OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 22 October 1986 *

Mr President,
Members of the Court,

1. This application concerns the reimbursement of anti-dumping duties to which an importer in the Community is entitled. Where an importer can show that

'the duty collected exceeds the actual dumping margin . . . , consideration being given to any application of weighted averages, the excess amount shall be reimbursed'. [1]

It is the first time that that procedure has given rise to proceedings before the Court.

2. The limited company Continentale Produkten Gesellschaft (hereinafter referred to as 'Continentale Produkten'), which imports cotton yarns originating in Turkey, was obliged to pay, in respect of the customs value of the goods which it had imported between 15 April and 16 July 1982 the anti-dumping duty of 12% imposed by Council Regulation No 789/82 of 2 April 1982 for products of that kind which were released for consumption after 1 January 1982.

In accordance with Article 15 of Council Regulation No 3017/79 (hereinafter referred to as the '1979 regulation'), the applicant submitted an application to the German authorities for a refund of the duty paid. For that purpose, it produced statements from its suppliers certifying that the export prices as fixed in the contracts concluded in 1981 were not the object of any dumping.

The Commission, to which the application was forwarded, essentially rejected Continentale Produkten's application by decision of 29 October 1984, adopted on the basis of Article 16 of Council Regulation No 2176/84 (hereinafter referred to as the '1984 Regulation').

It based its decision both on the conditions in which the anti-dumping proceeding took place, the reasons for which it had opted for a constructed normal value and, equally, on the problems connected with individualizing that value in the framework of the procedure for reimbursement under Article 16, and added that in any event the applicant had not adduced sufficient proof in support of its claims. Continentale Produkten puts forward four claims, which are set out in the Report for the Hearing. Primarily, it seeks a declaration that the Commission's decision is void. The applicant claims first that the Commission had no power to adopt the decision at issue, and secondly that the decision is vitiated by illegality.

The powers of the Commission

3. According to Article 15 of the 1979 regulation, the Member State in the territory of which the products were entered for consumption,

* Translated from the French.

1 — Article 15 of Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Community and Article 16 of Council Regulation No 2176/84 of 23 July 1984 which has applied since 1 August 1984.

'shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits. The Commission shall inform the other Member States forthwith and give its opinion on the matter. If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Member State in question may decide in accordance with the said opinion. In all other cases, the Commission shall, after consultation, decide whether and to what extent the Member State should grant the application'.

Article 16 of the 1984 Regulation amends those provisions in particular by stating that:

'If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Commission may decide in accordance with the said opinion. In all other cases, the Commission shall, after consultation, decide whether and to what extent the application should be granted.'

4. The first question which therefore arises is whether the Commission was empowered under Article 16 of the 1984 Regulation to decide on an application for a refund submitted in accordance with Article 15 of the 1979 Regulation. I, unlike the applicant, consider that that question must be answered in the affirmative.

The procedure had already commenced at the time when the new regulation entered into force, and the Commission obtained its powers from the general provision in Article 16 in conjunction with the transitional provision laid down in Article 19, to the effect that the 1984 regulation 'shall apply to proceedings already initiated'.

In challenging the application of that provision, Continentale Produkten claims that it had a vested right to the continuation of the procedure initiated under Article 15 of the 1979 Regulation.

In that connection, it is sufficient to point out, first, that the substantive conditions for the right to a refund remained unchanged in the two successive provisions and, secondly, that the change in the procedural rules relating to the decision on the application are merely a matter of form.

Indeed, Article 15 already required the State to which an application for reimbursement was submitted to comply, when deciding on such application, with the opinion given by the Commission and approved by the Member States. In such a case its power was therefore totally dependent upon the Commission's opinion. Consequently, Article 16 merely transferred formally to the Commission a power of decision which in practice it already had. In the event of an objection by a Member State, including the State to which the application had been submitted, the procedure was formally amended in the same way, so that the Commission then had a direct power to decide the application.

Thus, without it being necessary to examine the other arguments put forward under this head, based on the alleged disagreement of the Federal Republic of Germany and the length of the procedure, it is sufficient to state that the fact that Article 16 applied to an application for reimbursement submitted under Article 15 of the 1979 Regulation did not affect the substantive or procedural rights of the applicant. This submission therefore cannot be accepted.

The legality of the contested decision

5. According to the *applicant*, the contested decision is illegal first because of the illegality of Council Regulation No 789/82 itself and, secondly, because of the Commission's refusal to take into consideration the individual normal values of its suppliers.

