1. A natural or legal person is individually concerned by a provision of a regulation where that provision, although drafted in general terms, in fact constitutes a collective decision.
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 argument 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 118/77

IMPORT STANDARD OFFICE (I.S.O.), Paris, represented by André Simonard, Advocate at the Paris Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, 34B Rue Philippe II,

applicant,

V

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Hans-Jürgen Lambers, Director at the Legal Department of the Council, acting as Agent, assisted by Paul-François Ryziger, Advocate at the Conseil d'Etat and the Cour de Cassation, with an address for service in Luxembourg at the office of J. N. Van den Houten, European Investment Bank, 2 Place de Metz,

defendant,

and

FEDERATION OF EUROPEAN BEARING MANUFACTURERS' ASSOCIATIONS (FEBMA), Frankfurt, represented by Dietrich Ehle, Advocate at the Cologne Bar, assisted by Roger l'Eleu, Advocate at the Paris Bar, with an address for service in Luxembourg at the office of Jeanne Housse, Huissier, 21 Rue Aldringen,

intervener,

APPLICATION for the annulment 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),

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

I — Facts and procedure

(a) The framework of the legislation

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 in conformity with the General Agreement on Tariffs and Trade Anti-dumping Code (United Nations Treaty Series, Volume 651, p. 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-dumpting 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 particularly 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) (a) 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 of the Council (Official Journal 1973, L 206, p. 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 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".

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, an association 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 Limited.

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 purposes 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 to revise their prices, and provides that if the Commission finds that these undertakings are being evaded, are not being observed or have been withdrawn, it shall 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 Regulation (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 K.K".

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 applicant has lodged the present application against Council Regulation (EEC) No 1778/77.

It claims that the dumping complained of has not been sufficiently established in law and in accordance with the requirements of the Community rules.

(d) Procedure

The application was entered in the Court Register on 8 October 1977.

Following its application, which was entered in the Court Register on 4 November 1977, the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as "FEBMA") was allowed, by order of the Court of 30 November 1977, to intervene in support of the submissions of the Council, the defendant.

The Council, by document lodged on 30 December 1977, applied to the Court pursuant to Article 91 of the Rules of Procedure 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 applicant lodged its observations on 6 March 1978.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court 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 any preparatory inquiry.

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

II — Conclusions of the parties

The applicant claims that the Court should:

— Annul "Regulation" No 1778/77 of 26 July 1977 with all the legal consequences.

The defendant contends that the Court should:

— Declare that the application is inadmissible;

— Dismiss the application with all the legal consequences;

— Order the applicant to pay all the costs.

The intervener claims that the Court should:

— Dismiss the application as inadmissible and, in the alternative, as unfounded;

— Order the applicant to pay the costs, including the costs of the intervention.

III — Submissions and arguments of the parties

Admissibility

In its application, the applicant states that under the second paragraph of Article 173 of the Treaty its application is admissible.

In the light of the case-law of the Court, Regulation No 1778/77 must be considered to be a decision. This follows from Regulation No 459/68 alone which, whilst providing in Article 19 thereof that anti-dumping duties shall be imposed by regulation, describes that imposition as a decision in Article 15 (1) (a) and Article 16 (1) thereof.

It is clear that the contested measure is of direct and individual concern to the applicant as the exclusive importer into France of ball bearings of the Nachi Fujikoshi brand name, which were the subject-matter of the collection of the anti-dumping duties imposed.

Moreover, the applicant was implicated in the anti-dumping procedure by the Commission. Besides, the contested regulation was notified to the applicant by the Commission.

In its document submitting its objection of inadmissibility and in its defence, the *Council* states that the contested measure is not of direct or individual concern to the applicant.

The contested regulation is adopted on the basis of an objectively determined situation, in other words the existence of dumping on the Community market and of injury to the European industry. The regulation is a general measure applying to all importers of the goods upon whom an anti-dumping duty has been imposed. The importers are referred to in the abstract not by reason of a personal attribute which distinguishes them from other undertakings engaged in the same activity.

The category of importers of ball bearings in the Community is moreover much less limited than one might believe, and amounts, according to the Council, to 267 importers.

The fact that the applicant was one of the undertakings which was the subject-matter of the Commission's investigation cannot show that the contested measure is of direct concern to it. The fact that the Commission notified it of that measure, a simple act of courtesy, cannot qualify it under the second paragraph of Article 173.

