3. *Common commercial policy — Protection against dumping practices — Imposition of definitive anti-dumping duties — Retroactive effect — Prohibited — Derogation — Retroactive effect covering the period of application of the provisional anti-dumping duties — Absence of transitional provisions applicable to imports effected in pursuance of earlier contracts — Principle of the protection of legitimate expectation — Breach — None*
Council Regulation No 3017/79, Arts 11, 12 and 13(4)(a))

1. The one-year period provided for in Article 7(9) of Regulation No 3017/79 for the conduct of anti-dumping proceedings is a guide rather than a mandatory period, as is clear both from the wording of the provision in question and from the nature of the anti-dumping proceedings, whose progress does not depend solely on the efforts of the Community authorities. However, it follows from that provision that the anti-dumping proceeding must not be extended beyond a reasonable period to be assessed according to the particular circumstances of each case.

2. In a situation where, in the course of an investigation, it appears that the undertakings whose representativity concerning exports to the Community has caused them to be chosen for the establishment of the factors from which the dumping margin is to be determined sell only limited quantities on their domestic market, so that the normal value of the dumped products cannot be determined from the prices actually paid or payable in the ordinary course of trade, Article 2B(3)(b) of Regulation No 3017/79 allows recourse to the constructed value.

3. The prohibition on the imposition of retroactive anti-dumping duties enunciated in Article 13(4)(a) of Regulation No 3017/79 is not absolute. There are exceptions, in particular where the retroactive effect of the regulation imposing a definitive anti-dumping duty covers the period of application of the provisional anti-dumping duty imposed by an earlier regulation.

If an anti-dumping proceeding is in progress, a circumspect and prudent trader knows or ought to know that the imposition of an anti-dumping duty is possible and can therefore take that possibility into account when entering into contractual obligations. For this reason, the fact that the imposition of an anti-dumping duty is not accompanied by transitional measures for transactions effected pursuant to earlier contracts is not contrary to the principal of the protection of legitimate expectations.

REPORT FOR THE HEARING
delivered in Case 246/87 *

I — Facts and procedure

1. According to the order of the national court, the plaintiff in the main proceedings regularly imports cotton yarns, classified under subheading 55.05 B II of the Common Customs Tariff, originating in Turkey. After the Hauptzollamt München-

* Language of the case: German.

West had charged a definitive anti-dumping duty of 12% of the value for customs purposes on the importation of four consignments of cotton yarn on 15, 20, 27 and 28 April 1982, the plaintiff challenged the customs notices in proceedings before the Finanzgericht München, arguing that Commission Regulation No. 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (OJ 1981, L 347, p. 19) and Council Regulation No. 789/72 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey (OJ 1982, L 90, p. 1) were invalid.

2. In support of its claim, the plaintiff in the main proceedings made four submissions:

(a) Infringement of the second sentence of Article 7(9) of Council Regulation No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1), the 'basic' regulation, which provides that the conclusion of an anti-dumping proceeding 'should normally take place within one year of initiation of the proceeding'. The plaintiff maintains that between the initiation of the anti-dumping proceeding, on 3 August 1979, and the imposition of the definitive anti-dumping duty on 2 April 1982 a period of 32 months elapsed, with the result that the prescribed duration of the proceeding, which should have been 12 months, was almost trebled. According to the plaintiff in the main proceedings, Commission Regulation No 3453/81 and Council Regulation No 789/82, mentioned above, should have explained why the normal duration of the proceeding was not observed.

(b) The second submission is that the three undertakings chosen for the assessment of the dumping margin were not representative, as demonstrated by the fact that the Commission had to make special adjustments to the production costs of those undertakings.

(c) The third submission made by the plaintiff in the main proceedings is that there was no evidence of injury justifying the introduction of an anti-dumping duty. The Commission therefore used the anti-dumping duty as an inappropriate means of protecting the competing industry in the Community.

(d) In its fourth submission, the plaintiff in the main proceedings claims that Regulation No 789/82 was unlawful inasmuch as it made no provision for the complete exemption from the anti-dumping duty of 'old' contracts. Owing to the letters of credit opened for those old contracts, the plaintiff could not terminate them unilaterally on grounds of *force majeure* or frustration of contract, nor could it refuse to accept the goods or pass the anti-dumping duty on to the purchasers, since a subsequent alteration of the sale contracts was not permissible at the resale stage either. The regulation was therefore unlawful owing to its indirectly retroactive effect; an importer could not have expected an anti-dumping duty to be imposed 32 months after the initiation of the proceeding.

3. The Finanzgericht München concluded that the validity of Commission Regulation No 3453/81 and Council Regulation No 789/82 had been called in question, and

accordingly, by order of 23 July 1987, it decided to stay the proceedings pursuant to Article 177 of the EEC Treaty until the Court had given a preliminary ruling on the following question:

'Are Commission Regulation (EEC) No 3453/81 of 2 December 1981 imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1981, L 347, p. 19) and Council Regulation (EEC) No 789/82 of 2 April 1982 imposing a definitive anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1982, L 90, p. 1) valid?'

