5. In accordance with the 'Protocol on internal German trade and related problems' of 25 March 1957, annexed to the EEC Treaty, the Federal Republic of Germany is exonerated from applying the rules of Community law to German internal trade and the German Democratic Republic, while not a member of the Community, is not a non-member country *vis-à-vis* the Federal Republic of Germany.

It follows that the difference of treatment between importers established in the Federal Republic and those established in other Member States as regards the collection of anti-dumping duties imposed by a Council regulation in respect of products originating in the German Democratic Republic has a legislative basis in that Protocol and cannot therefore be regarded as discriminatory.

REPORT FOR THE HEARING
in Case C-323/88 *

I — Facts and procedure

1. In October 1985 the Commission was requested by the Groupement des industries de matériels d'équipement électrique et de l'électronique industrielle associée (Association of electrical equipment and industrial electronics industries, hereinafter referred to as 'Gimelec'), supported by industrial associations in four other Member States, to review certain anti-dumping measures in accordance with Article 14 of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1). That request sought the review of decisions to accept price undertakings given by the exporters in question in the context of an earlier anti-dumping procedure relating to imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW (hereinafter referred to as 'electric motors'), originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Poland and Romania (Council Regulation (EEC) No 2075/82 of 28 July 1982, Official Journal 1982 L 220, p. 36), Hungary (Commission Regulation (EEC) No 724/82 of 30 March 1982, Official Journal 1982 L 85, p. 9) and the Soviet Union (Commission Decision 84/189/EEC of 2 April 1984, Official Journal 1984 L 95, p. 28).

2. Further to the request for review, in November 1985 the Commission published a notice of reopening of an anti-dumping proceeding concerning imports of electric motors originating in the abovementioned

* Language of the case: French.

countries (Official Journal 1985 C 305, p. 2) and started an investigation.

3. On 30 September 1986, the Council adopted Regulation (EEC) No 3018/86, repealing Regulation No 2075/82 accepting undertakings given by exporters from Bulgaria, Czechoslovakia, the German Democratic Republic, Poland and Romania (Official Journal 1986 L 280, p. 66). By Regulation (EEC) No 3019/86 of the same date, the Commission repealed Regulation No 724/82 and Decision 84/189 accepting undertakings given by Hungarian and Soviet exporters respectively, and imposed a provisional anti-dumping duty on imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the Soviet Union (Official Journal 1986 L 280, p. 68). Since those imports originated in countries without a market economy, the normal value was determined on the basis of prices prevailing on the Swedish market.

4. By an application lodged at the Court Registry on 17 November 1986, Sermes SA, which *inter alia* is the exclusive importer into France of electric motors originating in the German Democratic Republic and exported by AHB Elektrotechnik (hereinafter referred to as 'Elektrotechnik'), brought an application under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Regulation No 3019/86 (Case 279/86, [1987] ECR 3109).

5. By an order of 8 July 1987, the Court dismissed the application as inadmissible on the ground that the contested decision constituted, as far as the applicant was concerned, a regulation of general application and not a decision within the meaning of the second paragraph of Article 173 of the Treaty, since the applicant was not associated with the exporter in question.

6. The validity of the provisional anti-dumping duty was extended for a period of two months by Council Regulation (EEC) No 254/87 of 26 January 1987 (Official Journal 1987 L 26, p. 1).

7. At the request of the abovementioned Community producers' associations, the Commission in November 1986 extended the anti-dumping proceeding to imports of electric motors originating in Yugoslavia (Official Journal 1986 C 282, p. 2).

8. On 23 March 1987 the Council adopted Regulation (EEC) No 864/87 imposing a definitive anti-dumping duty on imports of electric motors originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amount secured as provisional duties (Official Journal 1987 L 83, p. 1). The normal value of the imports in question was established on the basis of a weighted average of the Yugoslav producers' domestic selling prices.

9. A Bulgarian exporter and several importers established within the Community brought applications for the annulment of that regulation (Cases C-157/87, C-160/87, C-185/87 and C-188/87, [1990] ECR I-3021, I-2945, I-2939 and I-3013).

10. Following the imposition of the definitive anti-dumping duty, the French customs authorities claimed from Sermes, for imports of electric motors during April 1987, anti-dumping duties amounting to FF 419 720.

11. Challenging the validity of Council Regulation No 864/87, Sermes brought an action on 7 May 1987 against the Directeur des services des douanes de Strasbourg (Director of Customs, Strasbourg) before the Tribunal d'instance (District Court), Strasbourg, to recover the amount wrongly paid.