Nor can the fact that the applicant is the exclusive importer into France of Nachi Fujikoshi bearings make that measure of

individual concern to the applicant. It must pay the anti-dumping duty, if appropriate, not because of an attribute peculiar to it or because of individual conduct but simply because it imports goods which bear the anti-dumping duty, this being a completely objective criterion.

The *intervener* maintains that the regulation is a measure which applies to situations which have been objectively determined and entails legal effects on categories of persons referred to generally and in the abstract. Moreover, the applicant has no interest in contesting Article 1 of Regulation No 1778/77 as long as the anti-dumping duty is suspended by Article 2. An infringement of the undertaking signed by Nachi entailing termination of the suspension concerns the applicant only in the same way as any other importer.

Article 3 of Regulation No 1778/77 is not of individual concern to the applicant within the meaning of Article 173 of the Treaty. Moreover, it can contest the collection of the provisional duty before the national authorities first of all and then before the national courts.

In its reply, the *applicant* states that the general anti-dumping rule is the basic regulation, Regulation No 459/68, which is a true legislative measure, the contested measure being only a specific application to certain products.

It is applied not to 267 importers but only to a few, that is, the subsidiaries of the four producers, on the one hand, and the only independent importer, in other words the applicant, on the other.

It is individually concerned because it was involved in the investigation. In fact, the contested regulation belongs to a special category of measures which may only be adopted on the basis of the results of such an investigation.

Moreover Article 3 of Regulation No 1778/77 in particular is of direct concern to the applicant.

In reply to the observations of the intervener, the applicant observes in addition that it contested the whole of the regulation because its various articles are indivisible. Its interest in bringing an action lies in the fact that the provisional anti-dumping duties were imposed on it. The definitive collection of that provisional duty is only conceivable if the definitive duty is firmly established. The validity of Article 3 is therefore linked to that of Article 1 and in these circumstances both are of concern to the applicant. The intervener's statement that Article 3 is not of direct and individual concern to the applicant is completely incorrect.

In the rejoinder, the *Council* returns to the nature of the contested measure as a regulation. It is based on the existence of a fact, dumping, without making a value judgment on the attitude of one or several given undertakings. Anti-dumping duty is not a penalty imposed on certain undertakings but a means available to the Community authorities to re-establish the normal functioning of the market.

As regards the question whether the applicant is directly and individually concerned, the Council observes that supposing that the contested measure was introduced against certain named undertakings, it would follow that the applicant's application was inadmissible because it is not among the undertakings

named and the dumping occurred prior to the applicant's activity.

It follows from the applicant's observations that its application is principally directed against Article 3 and against the measures adopted in implementation of that article which may possibly be adopted by the national authorities. It cannot however bring such national implementing measures before the Community Court.

The *intervener* contests the "indivisibility theory" referred to by the applicant. Article 3 of the contested regulation is not of direct concern to the applicant as long as it has not established that it itself paid the provisional duty the collection of which was ordered. Nor is it of direct and individual concern to the applicant since the regulation applies to all importers of the products in question. It is impossible to maintain that the individual nature of the measure or its nature as a regulation depends upon the number of persons to whom that measure may be of concern.

The substance of the case

As regards the substance of the case the applicant puts forward against the contested measure the submissions of infringement of the Treaty or of all rules of law relating to its application and misuse of powers.

(1) Infringement of the Treaty

Both general legal principles and the basic regulation, Regulation No 459/68, have been infringed.

(a) Infringement of general legal principles

General principles do not permit a conditional penalty to be imposed unless that power has been expressly laid down. Therefore Community law results in refusing the Council the power to introduce, as it considered it was able to do, a definitive anti-dumping duty accompanied by a suspensory condition in the absence of a provision authorizing it to do so and appearing either in the Treaty itself or in a legislative measure such as a basic regulation.

The *defendant* and the *intervener* reply that the introduction of an anti-dumping duty, which is a political decision in the first instance, in no way constitutes a penalty of any kind. The decision to adopt or not such a measure involves a large measure of discretion. The introduction of a suspensory duty is merely a rule for the application of the anti-dumping duty which is not prohibited for the Council.

In its reply the applicant specifies that the attitude of the Community authorities constitutes in the present case a violation of the principle of legal certainty. It follows from the basic regulation and in particular from Article 17 thereof that there is a necessary link, as regards anti-dumping duties, between the introduction of definitive duty and the definitive collection of the provisional duty. The definitive collection of the provisional duty is justified only where there is a persistent breach, since the fact that agreements have been concluded should logically result in the abandonment of such collection.

