ORDER OF THE PRESIDENT OF THE COURT
17 DECEMBER 1984 [1]

Nippon Seiko KK
v Council of the European Communities

Case 258/84 R

Application for interim measures — Suspension of operation of a measure — Interim measures — Conditions for granting — Weighing up all the interests concerned
(EEC Treaty, Arts 185 and 186; Rules of Proecedure, Art. 83 (2))

Suspension of operation and other interim measures cannot be considered unless the factual and legal circumstances relied upon to obtain them establish a *prima facie* case for granting them. In addition there must be urgency in the sense that it is necessary for the measures to be issued and to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreparable damage to the party seeking them. Finally, they must be provisional in the sense that they do not prejudge the decision on the substance of the case.

In Case 258/84 R

NIPPON SEIKO KK, 2-3-2 Marunouchi, Chiyoda-Ku, Tokyo, Japan, represented by Jeremy Lever, Queen's Counsel of Gray's Inn, Eleanor Sharpeston, Barrister of Middle Temple, and Robin Griffith, Solicitor of Messrs Coward Chance, 21-22 Avenue des Arts, 1040 Brussels, Belgium, with an address for service in Luxembourg at the Chambers of J.-C. Wolter, 8 Rue Zithe,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Gijs Peeters and Erik Stein, acting as Agents, with an address for service in Luxembourg at

1 — Language of the Case: English.

the office of Jörg Käser, Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, Bâtiment Jean Monnet, Kirchberg,

intervener,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application dated 5 December 1984 Nippon Seiko KK requested the Court to suspend the application of Council Regulation No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball-bearings originating in Japan and Singapore (Official Journal, L 193, p. 1) in so far as that regulation affects the applicant and to order the necessary interim measures or such relief as might be lawful or equitable in all the circumstances.

2 That application, which was lodged at the Court Registry on 5 December 1984, was brought under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure.

3 The applicant refers to the application for the annulment of the aforesaid Regulation No 2089/84, which application it lodged at the Court Registry on 2 November 1984.

4 By order of 13 December 1984 the Commission was granted leave to intervene in the present proceedings. However it has not submitted written observations.

5 The applicant points out that in the future it and its subsidiaries will have to pay in respect of imports of ball-bearings a definitive anti-dumping duty. It claims that, as a result of this, should the contested regulation later be declared void and the duty refunded, they will lose the use of their money or will have to borrow money during the whole of the period in question.

6 Pending the final determination of the main application each of the applicant's European subsidiaries is willing to give, in respect of definitive anti-dumping duty that becomes payable by it in the future, a security to their respective national customs authorities; the guarantee fee payable is lower than the interest rate which would be payable by the applicant's European subsidiaries if they are forced to pay the future definitive duty as it falls due. Thus, in the United Kingdom, for example, the interest rate is 11.69% whereas it is only 0.4% for the guarantee fee. In consequence, unless the present application is speedily granted the applicant's European subsidiaries will lose substantial sums by way of interest.

7 The applicant refers, in addition, to the order of the President of the Court of 20 October 1977 in Case 119/77 R *Nippon Seiko KK* v *Council and Commission,* [1977] ECR 1867). It further states that there is no Community legislation providing for the payment of interest on the repayment of anti-dumping duties, the payment of which has been wrongly required. Finally, it draws attention to the fact that it has already had to accept repayment without interest of anti-dumping duties paid under a regulation subsequently declared void by the Court.

8 As regards the factors establishing a *prima facie* case for the measures applied for, the applicant expressly refers to its main application which sets out numerous grounds of annulment.

9 The Council contends that the basic anti-dumping regulation does not provide any possibility of replacing the collection of definitive anti-dumping duties by a security. In that respect it is necessary to distinguish between definitive anti-dumping duties and provisional duties in respect of which the provision of a security is specifically laid down.

10 According to the Council, the only irreparable damage which the applicant could suffer is the loss of interest on the definitive duties if they were paid by it but were later refunded as a result of the applicant's succeeding in its main application. Such damage cannot be regarded as serious. Furthermore the Council maintains that the provision of a security would not adequately secure the interests of the Community industry. The purpose of an anti-dumping duty is to increase the price of imported products in order to eliminate the effects of dumping and that purpose would not be achieved if only a security were required.

11 The Council considers that if suspension were granted in this case there would be no reason why every regulation imposing definitive anti-dumping duties should not be suspended once an application had been made to the Court to have it declared void.

12 According to Article 185 of the EEC Treaty actions brought before the Court of Justice do not have suspensory effect. The Court of Justice may, however, if it considers that the circumstances so require, order that application of the contested decision be suspended and prescribe any other interim measure pursuant to Article 185 and 186 of the EEC Treaty.

13 According to established case-law, the adoption of such measures cannot be considered unless the factual and legal circumstances relied upon to obtain them establish a *prima facie* case for granting them. In addition there must be urgency in the sense that it is necessary for the measures to be issued and to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreparable damage to the party seeking them. Finally, they must be provisional in the sense that they do not prejudge the decision on the substance of the case.

14 While the applicant has in the present case put forward allegations of fact and submissions in law which could be regarded as establishing a *prima facie* case for suspending application of the regulation in dispute, the Court must also assess the urgency of the suspension requested and the need for it in order to avoid serious and irreparable damage to the applicant as defined above.

15 In this respect, the damage which the applicant alleges that it will suffer is the loss of interest upon the anti-dumping duties, which would not be repaid to it if the applicant succeeds on the merits of its main application.

16 At the hearing it was common ground that the applicant will not be able to obtain complete restitution, including loss of interest, if it wins the main case, with, it would appear, the exception of the Federal Republic of Germany. At this stage of the proceedings the Court cannot affirm that repayment of interest could be ordered in the main action or in related proceedings but this possibility cannot be excluded.

17 With regard to the probable duration of the main action and at the rates of interest quoted by the applicant, such loss of interest cannot be regarded as negligible.

18 Although looked at solely from the point of view of the applicant, there might therefore be said to be some urgency, it is necessary to weigh up the different interests concerned in proceedings pursuant to Articles 185 and 186 of the EEC Treaty.

19 The Council and the Commission have been able to demonstrate that adoption of the interim measures applied for would cause substantial harm to the European Economic Community, in that merely to require the lodging of security, as proposed by the applicant would have considerably less protective effect than the levying of the anti-dumping duty itself. Such a step would not take the interests of the Community's own industry sufficiently into account and would be apt to frustrate the purpose of the regulation itself.

20 Furthermore the damage allegedly suffered by the applicant is not special to it but, on the contrary, is likely to arise in every case where anti-dumping duties are imposed. There is therefore no special feature of this case which would justify the interim measures requested.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

1. The application for the adoption of interim measures is dismissed;

2. The costs are reserved.

Luxembourg, 17 December 1984.

J. A. Pompe
Deputy Registrar

A. J. Mackenzie Stuart
President