collect the duties is a typical case of the imposition of duties by regulation. To argue that because the customs authorities are limited and known is sufficient to enable the character of a regulation to be regarded as a decision is to seek to enlarge the concept of a decision to such an extent as to jeopardize the system of the Treaty *(Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797 at 808).

The provisional duty was not imposed on the four Japanese undertakings but on importers. It was in relation to those importers that Regulation No 1778/77 ordered the definitive collection of duty.

2. Direct and individual concern

(a) The manufacturers and exporters

The *defendant* claims that the Japanese exporters are neither directly nor individually concerned by the contested measure. The regulation in question imposes a *suspended* anti-dumping duty and provides for the definitive collection of the provisional duty paid by *importers* on the products concerned. As that duty applies only to importers, any effect that Regulation No 1778/77 may have on exporters is indirect.

Nor is there anything in Regulation No 1778/77 which individually concerns the exporters. As indicated above, the fact that the exporters are named in Article 3 merely serves to comply with the General Agreement on Tariffs and Trade Anti-dumping Code and to identify the products which have accounted for all but an insignificant proportion of imports into the Community.

The *intervener* makes observations to the same effect.

(b) The importers

According to the *defendant* the importers among the applicants are not directly concerned by Articles 1 and 2 of Regulation No 1778/77. First, they cannot be directly affected by a duty which is imposed and then suspended by the same regulation. Next, to the extent that Article 2 may involve the reimposition of that duty the importers are not directly concerned because the Commission's power is interposed between the suspension and the reimposition of the duty.

The applicant importers are not individually concerned by Article 3 of Regulation No 1778/77 which applies generally to importers of the relevant products. The general character of that article is not affected by the fact that

those importers can be identified. The importers in question in this case are not the only importers who were required to pay the definitive duty. There are at least 260 such importers in the Community.

The *applicants* reply that the mechanism which Regulation No 459/68 has set up implies that they are individually concerned by the contested measure. The provisional duties as well as the order to collect them were imposed with regard to the individual behaviour and undertakings of each of the four affected enterprises.

The contested measure is also of direct concern to them. The order to collect is of direct concern to them and affects them immediately without the intervention of an administrative body whose actions could be brought before a national court.

The contention of the Council that it is not the exporter but the importer who is concerned does not bear scrutiny. The whole procedure is directed against the exporter. Moreover the Commission has treated the European distributors of the exporter as being economically one unit when substituting their sales prices for the export price. The applicants deny that there are any importers of their bearings who do not in effect buy from their European distributors.

According to the *defendant* it follows from the case-law of the Court that the fact that it is possible to ascertain the number or even the identity of the person to whom an act applies is not sufficient to convert it into a decision.

It maintains that in law and in practice the duty is imposed upon importers and it is only importers who would be directly concerned by any imposition of duty.

3. The validity of Regulation No 261/77 of the Commission

The *defendant* maintains that to the extent that the application seeks to impugn the validity of Regulation No 1778/77 by attacking the validity of Regulation No 261/77, the application is inadmissible. Even if the applicants invoke Article 184 of the EEC Treaty it is impossible to contest the validity of Regulation No 261/77 since Regulation No 1778/77 is not a decision either in form or in substance. Article 184 can only be invoked to attack a "parent" regulation of a contested decision.

Since Regulation No 1778/77 is concerned exclusively with the imposition of definitive duties after a full investigation by the Commission it can stand alone without reliance on Commission Regulation No 261/77.

The *applicants* rejoin that if the imposition of the provisional duty laid down in Regulation No 261/77 was irregular then the decision to have it definitively collected must also fall. Any measure adopted by the Community may be the subject-matter of an application under the second paragraph of Article 173. The applicants do not see any inconsistency in challenging a decision and relying *inter alia* on the inapplicability of a regulation; this is, moreover, permitted under Article 184 of the Treaty.

The *defendant* claims in reply that if Regulation No 261/77 is a regulation within the meaning of Article 184 it must follow that Council Regulation No

1778/77 is also a regulation whose annulment cannot be applied for under the second paragraph of Article 173.

The *defendant* and the *intervener* claim that Article 184 cannot be used to circumvent the time-limits under Article 173.