In order to assess the first head of this submission, it is necessary to ascertain the meaning and scope of Article 16 by situating it in the framework established by the 1984 Regulation.

That regulation is intended to defend Community production 'against dumped imports'. Article 2 (2) states as follows:

'A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product',

that is to say, the market price of the product. It is then possible to calculate the 'dumping margin', which is defined in Article 2 (13) (a) as 'the amount by which the normal value exceeds the export price'.

The calculation may be based on actual data or on constructed data, which are in general averaged. Although the normal value and the export price are in principle determined by reference to the price actually paid or payable (Article 2 (3) (a) and 8 (a)), they may be reconstructed on the basis of certain figures which are exhaustively listed (Article 2 (3) (b) (ii) and 8 (b)). Furthermore, price variations may cause the Commission to refer 'to the most frequently occurring, representative or weighted average prices' (Article 2 (13) (b)). Lastly, Article 2 (13) (c) states that 'where dumping margins vary, weighted averages may be established'. Those standard calculations, to which the circumstances may induce the Commission to resort in the course of the investigation initiated for that purpose, are in certain cases the only effective means of assuring protection against dumping.

Lastly, the anti-dumping duty is determined by reference, first, to the dumping margin and, secondly, to the injury caused to the Community. That is why Article 13 (3) lays down the following principle:

'The amount of such duties shall not exceed the dumping margin provisionally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury'.

There is therefore a twofold limit. The fact that the duty is limited to the level of the established margin requires that that margin should, even if it is based on standard data, be as close as possible to reality.

In the first place, that presupposes at the outset that the interested parties, in particular Community importers and exporters from non-member countries, should have been able to submit any observations concerning their own situation. That is precisely the purpose of the rules concerning the initiation and subsequent investigation conducted by the Commission, as laid down in Article 7 of the 1984 Regulation. The Commission must publish in the

Official Journal of the European Communities an announcement of the initiation of an anti-dumping proceeding and 'so advise the exporters and importers known to the Commission to be concerned . . . ' (Article 7 (1) (a) and (b)).

The Commission must also supply to 'the importers and exporters known to be concerned . . . all information made available to the Commission by any party to an investigation'. They 'may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty' (Article 7 (4) (a) and (b)). The Commission must hear the interested parties if they have requested it to do so within the period prescribed in the announcement of the initiation of an investigation (Article 7 (5)) and give them an opportunity to meet (Article 7 (6)). Lastly, although Article 8 provides for the confidentiality of certain information, such confidentiality must be reconciled with the rights of the defence (judgment of 20 March 1985 in Case 265/82 *Timex* v *Commission* [1985] ECR 849, 861, paragraphs 24 and 30).

The fact that the parties are heard under the procedure for an anti-dumping investigation thus gives the Community importers and exporters from non-member countries concerned an opportunity of making known their point of view before any duty is fixed.

Secondly, the interested parties may subsequently, after the anti-dumping duty has been fixed and applied, claim that the dumping margin does not correspond with the true position.

First, in contentious proceedings. The *exporters* may bring an action for a declaration that the regulation instituting the anti-dumping duties is void, on the basis of the second paragraph of Article 173, in the conditions laid down by the judgments of the Court (Joined Cases 239 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005). Community *importers* may, like the applicant, bring an action before the national courts challenging the decisions providing for the collection of duty, in which they can challenge the legality of the regulation itself and request the Court to make a reference for a preliminary ruling on its validity (*Allied Corporation*, cited above, paragraph 15).

Secondly, by two administrative adjustment procedures. First, any interested party is entitled, after the duties have been applied for one year, to request a 'review, in whole or in part, where warranted' of the regulation imposing anti-dumping duties, if it 'submits evidence of changed circumstances sufficient to justify the need for such review' (Article 14 of the 1984 Regulation). If a review is warranted, the investigation may be reopened with a view to amending or repealing the original regulation. Secondly, any Community importer may, like the applicant in this case, apply for a refund under Article 16.

Thus situated within the system laid down by Regulation No 2176/84 as a whole, it is clear that the procedure under Article 16 cannot be regarded as enabling the regu-

lation imposing anti-dumping duties to be challenged.

To recognize that a person applying for a refund is entitled in the course of that procedure to contest the legality of the method adopted by the Commission in order to establish the existence of dumping would be tantamount to jeopardizing the coherence of the system set up by the regulation itself: importers are at liberty, in the course of the investigation procedure, to put their point of view and, on the adoption of the regulation imposing the duties, to challenge its validity. Furthermore, it is clear that Article 16 provides for the reimbursement of duty collected by virtue of a regulation which is duly applicable. The refund is merely a corrective factor designed to enable the rate fixed by the regulation to be adjusted in a particular case. It presupposes that the duty is lawfully collected.