12. Its action was dismissed by judgment of 16 June 1987, and Sermes appealed to the Cour d'appel (Court of Appeal), Colmar, which, in a judgment of 5 September 1988, stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'Is Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the Soviet Union, and definitively collecting the amounts secured as provisional duties, valid in the light of Community law, in particular the basic regulation, Council Regulation No 2176/84, and the fundamental principles of Community law?'

13. The judgment making the reference was received at the Court Registry on 4 November 1988.

14. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Sermes, represented by Jean-Pierre Spitzer, of the Paris Bar, by the French Government, represented by Edwige Belliard and Géraud de Bergues, acting as Agents, and by the Council of the European Communities, represented by its Legal Adviser Erik Stein, and by the Commission of the European Communities, represented by its Legal Adviser Marie-José Jonczy.

15. After hearing 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 and assigned the case to the Fifth Chamber in accordance with Article 95(1) of the Rules of Procedure.

II — Written observations

16. *1. Sermes* maintains that Council Regulation No 864/87 is unlawful on the ground that it infringes Regulation No 2176/84 and certain fundamental principles of Community law.

(a) *Infringement of Article 14 of Regulation No 2176/84 and of the principle of legal certainty*

17. Sermes contends that, in undertaking a review of the price undertakings previously accepted, the Commission and the Council did not comply with Article 14 of Regulation No 2176/84. There was no evidence of any change in circumstances, which is an

essential prerequisite for the reopening of proceedings. The evidence mentioned in point 4 of the preamble to the contested regulation was never brought to the notice of the importers and exporters in question and was in no way substantiated. The price undertakings accepted by the Council in 1982 were complied with and the price levels laid down therein were adjusted in accordance with Council Regulation (EEC) No 1275/84 of 7 May 1984 (Official Journal 1984 L 123, p. 22).

18. By reviewing the undertakings previously given and imposing a definitive anti-dumping duty, the institutions also infringed the principle of legal certainty, since the economic circumstances had not changed since acceptance of the undertakings in 1982, or if they had they had deteriorated, and the Community had no general interest in the imposition of an anti-dumping duty.

(b) *Infringement of Regulation No 2176/84 and certain general principles of Community law*

19. (aa) Sermes considers, moreover, that the institutions have not properly established the existence of dumping, either in fact or in law.

20. By taking the selling prices prevailing on the Yugoslav market for the determination of the normal value the Council infringed Article 2(5) of Regulation No 2176/84 and the principles of equal treatment and objectivity. Sermes and the Danish company Pedersen suggested, on the reopening of the anti-dumping proceeding, that the method provided for in Article 2(5)(c) of the abovementioned regulation should be applied since the Swedish market, used for the provisional determination of dumping, did not for various reasons satisfy the requirements laid down by Article 2(5)(a) and (b). Nor did the Yugoslav market afford an appropriate and not unreasonable basis of comparison for the definitive determination of the normal value of the products in question, since prices are not free on that market. If the Commission had proceeded as suggested by Sermes, it would have found that the price actually paid in the Community and in particular on the French market was comparable to the price charged by Sermes.

21. Moreover, the Council contradicted itself by rejecting, in point 14 of the contested regulation, the adjustment of the normal value of Soviet electric motors in respect of differences in rationalization and economies of scale on the ground that those concepts are not valid in a State-trading country. Sermes argues in that context that prices are fixed by the State in Yugoslavia.

22. (bb) Sermes maintains, as a secondary argument, that the institutions did not establish that Community producers have suffered injury as a result of the imports in question.

23. By comparing the cost price on the Community market with the selling price of motors originating in East European countries the Commission infringed Article 4(2)(b) of Regulation No 2176/84, which demands that any undercutting should be measured in relation to the price of a like product in the Community. It has never

been proven that almost all Community producers sold at a loss. It is clear from the figures set out in points 23 and 24 of the contested regulation that the price undercutting margins in relation to the cost prices of Italian manufacturers were extremely small, particularly when the most successful undertakings were taken into consideration.

24. Moreover, the Council itself stated, at point 25 of the regulation, that imports of the electric motors in question did not have a visible adverse impact on Community producers. During the period under consideration, Community production was able to regain 3% of the market and thus suffered no damage as a result of the imports in question. Furthermore, the results of the various Community undertakings were positive in 1985 and staff reductions were due at least as much to industrial restructuring as to imports.

25. The institutions have therefore not shown that the imports in question were the cause of sales at a loss by Community producers. In that context, Sermes also challenges the sampling of electric motors decided on by the Commission and argues that it is not aiming at the same customers as large Community manufacturers; indeed, the latter sell at significantly lower prices than it on the large-users markets.