The substance of the case

The applicants rely on grounds of lack of competence, infringement of an essential procedural requirement and infringement of the Treaty and of legal provisions relating to its application.

A — Lack of competence

According to the *applicants,* the Commission did not have power to issue Regulation No 261/77. The power conferred on it by Regulation No 459/68 of the Council is *ultra vires* and is not supported by any competence granted by the Treaty to the Council. Measures which demand an independent decision and which have a definite effect require the strict observance of the distribution of competence ordained by the Treaty. In the view of the applicants, the imposition of a provisional duty required such a decision in that the assumed occurrence of dumping and following injury entitles but does not force the Community to impose provisional measures.

In its defence, the *Council* claims that in authorizing the Commission to take provisional measures pursuant to Article 15 of Regulation No 459/68, it was acting within its powers (Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster, Berodt & Co.* [1970] ECR 1161 and Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279).

In relation to anti-dumping duty the basic elements have been dealt with by Council Regulation No 459/68 and in accordance with the procedure laid down in Article 113 (2) of the EEC Treaty. Having regard to the necessity of immediate action the Council had sound practical reasons for delegating the implementation of the basic regulation in relation to provisional duties to the Commission under Article 155 of the Treaty.

Even if Commission Regulation No 261/77 were defective the Council would not accept that Article 3 of Council Regulation No 1778/77 would necessarily also be invalid. Having regard to the fact that no direct attack has been made by the applicants against the latter regulation it may be considered, in the light of the full investigation carried out for the purposes of Council Regulation No 1778/77, that the passing of that regulation had cured any defect in Commission Regulation No 261/77, at least in so far as the defect was procedural.

The *intervener* also maintains that the applicants are time barred from invoking the illegality of Regulation No 261/77.

In their reply, the *applicants* allege that Article 113 (2) ordains that the Commission proposes but the Council takes the decisions. Article 15 of Regulation No 459/68 concerns an act of implementing the common commercial policy which Article 113 of the EEC Treaty has reserved to the Council and made subject to the requirement of a qualified majority in the Council. This requirement would obviously be evaded if the decision were passed on to the Commission.

In its rejoinder, the *Council* observes that, in relation to Article 113, the "measures to be taken in case of dumping" are the basic elements of the matter. These have been adopted by Regulation No 459/68 of the Council. The power to impose a provisional duty has been adopted as one of the basic elements by Article 15 of that regulation. The actual implementation of the basic regulation has however been delegated to the Commission in line with the decision of the Court of Justice in Case 25/70 *(Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster, Berodt & Co.* [1970] ECR 1161 at 1172).

B — Infringement of essential procedural requirements

1. The *applicants* claim that the order referred to in Article 3 of Regulation No 1778/77 to collect the provisionally imposed anti-dumping duties relies upon the imposition of those duties by Commission Regulation No 261/77 and is unlawful if this regulation is invalid. The applicants claim that the latter regulation does not satisfy the formal conditions stipulated in Article 190 of the Treaty and also in Article 10 (c) of the Anti-dumping Code.

Regulation No 459/68 of the Council, which forms the basis of Regulation No 621/77, fails to state that a qualified majority vote has been obtained (Article 113 (4)).

Moreover, the Commission was bound to observe the conditions imposed by Article 19 (3) of Regulation No 459/68, according to which no provisional duty "shall exceed the margin of dumping provisionally established". Commission Regulation No 261/77 entirely fails to determine that margin.

In addition, no reasons are given in that regulation as to why such an emergency situation was thought to exist. Such a situation, according to the applicants, constitutes one of the conditions precedent for the power of the Commission.

In its defence, the *Council* observes that the requirement to state reasons depends on the nature of the measure in question. Regard should also be had to the circumstances in which the measure in question was passed. In this case, the relevant circumstances which must be borne in mind are the extensive investigations conducted by the Commission, the limitations imposed on the Commission in relation to the confidentiality of the information supplied by the parties concerned and the period of five working days laid down under Article 15 (1) (c) of Regulation No 459/68.

The *intervener* considers that the applicants have not specified which formal conditions stipulated in Article 10 (c) of the Anti-dumping Code it is alleged that the regulation fails to satisfy.

The *Council* and the *intervener* claim that neither Article 190 or any other article of the Treaty provide for a duty to refer in a regulation to the fact that it was adopted by a qualified majority.