4. The order of the Finanzgericht was lodged at the Court Registry on 13 August 1987.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted:

on 13 November 1981 by the Council of the European Communities, represented by Hans-Jürgen Lambers, Director of the Legal Department of the Council, and Erik Stein, Legal Adviser at the Council, acting as Agents;

on 16 November 1987 by the Commission of the European Communities, represented by Peter Gilsdorf, Legal Adviser at the Commission, acting as Agent, assisted by Reinhard Wagner, a German Judge attached to the Commission as part of a programme for the exchange of officials;

on 26 November 1987 by the Hellenic Government, represented by Yannos Kranidiotis, Special Secretary at the Ministry of Foreign Affairs, acting as Agent.

Upon 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. In accordance with Article 95(1) and (2) of the Rules of Procedure, the Court decided to assign the case to the Sixth Chamber.

II — Written observations submitted to the Court

1. The Commission and the Council wonder first of all why the national court should cast doubt on Commission Regulation No 3453/81, which imposed a provisional anti-dumping duty, when the imports in question were carried out under Council Regulation No 789/82, which imposed a definitive anti-dumping duty. The Commission confines itself, however, to giving its views on the validity of Council Regulation No 789/82, since the legal questions are the same for both regulations and since the Council regulation repeats the recitals in the preamble to Commission Regulation No 3453/81; similarly, the Council limits itself to giving its opinion on the validity of Regulation No 789/82, pursuant to Article 20 of the Protocol on the Statute of the Court. On a procedural point, the Commission considers that the force of *res judicata* attaching to the Court's decision of 24 February 1987 in Case 312/84 *Continentale Produkten* v *Commission* [1987] ECR 841 does not extend to the legality of the regulations in question so that the question has been rightly referred to the Court.

Continuation of the proceeding beyond the period envisaged by Article 7(9) of the basic regulation

2. Both the Commission and the Council observe that the wording of Article 7(9) of the basic regulation, particularly the word 'normally' used therein, indicates that the period of one year which it envisages is not mandatory and that therefore exceptions are allowed if the circumstances justify them. In this case the justifying circumstances were as follows:

(i) the political events in Turkey at that time, which made the investigation more difficult;

(ii) the fact that the Turkish exporters themselves requested an extension of the period of investigation (see the sixth recital of the preamble to Regulation No 789/82);

(iii) the currency devaluation which occurred in Turkey shortly before the initiation of the investigation, towards the end of 1979, as a result of which it was impossible to make a reliable assessment of the value of Turkish currency, so that the officials of the Commission were obliged to cancel their journey to Turkey;

(iv) the inadequate cooperation of the Turkish exporters, which led to delay;

(v) the need to conduct lengthy negotiations with the association of Turkish textile exporters (TTEA), on account of the numerous Turkish exporters involved;

(vi) lastly, the fact that the Commission, in response to a request on the Turkish side, included the last three months of 1981 in the reference period, whereas the period originally ran from 1 January to 30 September 1981.

3. More particularly, the Commission takes the view that Article 7(9) of the basic regulation is a procedural rule, infringement of which cannot, unless it is arbitrary, have any legal consequences. Moreover, the length of the proceeding was taken into account by the Council, in introducing the definitive duty at 12% as opposed to the higher provisional duty of 16%, and commencing on 1 January 1982 instead of 3 December 1981 — the date on which Regulation No 3453/81 imposing a provisional anti-dumping duty entered into force.

4. With regard to the lack of reasons for the long duration of the proceedings, the Council maintains that the statement of reasons is adequate because the circumstances of the case are set out in the third and sixth recitals of Regulation No 789/82.

5. The Greek Government also takes the view that the reasons given for the regulations at issue are adequate because they meet the requirements laid down by the case-law of the Court.

Whether the undertakings selected were representative

6. The Commission submits that, where there are a large number of manufacturers, it is necessary to select certain representative undertakings, otherwise the calculation of

the normal value is impossible. Furthermore, the basic regulation provides for that method (Article 2(3)(b) of Council Regulation No 3017/79). With the agreement of the TTEA, three undertakings were chosen by the Commission because they included both public and private firms and were situated in the three main producing regions of Turkey.

7. The Commission admits that it later transpired that the three undertakings sold only limited quantities of cotton yarn on the domestic market and that they could not be used for establishing the price actually paid or payable in the ordinary course of trade in Turkey, as provided for by Article 2(3)(a) of the basic regulation. However, selecting new undertakings would have involved further long delays, in view of the new negotiations to be conducted with TTEA. That is why the Commission carried out the calculation of the normal value in accordance with the method laid down by Article 2(3)(b)(ii) of the basic regulation (the 'constructed value' method).