The Community authorities are faced with the following dilemma: in view of the undertaking they could not in all fairness introduce a definitive duty; nor in addition could they order, without the introduction of definitive duty, the definitive collection of the provisional duty. This led to a stratagem consisting in introducing definitive duty under a suspensory condition so as to create the necessary basis for the definitive collection of the provisional duty; this stratagem infringes the legal certainty of the undertakings. The principle ac-

cording to which the greater includes the lesser cannot be relied upon in these circumstances.

In the rejoinder, the *Council* observes that the principle of legal certainty has not been violated in the present case and states that this principle refers to diffferent situations. The complaint that a stratagem has been used so as to enable the provisional duty to be definitively collected amounts to maintaining that the importation of products by means of dumping should have no results if, towards the end of the investigation and just before the introduction of a definitive duty, the exporter gave an undertaking to eliminate the margin of dumping.

Article 14 (2) (a) of the basic regulation, whilst enabling the Commission to terminate the procedure, also enables it to submit a proposal to the Council if it results from its findings that the interests of the Community necessitate Community action.

The *intervener* states once more that the anti-dumping duty is not in the nature of a penalty.

(b) Infringement of the distribution of the powers of the Council and the Commission conferred by the basic regulation, Regulation No 459/68

According to this distribution, in the opinion of the *applicant,* only the Council has power to impose a penalty of definitive anti-dumping duty, the Commission intervening only in special and limited cases to aid the Council in determining the margin of dumping and, where appropriate, to decide a provisional measure.

Thus Article 2 (1) of the contested regulation may indeed give the Commission the power to monitor closely the observance of the undertakings but, on the other hand, the grant of a power to terminate the suspension immediately *without fresh examination of the situation* far exceeds the powers conferred upon the Commission by the basic regulation and is directly contrary to the provision laid down in Article 14 (2) (d) of Regulation No 459/68. According to the procedure laid down in the basic regulation, any infringement of the undertaking can be found and penalized *only after the Commission has recommenced its examination of the facts.* Articles 1 and 2 of the contested regulation do not comply with the provision quoted above.

In reply the *Council* alleges first that that complaint is evidently based on an immoral and unlawful cause. Its objective is in fact to obstruct the re-introduction of the anti-dumping duty if the Japanese producers violate the undertaking.

According to the *Council* and the *intervener* the provision of Article 14 relied upon is inapplicable since that provision refers only to the case of a procedure which has been terminated. In the present case, the Commission has not however terminated the procedure precisely because the undertakings given did not have retroactive effect and, moreover, did not immediately abolish dumping.

It is true that the Council could have applied the procedure provided for by the general law and requested the Commission to bring the matter before it in cases in which the undertakings were violated. However such a procedure would have been cumbersome and could not have been easily applied; this led to the idea of a delegation of power by the Council to the Commission in order to terminate the suspension of the duty; this delegation is in conformity with Article 155 of the Treaty because it is justified by practical necessities.

In the reply, the applicant alleges that the provision laid down in Article 14 (2) (d) remains applicable even if the

procedure was terminated by a decision of the Council which takes into account the undertakings, as was done in the present case. The Council could not deviate from the "procedure provided for by the general law". The fact that that procedure is cumbersome is not a valid reason for disregarding it.

As the delegation of power granted to the Commission involves the transformation of a conditional right into an absolute right, it exceeds the limits of the concept of implementation and, therefore, of Article 155 of the Treaty.

It contests that the rule of *nemo auditur suam turpitudinem allegans,* which moreover is not accepted by the case-law of the Court, is applicable to its complaint.

In its rejoinder, the *Council* maintains that the complaint is inadmissible by virtue of the rule of *nemo auditur suam turpitudinem allegans.* It also maintains that the provision laid down in Article 14 (2) (d) of the basic regulation, Regulation No 459/68, was not applicable in the present case, adding that it was difficult for the Council, in the state of the undertakings, not to suspend the application of the anti-dumping duty (at least for the period after the increases had been made).

(c) Infringement of Article 19 (3) of the basic regulation

This provision, which provides that the amount of an anti-dumping duty shall not exceed the margin of dumping established, is infringed by the system introduced by Articles 1 and 2 of the contested regulation. In fact this system might lead to the application of an anti-dumping duty of 15 % to penalize failures to observe undertakings resulting in margins of dumping lower than that percentage.