The *Council* observes that the effect of imposing a provisional duty of 20% on the products of the applicants against a finding as stated that in several cases the margin of dumping exceeded 30% is by implication, having regard to Article 19 (3) of Regulation No 459/68, to state that the average margin as provisionally determined was at least 20%.

Considering that the interests of the Community "call for immediate intervention", Commission Regulation No 261/77 indicated as clearly as possible that there was an emergency.

The *applicants* reply that there is no way either for the Court or for the parties concerned to know whether the requirements laid down in Articles 148 and 149 of the Treaty have been met, since the deliberations of the Council are not taken in public. The applicants leave this point to the wisdom of the Court to consider.

The Council cannot by its acts relieve the Commission of the necessity to give adequate reasons for its decisions. If the Commission did not fulfil that requirement within the five working days that would show that it was unable to transact its business in the way the Treaty prescribes.

With regard to the absence of an indication of the margin of dumping, the applicants observe that if the very fact that the duty had been imposed proved that the determined margin could not have been lower than the duty this would make nonsense of Article 10 (c) of the Anti-dumping Code which provides that "the authorities concerned shall inform ... the directly interested parties of their decisions regarding imposition of provisional measures, indicating the reasons for such decisions and the criteria applied". Article 190 of the Treaty and Article 10 (c) of the Anti-dumping Code give the applicants the right to know what actual margin had been determined as the criterion of the allowable rate which the duty must not exceed.

According to the applicants, Regulation No 261/77 fails to keep within the limits laid down in the recitals of the preamble to Regulation No 459/68 for the purposes of justifying the emergency procedure. The Commission has not even tried to explain why that intervention had to be made by the Commission rather than by the Council and why it could not wait until, a few months later, the Council could decide on the facts as finally established.

In its rejoinder, the *Council* claims that the short time-limit of five working days is in truth imposed by the nature of the measures. The General Agreement on Tariffs and Trade Anti-dumping Code recognizes the imposition of provisional measures.

With regard to the alleged failure to state the margin of dumping, the Council considers that the applicants could deduce from the various findings set out *and* the articles in Regulation No 459/68 of the Council under which the findings are made what the margin provisionally determined was. It was possible for the applicants to make that calculation.

With regard to the emergency procedure, the Council maintains that all the conditions laid down in Article 15 (1) (a) of Regulation No 459/68 were fulfilled.

2. Failure to state the reasons why the export prices were unreliable

The *applicants* observe that in accordance with Article 3 (3) of Regulation No 459/68, both the provisional determination of the existence of dumping within the context of Regulation No 261/77 and the definitive determination of the latter within the context of Regulation No 1778/77 imply an analysis of the price and comparison of that price with the price on the domestic market "on the basis of the price at which the imported products were first resold to an independent buyer". However the regulations do not indicate the reasons why the export prices did not constitute a reliable basis for the comparison.

It follows from paragraph 1 of the Notes and Supplementary Provisions to Article VI of the General Agreement on Tariffs and Trade that hidden dumping by

associated houses includes "the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country" which could only have been ascertained by investigating the transactions of each of the importers separately.

The *Council* replies that the Commission is entitled to take the view that the actual export prices were unreliable because of "association". No other reason is required (Article 3 (3) of Regulation No 459/68).

Paragraph 1 of the Notes and Supplementary Provisions to Article VI relied upon by the applicants was replaced by the Anti-dumping Code, which is based on a broader concept.

The *intervener* observes that the Commission was faced with extreme difficulty in determining the export prices of bearings produced in Japan. The prices on the export price list discussed during the meetings of 18 and 19 January 1977 between representatives of the Japanese bearing industry and the Commission were described as guidelines only and whilst originally they were referred to by the Japanese representatives as FOB prices, subsequently these representatives maintained that they represented ex-warehouse prices. The use of the criterion of the first resale price to an independent buyer is therefore justified on both the grounds contained in Article 3 (3) of Regulation No 459/68 of the Council, that is, the lack of a determinable export price and the unreliability of export prices because of the association between exporter and importer, although only the latter grounds were referred to in Commission Regulation No 261/77 and Council Regulation No 1778/77.