Because the measure in respect of which the applicant is requesting a declaration of nullity is a decision by which the Commission refused to apply Article 16 of the regulation, the application brought before the Court cannot be based on the alleged illegality of Regulation No 789/82.

6. It therefore remains to examine the second head of the same submission by which the applicant complains that the Commission refused to take into account individual normal values in deciding on its application for a refund.

Under the general scheme of the system set up by the 1984 Regulation, Article 16 is, as I have pointed out, a corrective factor which enables the effect of the regulation to be modified in relation to an individual situation without jeopardizing the general aim of protecting the Community. That is the type of arrangement which exists in the United States as a result of the application of the Tariff Act 1930, as amended by the Trade Agreements Act 1979 (19 USC paragraph 1671-1677 g (1982)). More generally, it falls within the framework of the provisions of Article 8 (3) of the General Agreement on Tariffs and Trade (GATT), which provides as follows:

'The amount of the anti-dumping duty must not exceed the margin of dumping .... 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]

In that regard it should be pointed out that the third recital in the preamble to the 1984 regulation states as follows:

'in applying these rules it is essential, in order to maintain the balance of rights and obligations which these Agreements sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice'.

The reimbursement of duty itself permits the standard values adopted by the Commission to be adjusted in individual cases. However, it is a corrective factor which must be situated in the framework of the method of calculation adopted by the Commission in order to establish the dumping margin, the legality of which may not, as I have shown, be challenged on the occasion of the application of Article 16. In other words, so far as the normal value is concerned, Article

2 — Cited in the Council Decision of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 Trade Negotiations (Official Journal 1980, L 71, at p. 95).

16 cannot permit the method to be changed for purposes of an individual case by substituting real prices for a constructed value. But it does enable the latter to be recalculated by taking into account special factors which exist in a particular situation. The same applies to the second element, the export price, depending upon whether the Commission chooses to take into account a real or a constructed price.

In this case, the dumping margin was fixed on the basis of a constructed normal value and a real export price (twelfth recital to Regulation No 789/82). On that basis, Article 16 enabled Continentale Produkten, if that had been the case, to rely upon:

(i) as regards the constructed value, the special features of the production by its suppliers (cases of family-based undertakings, for example),

(ii) as regards export prices, the decision which might have been taken by its suppliers, anticipating the arrangement to be made, to raise those prices to the level of the constructed value.

7. In this case, Continentale Produkten is disputing the adjustment of the constructed normal value to meet its individual case.

If, in order to refuse its request for a refund, the Commission had on principle refused to take into account consideration factors peculiar to its suppliers, it would have deprived it of the benefit of the right open to any importer.

That was not the case. Indeed, the information provided by the applicant in support of its request was examined by the Commission. The Commission did not find it persuasive (paragraphs 15 and 16 of its decision).

In this area, apart from compliance with the procedural safeguards which are not at issue in this case, the control exercised by the Court is limited to a manifest error of assessment and misuse of powers (Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 30). No misuse of power has been alleged. As to manifest error, which it is up to the applicant to prove, no such error has been established. It can only be assessed by reference to the elements supplied to the Commission in support of the application for a refund. Continentale Produkten has not succeeded in establishing that the Commission failed to take into account one or more of such elements, which were so decisive in nature as to have entitled it to a refund. In any case, statements by suppliers merely certifying that the prices applied did not entail any dumping could not be regarded as so decisive. So far as subsequent events are concerned, even if they were relevant they could not affect the legality of the contested decision. It is impossible to reopen before the Court of Justice consideration of an application which has to result in an administrative decision.

That is determined by the economic and legal *raison d'être* for the system. A general decision for the protection of the Community, adopted with safeguards and subject to the means of appeal described above, imposed an anti-dumping duty applicable to all imports of a certain kind of product. A provision applying *ex post facto*

for reasons of fairness introduces an individual corrective factor which is applicable to a particular situation. An importer who wishes to benefit from it and who is required to adduce evidence must therefore supply the competent administrative authority — in this case, the Commission — in good time with all the relevant evidence in support of its request. It is in these conditions and in the limits set out above that the Court will have to exercise its control.

I therefore conclude that the present application should be dismissed, and the applicant should be ordered to pay the costs.