In its defence, the *Council* questions, as in the case of the previous complaint, the admissibility of this complaint having regard to the rule of *nemo auditur suam turpitudinem allegans.* Moreover, it is not based on any interest which exists at present and is purely hypothetical in nature.

Besides, according to the *Council* and *intervener,* the argument is unjustified since cases such as those referred to by the applicant can always arise in the application of definitive duty. In those cases those concerned have the legal remedy created by Article 19 (4) of Regulation No 459/68.

The *applicant's* reply states that there is a right which exists at present. Moreover, the applicant is entitled to show the illegality of the system adopted by establishing its strange results.

In the light of the other arguments put forward by the Council, which are contradictory, the question arises whether it would not have been more logical to await a possible violation of the undertakings to introduce the definitive duty on the basis of the margin of dumping found at that date and with knowledge of that margin.

The rejoinder of the *Council* is based on French case-law, considering the complaint as an invalid argument; it maintains that the Council's arguments do not contain any contradiction.

According to the *intervener,* experience confirms that the hypotheses put forward by the applicant are of a purely theoretical nature.

(d) Infringement of Article 19 (2) (a) of the basic regulation

Contrary to that provision if the suspension were lifted as provided for in Article 2 of the contested regulation this would have retroactive effect because, according to the general principles of civil law, a completed condition is retroactive.

The *Council* and *intervener* reply that the complaint wrongly assimilates the effects in private law of the suspensory condition affecting a duty and the suspension by a public authority of the effects of one of its decisions. Since Article 1 of the contested regulation ordered the suspension of the duty the fact that the suspension is terminated implies only that the duty is collected on the goods imported subsequent to the date on which the suspension of the duty was terminated.

(2) Misuse of powers

The contested regulation, Regulation No 1778/77, constitutes a misuse of powers because it lays down a genuine suspended penalty, an offence which is aggravated by the existence of the undertakings.

All the procedures initiated previously by the Commission under the basic regulation were closed (except one) and did not give rise to a decision by the Council, no doubt because as a result of the undertaking given by those concerned to revise their prices the Community authorities did not retain the securities (provisional duty).

The only exception (Council Regulation No 316/77 of 14 February 1977, Official Journal, L 45, p. 4) led to the introduction of a definitive anti-dumping duty in the absence of an undertaking to revise prices.

This exception confirms, *a contrario,* that in the present case the misuse of powers is evident.

The *Council* does not understand in what the misuse of powers alleged has consisted. The Commission's practice in previous cases cannot bind the Council. Moreover, the line of conduct adopted by the Commission can in no way bind it and prevent it from changing its policy.

The *applicant* maintains that the basic regulation links the definitive collection of the provisional duty to the introduction of the definitive duty; this introduction is justified only if the infringement continues. As this was not so in the present case there has been a misuse of powers.

The *Council* observes that, in the reply, the argument as put forward is quite different from that which appeared in the initial application. The new argument thus raised is a mere allegation. On the date on which the Council's decision was adopted the Japanese undertakings had, it is true, undertaken to raise their prices but only with regard to the future and dumping therefore still existed at the date on which Regulation No 1778/77 was adopted. The duty was suspended therefore by a measure of goodwill.

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 8 October 1977, received at the Court Registry on 7 October 1977, the applicant, Import Standard Office, Paris, (hereinafter referred to as "I.S.O.") brought before the Court of Justice under Article 173 of the Treaty an action against the Council for the annulment 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).

2 By application of 4 November 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 30 November 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 gave voluntary undertakings signed on 20 June 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, suspended the application of that duty and provided, 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.

7 It is not in dispute that I.S.O. is the exclusive importer in France of the bearings in question of the brand name of Nachi Fujikoshi (hereinafter referred to as "Nachi"), one of the four major Japanese producers.

The admissibility of the application

8 The Council has raised an objection of inadmissibility claiming that the contested measure is 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.

9 It claims that in the present case this is not a decision adopted in the form of a regulation since Regulation No 1778/77 in fact constitutes a general rule which affects all the products in question originating 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.

10 The applicants reply that the contested measure, although drafted in abstract terms, in fact affects only Nachi and three other Japanese undertakings which produce the products in question (hereinafter referred to as "the major producers"), as well as their subsidiaries and exclusive importers in the Community.

11 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 exclusive importers and then at the premises of the major producers in Japan.