In their reply, the *applicants* claim that under Article XXXIV of the General Agreement on Tariffs and Trade, the annexes to that Agreement are an integral part thereof; Annex 1 consists of the Notes and Supplementary Provisions relied upon by the applicants.

The applicants claim that the association must have led, and must be shown to have led, to the importer having sold the products in question at prices below those which he paid to the exporter. No such policy has ever been practised by the applicants.

In its rejoinder, the *Council* answers that the General Agreement on Tariffs and Trade Anti-dumping Code as an interpretation of Article VI was intended to be the operative interpretative provision *unless* otherwise expressly stated. The words in paragraph 1 of the Supplementary Provisions referred to by the applicants do no more than give an example of hidden dumping. Both under Article 2 (e) of the General Agreement on Tariffs and Trade Anti-dumping Code and under Article 3 (3) of Regulation No 459/68, unreliability "because of association" is the only criterion applicable for the purpose of reconstructing the export prices on the basis of sales to the first independent buyer.

The *intervener* observes that the applicants have not availed themselves of the opportunity to show from actual figures that the export prices to its subsidiaries were, notwithstanding the relationship between exporter and importer, "reliable".

C — Infringement of the Treaty and of legal provisions relating to its application

1. Failure to pay regard to the price increases made pursuant to the undertaking

The applicants claim that they undertook to increase their prices in a manner which was designed to eliminate to the satisfaction of the Commission any alleged or definitively determined cause for the imposition of an anti-dumping duty. The undertaking was given on 20 June 1977 and was retrospective to 5 February 1977, the date on which Commission Regulation No 261/77 came into force. The applicants have acted upon this undertaking and thereby achieved the same effect that the definitive collection of the provisional duty could have produced. They submit that since Regulation No 1778/77 states that those undertakings to revise prices justify the suspension of the definitively imposed duty they must, by the same reasoning, preclude the definitive collection of the provisional duty.

In reply, the *Council* and the *intervener* observe that the applicants offered undertakings at a very late stage in the proceedings, in other words, on 20 June 1977. It was impossible for the applicants thus to have acted on the undertakings from 5 February 1977.

Although the undertaking enabled the definitive duty of 15% imposed to be suspended for the future, it did not in any way preclude the collection of the provisional duty.

The *Council* adds that the price increases prior to the offering of the undertaking were due entirely to the imposition of the provisional duty. They had an effect for a very limited period only and did not in any case eliminate the margin of dumping found.

In their reply, the *applicants* emphasize that they did not wait to sign undertakings before raising their prices and they refer to the actual increases. As has been shown to the Commission they raised them by substantially more than the percentage called for in the undertakings subsequently signed.

The applicants consider that the blame for the delay, if there was one, lies mainly with the Commission because it steadfastly refused to answer the applicants' queries.

They claim that the Council was not entitled to order the collection of the security given for the provisional duty once a voluntary undertaking had been given and accepted. The undertaking was given at the instigation of and in the wording suggested by the Commission.

The Council's suggestion that not to collect the duty would amount to a reward to the Japanese companies for the delay which they had caused is totally unjustified. Provisional duties are not punitive measures (Article 7 (b) of the Anti-dumping Code).

In its rejoinder, the *Council* maintains that any increases in prices prior to the giving of the undertaking did not eliminate the margin of dumping found. In the view of the Council, the applicants give absolutely no details of the price increases they say they made or the dates when they were made. Neither the applicants nor their subsidiaries had implemented the undertaking even by 31 December 1977.

The Council emphasizes that the failure by the applicants to offer an undertaking until a late stage was in no way prejudicial to their case and the relevant part of Article 7 (b) of the General Agreement on Tariffs and Trade Anti-dumping Code (incorporated in Article 14 (2) (c) of Regulation No 459/68 of the Council) was in no way infringed.

2. *Discrimination through applying different rates for the provisional duty*

According to the *applicants* the provisional duty imposed by the Commission provides for a lower rate in respect of products manufactured and exported by two specified producers. Under Article 3 of Regulation No 1778/77, the applicants and one other firm would have to pay retrospectively 15% duty whereas two other firms can only be made to pay 10%, although no difference in the dumping margin has been established in that regulation. That regulation must therefore be regarded as discriminatory and offending against the provisions of the Anti-dumping Code (Article 8 (b)).