26. The damage caused by factors other than dumping, such as the volume and price of imports of other origin or intra-Community competition, should not be attributed to the imports in question. If the Commission had taken as its basis the price of certain Swedish, Yugoslav or Hong Kong electric motors on the French market, or even Italian electric motors sold there, it would have found a total absence of injury. Finally, the Council's own declarations show that the factories installed in the Community in 1985 were not sufficiently productive to compete on the world market, which does not mean that dumping was taking place.

27. (cc) Even if dumping and injury were established, the institutions have shown no causal link between these two matters. The Council itself, at point 31 of the contested regulation, mentions the importance of intra-Community competition and adds that the market share of Eastern European countries had gone down by 3.4% between 1982 and 1985.

28. (dd) Finally, the Council has adduced no evidence showing that it was necessary to impose an anti-dumping duty. There is no such need, because of the acceptance by the Community of price undertakings two years previously.

(c) *Misuse of powers*

29. Thirdly, Sermes reiterates the objectives of Regulation No 2176/84, the basic regulation on anti-dumping, which are in particular to combat protectionism and unfair methods. Contrary to those objectives, the Commission has not sought to adduce evidence of dumping but has taken at face value the complainants' erroneous allegations. Nor did the Commission take into consideration the written statement made by Sermes in the context of the adoption of Regulation No 3019/86.

30. Similarly, the institutions allowed themselves to be guided not by the Community interest but by the interest of a Community industry, in particular a French industry, in sectoral protection. The misuse of powers is demonstrated by the prices charged by the French producer, Leroy Somer, during 1986, which represent only between 80 and 100% of the purchase price paid by Sermes for the same motor originating in the German Democratic Republic. Adding Sermes's gross margin of approximately 50% on the purchase price, before customs duty, the latter motors are therefore 50% more expensive on average than the motors sold by Leroy Somer.

(d) *Infringement of essential procedural requirements and failure to state reasons*

31. Sermes claims that the statement of the reasons on which the contested regulation is based is not sufficient to enable the Court to carry out judicial review. In particular, the institutions did not state the factors enabling it to be verified whether the complaint lodged by Gimelec contained sufficient evidence. Nor did they give reasons for the sampling of the motors which was adopted, although Sermes challenged that sample. As regards injury, the institutions merely referred to the losses suffered by Community producers on standard motors and to a reduction in the number of jobs, without however mentioning capacity utilization, stocks, return on investments and cash flow. As regards causality, the Council merely reiterated a certain number of economic facts which were, however, erroneous. As regards the need to impose an anti-dumping duty in order to safeguard the interests of the Community, the institutions merely referred to the financial losses suffered by Community producers.

(e) *Infringement of Article 7 of Regulation No 2176/84 and the right to a fair hearing*

32. Sermes considers that by providing neither it nor its exporter in the German Democratic Republic, Elektrotechnik, with all information on the calculation of the normal value on the Swedish market and the losses suffered by Community producers, the Commission failed to observe Article 7 of Regulation No 2176/84. Moreover, the Commission refused to give Sermes a hearing, although Sermes had expressly requested one by letter dated 10 January 1986. During the second phase of the anti-dumping proceeding, the Commission did agree to see Sermes and Elektrotechnik for some time, but continued to refuse any confrontation with the complainants.

(f) *Infringement of the principle of equal treatment*

33. Sermes is of the opinion that the application of special provisions governing relations between the Federal Republic of Germany and the German Democratic Republic involves discrimination which is not justified by objective differences between importers in the Federal Republic of Germany on the one hand and importers in the rest of the Community on the other.

34. Sermes therefore suggests that the Court should reply to the question raised by

ruling that Council Regulation No 864/87 must be annulled, at the very least as far as imports into France from the German Democratic Republic are concerned.

35. 2. *The French Government* supports the Council's conclusions (see paragraph 3 below) to the effect that an examination of the question raised discloses nothing capable of affecting the validity of Regulation No 864/87.

36. The anti-dumping investigation conducted by the Commission revealed dumping margins varying between 121 and 164%, which by their magnitude represent a challenge to the rules of normal competition in international trade and threaten the survival of the Community industry in question. The duties imposed by the Council amount to a very restrained measure in the light of the dumping margins established, since they were calculated on the basis of the cost prices of the most competitive Community producers and not on the basis of the average cost price. If the latter option had been taken, an increase in import prices of 60% would have been possible, whereas the definitive duty brought about an increase in prices of only 35%. Moreover, since the anti-dumping duty is variable and calculated on the basis of minimum prices, it is only levied if those thresholds have not been observed. The French Government adds, in that connection, that imports into France of motors originating in the German Democratic Republic went up by 26% in volume in the first six months of 1988 in relation to the same period of 1987.