12 The specific nature of the measure is confirmed by the fact that Article 1 (2) thereof suspends the application of the imposed anti-dumping duty on the ground, stated in the penultimate recitals in the preamble, that the four major Japanese producers have given undertakings to revise their future prices.

13 This specific nature is also 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.

14 The contested measure therefore constitutes a decision which affects only the major producers and their subsidiaries and exclusive importers and must therefore be considered to be a decision concerning them adopted in the form of a regulation.

15 It should be stated that Nachi and I.S.O. 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.

16 In these circumstances it is necessary to consider that the measures which refer particularly to Nachi's products and are of direct and individual concern to Nachi are of direct and individual concern to I.S.O.

17 Regulation No 1778/77 contains essentially three provisions:

— 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;

— 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;

— 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 regulation of a provisional duty.

18 For the purpose of judging the admissibility of the application, these three articles should be examined separately.

19 It emerges from the two recitals before last in the preamble to Regulation No 1778/77 that Article 1 (2) provides for the suspension of the definitive anti-dumping duty because "the four major Japanese producers have given undertakings to the Commission to revise their future prices".

20 "Whereas, however, it is necessary that the Commission closely monitor the observance of the undertakings and take immediate action if there is any violation or evasion or if the undertakings are withdrawn", it is provided in Article 2 of the regulation that "the Commission shall, in collaboration with the Member States, closely monitor the observance of the undertakings given by the major Japanese ... producers to revise their prices" and that it "shall forthwith ... terminate the suspension" if it finds "that these undertakings are being evaded, are not being observed or have been withdrawn".

21 It follows from these recitals that, whatever character the imposition of a suspended anti-dumping duty may present in other cases, in the present case the measure in question is intended to ensure the strict observance of the stated undertakings by the creation of an additional penalty.

22 Thus, although drafted in general terms, Article 1 in fact concerns only the situation of the major Japanese producers, including Nachi, by reason of the undertakings which they have given to revise their prices.

23 Hence the applicants' application against Articles 1 and 2 is also admissible.

24 As regards the admissibility of the application in so far as it is directed against Article 3, that article constitutes a collective decision.

25 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.

26 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.

27 Article 3 of Regulation No 1778/77 is therefore of direct and individual concern to those importers and consequently the application lodged by I.S.O., as exclusive importer of Nachi products, is admissible.

The substance of the application

28 As regards Articles 1 and 2 of Regulation No 1778/77, the applicant claims in substance that Regulation No 459/68 does not permit a definitive anti-dumping duty to be imposed at the same time as undertakings by the producers concerned to revise prices are accepted.

29 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 to take measures to protect trade in case of dumping, gives the Council the power to adopt an *ad hoc* regulation independently of the provisions of Regulation No 459/68.

30 The Council must therefore be deemed to have exercised that power in the present case.

31 Finally, as the Commission's investigation discovered a margin of dumping of at least 15% injuring the Community industry and as Nachi

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.

32 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."

33 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."

34 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.

35 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.

36 Those undertakings were referred to by the Commission in its proposal to the Council of 4 July 1977 and considered to be "acceptable".

37 The same undertakings were, as observed above, 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.

38 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.

39 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.

40 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.

41 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.

42 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.

43 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.

44 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.

45 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.

46 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.

47 The application is therefore well founded in this respect.

48 As regards the application in so far as it is directed against Article 3 of Regulation No 1778/77, in the circumstances the judgment on Article 3 is the same as that on Articles 1 and 2 of the regulation.

49 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.

50 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.

51 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.

52 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.

53 It is also confirmed by the wording of Article 17 (2) (b).

54 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.

55 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.

56 The application is therefore also well founded in this respect.

57 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.

58 It follows from the preceding statements and from the arguments put forward by the applicants in the parallel applications in Cases 113/77, 119/77, 120/77 and 121/77 that Regulation No 1778/77 is unlawful and that the application is therefore well founded.

59 It is therefore necessary, in accordance with the applicants' request, to annul that regulation.

60 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

61 The applicant's application has been successful. It is therefore necessary to order the Council to pay the costs, except for the costs caused by the intervention.

62 The intervener must be ordered to pay the costs incurred by the applicant on account of its intervention.

On those grounds,

THE COURT

hereby:

1. **Annuls 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;**

2. **Orders the Council to pay the costs, except for the costs caused by the intervention;**

3. **Orders the intervener to pay the costs incurred by the applicant 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

OPINION OF MR ADVOCATE GENERAL WARNER
(see Case 113/77, p. 1212)