The *Council* and the *intervener* reply that if there was any act of discrimination the act of discrimination was the making of Commission Regulation No 261/77. That regulation cannot be challenged in these proceedings.

The investigation carried out at the time when the provisional duties were imposed indicated different margins of dumping. That being so, the fact provision was made for the application of a duty at a different rate to products of different origins does not constitute discrimination but proves, rather, that the provisions of Article 19 (3) of Regulation No 459/68 have been scrupulously observed.

According to the *applicants* it is not Regulation No 261/77 but Regulation No 1778/77 which contains the discrimination. On finding that there had been no reason to treat the different exporters differently the Council could have welcomed the opportunity of putting matters right even if this could only be done by collecting the same 10% from all exporters.

The discrimination lies in the fact that different amounts are to be collected from parties whose percentage of dumping has been held to have been the same at the time the collection was ordered.

In its rejoinder, the *Council* claims that the difference in treatment resulted from being unable to collect duty from importers of Nachi and Koyo products by virtue of the provisions of Article 19 (3) of Regulation No 459/68. It did not result from any arbitrary decision.

3. *Date taken for the comparison of prices*

According to the *applicants,* it matters whether the resale price, if substituted for the export price, is being compared with the home market price at the time of the actual import or with that at the time of the "first independent resale".

The applicants hold considerable stocks for considerable times. The only non-discriminating comparison can be that between the home market price at the time of the actual export and the price at which the goods in question could have first been resold to an independent buyer.

The *Council* and the *intervener* observe that the prices were compared in

accordance with the provisions of Article 3 (4) (a) of Regulation No 459/68 and of Article 2 (f) of the General Agreement on Tariffs and Trade Anti-dumping Code for sales "made as nearly as possible at the same time".

In their reply, the *applicants* maintain that they should be allowed, as any stockist, to sell a bearing in July at a price at which they could have sold it the previous January, when the products were entered for consumption in the common market, even if there has in the meantime been a movement in Japanese home market prices or in rates of exchange. The method followed by the Commission and the Council must be regarded as discriminatory.

In its rejoinder, the *Council* answers that the wording of Article 3 (4) (a) of Regulation No 459/68 and of Article 2 (f) of the General Agreement on Tariffs and Trade Anti-dumping Code is clear. There is no requirement to assess at what stage products came into stock or to attempt to evaluate when products were in fact exported.

IV — Oral procedure

The parties presented oral argument at the hearing on 10 and 11 January 1979. The Advocate General delivered his opinion at the hearing on 14 February 1979.

Decision

1 By application of 19 September 1977, received at the Court Registry on 20 September 1977, the applicants, NTN Toyo Bearing Company Ltd. (hereinafter referred to as "NTN"), NTN Bearings — GKN Ltd. — NTN Wälzlager (Europa) GmbH and NTN Sidag (hereinafter referred to as "the subsidiaries") brought before the Court of Justice under Article 173 of the Treaty an action against the Council for the annulment of Article 3 of Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan (Official Journal 1977, L 196, p. 1) in so far as that article affects them.

2 By application of 5 October 1977 the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as "FEBMA") asked to be allowed to intervene in support of the submissions of the Council, the defendant; this intervention was allowed by order of the Court of 26 October 1977.

3 As early as the beginning of 1977, the Commission, under Article 10 of Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection

against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), commenced examination of the matter so as to check whether protective measures against dumping by Japanese ball bearing and tapered roller bearing producers were necessary.

4 Pursuant to Article 10 in conjunction with Article 15 of Regulation No 459/68, the Commission introduced by Regulation (EEC) No 261/77 of 4 February 1977 (Official Journal 1977, L 34, p. 10) a provisional anti-dumping duty of 20%, reduced to 10% in the case of two producers, for ball bearings, tapered roller bearings and parts thereof originating in Japan; this provisional duty was extended by Council Regulation (EEC) No 944/77 of 3 May 1977 (Official Journal 1977, L 112, p. 1) under Article 16 of the basic regulation, Regulation No 459/68.

5 During the procedure initiated by the Commission the four major Japanese producers, including NTN, gave voluntary undertakings signed on 20 July 1977 under Article 14 (2) of Regulation No 459/68 to revise their prices so that the margin of dumping might be eliminated; those undertakings resulted in an increase of 20% in their export prices.