37. 3. The *Council* and the *Commission* observe that the question referred for a preliminary ruling is framed in very general terms and that the lack of specific detail means that the validity of the contested regulation can be defended only in a very general manner. Whilst the application brought by Sermes before the Court of Justice against Commission Regulation No 3019/86 imposing provisional anti-dumping duties is to be found annexed to the judgment making the reference, the criticisms made against that regulation cannot be transposed to the Council regulation, regard being had to the differences between the provisional regulation and the definitive regulation. The validity of Regulation No 864/87 must therefore be examined solely in the light of the definitive findings made by the institutions. In addition to the observations submitted in this case, the Council and the Commission refer to their defences and rejoinders lodged in Cases C-157/87, C-160/87, C-185/87 and C-188/87, mentioned above.

38. The *Council* adds that the validity of the provisional duties was extended for a period of two months because the examination of the circumstances had not yet been completed and several exporters had requested a fresh determination of the normal value, the dumping margin and the injury caused to the Community industry. The Commission examined the observations of the persons concerned with regard to the provisional regulation and, in the definitive regulation, took their requests into account or gave reasons why they could not be adopted.

39. As far as the determination of the normal value is concerned, the Council considers that the reasons for the decision

to take Yugoslavia as a comparable country for the purposes of the definitive regulation, instead of Sweden used in the provisional regulation, are sufficiently stated in points 6, 7 and 8 of the contested regulation. The decision to base the normal value on Yugoslav prices ensured equal treatment for all the exporting countries involved. Indeed, the change in the country taken as a basis for comparison entailed a reduction in the dumping margin for exports from the German Democratic Republic from 208 to 137%, resulting in a lower rate of definitive duty by comparison with the provisional duty.

40. Moreover, the Council stresses that the comparison between normal value and export price and the establishment of injury to the Community industry were conducted in accordance with Article 2(9) and (10) and with Article 4 of Regulation No 2176/84 and that the contested regulation contains a proper statement of reasons in this respect. As far as the assessment of the interests of the Community is concerned, the contested regulation satisfies the requirements of Regulation No 2176/84 and was adopted in compliance with the procedural rules on the basis of substantively correct facts; there were no errors of assessment or misuse of powers.

41. The Council therefore suggests that the reply to be given should be that examination of the question raised by the Court of Appeal, Colmar, has disclosed nothing which could affect the validity of Regulation No 864/87.

42. *4.* The *Commission* goes on to argue that the proceeding was reopened as a result of a change in circumstances, and that the notice of reopening was sent to the parties known to be concerned. Those parties were afforded the possibility of making observations within a given period. Moreover, their request to be heard was acceded to, and the facts and considerations on the basis of which the Commission reached its conclusions were notified to them. The Council took into account the observations submitted by the parties before imposing a definitive anti-dumping duty, as is borne out by the detailed statement of reasons in the contested regulation.

43. As regards the finding of dumping, the Commission considers that the choice of prices prevailing on the Yugoslav market as the basis of the normal value enabled all the exporting countries to be treated equally. Adjustments to the normal value and to the export prices were carried out within the limits laid down in Article 2(9) and (10) of Regulation No 2176/84, where the validity of the request was satisfactorily established.

44. The injurious effect of the imports in question was assessed cumulatively and the level of price undercutting was established by reference to the cost prices of the most efficient Community producers. The Council concluded that the Community industry had suffered considerable injury, particularly on account of the market share held by the imports in question, the level of price undercutting found and the substantial losses incurred by Community producers. The Community interest was carefully examined and assessed both generally (relations between the Community and State-trading countries) and specifically (the interests of Community producers and importers). The rate of anti-dumping duty

imposed complies with the limits laid down in Article 13(3) of Regulation No 2176/84, inasmuch as it is less than the dumping margins found to exist since that duty is sufficient to eliminate the injury.

45. Finally, as regards the alleged infringement of the fundamental principles of Community law, the Commission refers to the course of the procedure described above and considers that there is nothing in the contested regulation to enable the conclusion to be drawn that the right to a fair hearing was infringed. The prohibition of discrimination was also observed, since the Commission, following observations made by certain parties on the source of the injury and in so far as the information supplied to it afforded justification, decided to extend the anti-dumping procedure to imports originating in Yugoslavia in order to prevent the anti-dumping rules from being applied in a discriminatory manner.

46. Consequently, the Commission proposes that the reply to be given to the question raised should be that examination of Regulation No 864/87 in the light of Community law, in particular of the basic regulation, Regulation No 2176/84, and the fundamental principles of Community law, have disclosed no factor capable of calling in question the validity of that regulation.

M. Zuleeg
Judge-Rapporteur