6 Council Regulation (EEC) No 1778/77 of 26 July 1977 then introduced, under Article 17 of Regulation No 459/68, a definitive anti-dumping duty of 15% on the products in question and suspended the application of that duty; Article 3 of that regulation, which is the subject-matter of the application, provides, as regards the products exported by the four major Japanese producers, for the definitive collection of the amounts secured by way of provisional anti-dumping duty laid down in Regulations Nos 261/77 and 944/77.

The admissibility of the application

7 The Council has raised an objection of inadmissibility claiming that the contested article forms part of a regulation and that the applicants are therefore not entitled to request annulment of it under the second paragraph of Article 173 of the Treaty. It claims that in the present case this is not a decision adopted in the guise of a regulation since Regulation No 1778/77 in fact constitutes a general rule which affects all the products in question orig-

inating in Japan and which must, according to Article 19 (1) of Regulation No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), be adopted in the form of a regulation.

8 The applicants reply that the contested article, although drafted in abstract terms, in fact affects only the first applicant and three other Japanese undertakings which produce the products in question (hereinafter referred to as "the major producers"), as well as their subsidiaries in the Community. The preliminary investigation carried out before the adoption of Regulation No 1778/77 was limited to inquiries made first at the premises of the European subsidiaries and then at the premises of the major producers in Japan. The specific nature of the measure is confirmed by Article 3 of Regulation No 1778/77 which provides for the collection of the amounts secured by way of provisional duty only as regards the products manufactured and exported by the major producers. The contested article therefore constitutes a decision which affects only the major producers and their subsidiaries and must therefore be considered to be a decision concerning them adopted in the guise of a regulation.

9 Before commencing the examination of the admissibility of the application, it should be stated that NTN and its subsidiaries are sufficiently closely associated for the Commission to have considered, during its examination of the matter, that it was necessary to apply to them the special provisions concerning export prices laid down in Article 3 (3) of the basic regulation, Regulation No 459/68. In these circumstances there is no need, as regards the question whether the contested measure is of direct and individual concern to the applicants, to make a distinction in relation to them between producers on the one hand and importers on the other.

10 Regulation No 1778/77 contains essentially three provisions:

(i) Article 1 imposes a definitive anti-dumping duty of 15% on the products in question originating in Japan and suspends the application of that duty without prejudice to Article 2;

(ii) Article 2 regulates the monitoring of the undertakings given by the major Japanese producers and empowers the Commission to terminate

the suspension of the application of the duty if it finds that these undertakings are being evaded, not being observed or have been withdrawn;

(iii) Article 3 provides, in respect of the products manufactured by the major producers, for the collection of the amounts secured by way of provisional duty in application of the imposition by previous regulations of a provisional duty.

11 Article 3 constitutes accordingly a collective decision relating to named addresses. Although the collection of the amounts secured by way of provisional anti-dumping duty is *per se* of direct concern to any importer who has imported the products in question subject to such duty, the special feature of Article 3 which sets it apart is that it does not concern all importers but only those who have imported the products manufactured by the four major Japanese producers named in that article. The allegation of the Council and the intervener that only implementing measures adopted by the national authorities are of direct concern to the importers and that these importers should therefore, where appropriate, bring the matter before the national courts having jurisdiction disregards the fact that such implementation is purely automatic and, moreover, in pursuance not of intermediate national rules but of Community rules alone.

12 Article 3 of Regulation No 1778/77 is therefore of direct and individual concern to those importers and consequently the applications lodged by the subsidiaries, as importers of NTN products, are admissible. As a result the application lodged by NTN against that article is also admissible.

The substance of the application

13 The applicants base their application against Article 3 of Regulation No 1778/77 on the claim, amongst other complaints against that article, that Regulation No 459/68 does not permit the definitive anti-dumping duty to be imposed at the same time as undertakings by the producers concerned to revise prices are accepted. They claim that since the collection of the

amounts secured by way of provisional duty was possible only within the context of the introduction of a definitive anti-dumping duty, it follows that Article 3 has no legal basis.

14 The Council and the intervener reply that as the contested regulation was based not only on the basic regulation but also on Article 113 of the Treaty the latter provision, which authorizes the Council the power to adopt an *ad hoc* regulation independently of the provisions of Regulation No 459/68. The Council must therefore be deemed to have exercised that power in the present case. Finally, as the Commission's investigation discovered a margin of dumping of at least 15% injuring the Community industry and as NTN acknowledged by implication by its undertaking that there was a margin of dumping of 20%, it is unsatisfactory to have to recommence the investigation for failure to observe the undertaking and more appropriate in such a case to terminate the suspension of the definitive duty imposed on the basis of well-established facts.

15 Article 14 (1) of the basic regulation, Regulation (EEC) No 459/68, as amended by Regulation (EEC) No 2011/73 of the Council of 24 July 1973 (Official Journal 1973, L 206, p. 3) having provided that "If it becomes apparent ... that protective measures are unnecessary ... the proceedings shall stand terminated", Article 14 (2) provides as follows:

"(a) The provisions of the foregoing paragraph shall also apply where, during examination of the matter, the exporters give a voluntary undertaking to revise their prices so that the margin of dumping is eliminated or to cease to export the product in question to the Community, provided that the Commission, after hearing the opinions expressed within the Committee, considers this acceptable.

(b) Where the Commission, acting in accordance with the provisions of the foregoing subparagraph, accepts the undertaking referred to therein, the investigation of injury shall nevertheless be completed if the exporters so desire or if, after hearing the opinions expressed within the Committee, the Commission so decides. If the Commission, after hearing the opinions expressed within the Committee, makes a determination of no injury, the undertaking given by the exporters shall automatically lapse unless the exporters state that it is not so to lapse.

(c) The fact that exporters do not offer to give such undertakings, or do not accept an invitation made by the Commission to do so, shall in no way be prejudicial to the consideration of the case. However, the Commission shall be free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

(d) Where the Commission finds that the undertaking of exporters is being evaded or no longer observed or has been withdrawn and that, as a result, protective measures might be necessary, it shall forthwith so inform the Member States and shall recommence the examination of the facts in accordance with Article 10.

(e) The provisions of Article 18 (1) shall apply *mutatis mutandis* to the undertakings given by exporters on the basis of this article. Any modification of such undertakings shall be made in accordance with the procedure laid down in this article."

16 On the other hand, where the procedure of examination of the matter is continued, Article 17 of that regulation provides as follows:

"1. Where the facts as finally established show that there is dumping and injury, and the interests of the Community call for Community intervention, the Commission shall, after hearing the opinions expressed within the Committee, submit a proposal to the Council. Such proposal shall also cover the matters set out in paragraph 2.

2. (a) The Council shall act by a qualified majority. Where Article 15 (1) has been applied, the Council shall decide, subject to the provisions of Article 15 (2), what proportion of the amounts secured by way of provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there is material injury (and not merely threat of material injury or of material retardation of the establishment of a Community industry) or that such injury would have been caused if provisional action had not been taken."

17 In the light of these provisions it is unlawful for one and the same anti-dumping procedure to be terminated on the one hand by the Commission's accepting an undertaking from the exporter or exporters to revise their prices

at the same time as, on the other, by the imposition on the part of the Council, at the proposal of the Commission, of a definitive anti-dumping duty.

18 It is impossible to accept the argument that in the present case the undertaking was given only after examination of the matter since the examination of the matter ends only when the Commission submits its proposals to the Council, whilst it is not disputed in the present case that the undertakings were signed on 20 June 1977 before the meeting of the advisory committee provided for in Article 12 (2) of Regulation No 459/68 held on 21 June 1977. Those undertakings were referred to by the Commission in its proposal to the Council of 4 July 1977 and considered to be "acceptable". The same undertakings were referred to by the Council both in the recitals of the preamble to Regulation (EEC) No 1778/77 and in the provisions of that regulation as valid existing undertakings. The fact that the Commission did not notify its acceptance of the undertaking until 3 August 1977 cannot therefore be considered as an indication that that acceptance was made only "subject to" the suspended imposition of a definitive anti-dumping duty as a penalty.

19 On the contrary, under the above-mentioned Article 14, an undertaking by an exporter to revise his prices leads to termination of the proceeding so that it is impossible to apply Article 17 of Regulation No 459/68. By specifying that termination of the proceeding occurs only if "the Commission, after hearing the opinions expressed within the Committee, considers this acceptable", Article 14 in no way implies that the Commission and, where appropriate, the Council may follow the procedure provided for until the stage reached in Article 17 and accept the undertaking only at the same time as introducing a definitive anti-dumping duty.

20 Such a combination of measures which are by their very nature contradictory would in fact be incompatible with the system laid down in the basic regulation. The argument based on the effectiveness of this combination for the purpose of monitoring the observance of the undertaking and being able to penalize any infringement of it cannot therefore be accepted since the provisions of Regulation No 459/68 and in particular those of Article 14 (2)

(d) provide that in such a case the Commission must recommence the examination of the facts in accordance with Article 10. This provision implies that the Commission may, if it considers that an appropriate situation has arisen, immediately introduce a provisional anti-dumping duty or take other necessary measures but requires nevertheless that those measures should be adopted having regard to the situation caused by the failure to observe the undertaking. In any case Regulation No 459/68 aims to ensure that the measures to be taken are adopted in compliance with the formalities and guarantees laid down in Article 10.

21 The argument that Regulation No 1778/77 constitutes a measure *sui generis* based directly on Article 113 of the Treaty and not subject to the provisions of Regulation No 459/68 disregards the fact that the whole proceeding in question was carried out within the context of the provisions laid down by that regulation. The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies.

22 The submission is therefore well founded and it follows that the application directed against Article 3 is sound in law.

23 If the result of the undertakings signed by the four major Japanese producers was that, under Article 14 of the basic regulation, the proceeding should have stood terminated, it follows that there was no need to apply Article 17 which empowers the Council to order the collection of the amounts secured by way of provisional duty. The wording of Article 17 shows moreover that such a decision can be adopted only at the same time as the imposition of a definitive anti-dumping duty.

24 It follows in particular that the Commission can propose a decision to collect the amounts secured only if it proposes "Community action", in other words, the introduction of a definitive anti-dumping duty. This interpretation

is confirmed by Article 16 (2) which provides that the Commission must submit a proposal to the Council for Community action at least one month before expiry of the provisional anti-dumping duty. It is also confirmed by the wording of Article 17 (2) (b).

25 In fact, under Article 19 (3) of the basic regulation a provisional anti-dumping duty can be imposed only in so far as a margin of dumping and material injury have been found. This would seem to have been the intention of the Council when it provided in Article 3 of the contested regulation that the amounts secured were to be "definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation", in other words the rate of the definitive anti-dumping duty whose application had been suspended.

26 Since Article 4 of Regulation No 1778/77 regulates only the entry into force of the preceding provisions there is nothing to prevent this regulation's being annulled in its entirety.

27 It follows from the preceding statements and from the arguments put forward by the applicants in the parallel applications in Cases 118/77, 119/77, 120/77 and 121/77 that Regulation No 1778/77 is unlawful and that the application is therefore well founded. It is therefore necessary, in accordance with the applicants' request, to annul Article 3. It should however be observed that the annulment of Regulation No 1778/77 in no way affects the undertakings given by the major Japanese producers by which those producers undertook to revise their prices so that the margin of dumping is eliminated and those undertakings therefore retain their validity and continue to be subject to the provisions of Article 14 (2) in conjunction with Article 10 of Regulation No 459/68.

Costs

28 The applicants have succeeded in their submissions.

29 It is therefore necessary to order the Council to pay the costs in connexion with the application for the adoption of interim measures and the main action, except for the costs caused by the intervention of FEBMA.

30 It is also necessary to order the Council to pay the costs incurred by Nippon Seiko and its subsidiaries as interveners in connexion with the application for the adoption of interim measures.

31 Finally, the intervener FEBMA must be ordered to bear its own costs and those incurred by the applicants on account of its intervention.

On those grounds,

THE COURT

hereby:

1. **Annuls Article 3 of Regulation (EEC) No 1778/77;**
2. **Orders the Council to pay the costs in connexion with the application for the adoption of interim measures and the main action, except for those caused by the intervention;**
3. **Orders the Council also to pay the costs caused by the intervention of Nippon Seiko and others in connexion with the application for the adoption of interim measures;**
4. **Orders the intervener FEBMA to bear its own costs and those incurred by the applicants on account of its intervention.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 29 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President