8. The Commission maintains that an objection to the use of that method of calculation is valid only if its effect is that the Commission adopts a higher price than the price actually paid or payable in the ordinary course of trade. In the present case, however, the price arrived at was not higher.

9. The Commission points out that the prices of raw cotton were controlled at that time by the Turkish Government so that there was no significant variation in the costs of raw materials. Since the cost of raw cotton represented at least 60% of the total costs, those costs could not therefore vary much, for that very reason. The cost of the raw cotton supplied by the plaintiff's Turkish suppliers, to whom the plaintiff referred in Case 312/84, was indeed 8.5% higher than the cost recorded by the Commission during its investigations in Turkey. The margin for variations in costs was therefore further restricted owing to the higher prices of materials.

10. As far as the other costs are concerned, the Commission claims that at least half of them (the cost of equipment, energy, etc.) are virtually identical for all producers. As for wages, they can only vary within a margin of 20% at most. Within the limits of that margin, any advantages which small production units may enjoy are generally offset (at least) by the technological superiority of the larger undertakings. Furthermore, companies working mainly for export enjoy considerable advantages over the producers working mainly for the domestic market. They may obtain special export credit facilities from the government and can thus reduce their overheads.

11. Although, in calculating the normal value in accordance with Article 2(3)(b)(ii) of the basic regulation, the Commission carried out certain 'adjustments', it cannot, contrary to the plaintiff's assertion, be concluded that the companies selected were not representative. Such adjustments are expressly provided for in Article 2 of the basic regulation and they are almost

invariably necessary in the calculation of the normal value.

12. The Council takes the view that adjustments, which are necessary in the case of all (or almost all) exporters, have no bearing on the question of representativity; in that connection it refers to the ninth and 10th recitals in the preamble to Regulation No 789/82. It also cites Article 7(7)(b) of the basic regulation, which expressly provides that, if the necessary information is not supplied within a reasonable period or if the investigation is significantly impeded, findings may be made on the basis of the facts available. At the time in question the Commission had information regarding costs and it therefore rightly used that information in determining the normal value. According to the Council, its decision to do so cannot in any event be regarded as a 'manifest error in its appraisal of the facts'. It quotes the judgment of the Court of 7 May 1987 in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, paragraph 26.

13. The Greek Government repeats the arguments set out above and adds that the Commission carried out an additional investigation in Turkey into exports during the last quarter of 1981. The Greek Government further observes that Article 7 of the basic regulation enables the parties concerned to acquaint themselves with the facts established by the investigation and the views expressed in their regard (Article 7(4)(a) and (b) of the basic regulation), and also allows them to submit observations and be heard by the Commission (Article 7(4)(c)(iii) and (5)). It follows that if the plaintiff had really considered itself obliged to raise objections regarding the representativity of the three exporting undertakings, it should in good faith have submitted them in the course of the investigation, not after the imposition of the anti-dumping duties.

Requirement of injury

14. With regard to the submission regarding the requirement of injury, the Commission refers to the 14th and subsequent recitals in the preamble to Council Regulation No 789/82, which explains in detail the injury sustained by European industry. According to the Commission the anti-dumping duty is equal to the lowest dumping margin found and its protective effect is therefore limited to the strict minimum. It follows that Community production, far from being improperly protected, has been underprotected.

15. The Council also refers to the 14th, 15th and 16th recitals, listing three elements of injury: an increase in the quantities of imported cotton yarn, a similar increase in the market share of Turkish cotton yarn and a fall in prices. The impact on Community production, explained in the 17th and 18th recitals to Regulation No 789/82, is considerable. As regards the argument put forward by the plaintiff in the proceedings before the Finanzgericht München, to the effect that the Community producers could not have avoided incurring losses even if the Turkish producers had offered goods at prices raised by 12%, since even after such an increase their prices would have remained below the prices of Community products, the Council contends that 'losses' in general have been confused

with 'injury' within the meaning of the anti-dumping regulation. According to the Council, however, the offsetting, by means of anti-dumping duties, of the injury due to the dumping margin is not prohibited.

16. The Greek Government considers the question to be one of proof. That proof (the fall in normal prices and in profitability and the decline in employment) is set out in the preamble to the two regulations at issue. Moreover, if the plaintiff had objections suggesting that no real injury was suffered, it could, during the investigation, have used the possibilities available to it under Article 7(4)(c)(iii) of the basic regulation and later under Article 14 providing for the review of the anti-dumping regulations concerned.

Retroactive effect with regard to pre-existing contracts

17. The Commission submits that the argument of the plaintiff in the main proceedings might carry some weight if Regulation No 789/82 entailed an infringement of the principle of legitimate expectation (Article 13(4)(a) of the basic regulation). However, legitimate expectation on the part of importers cannot be pleaded because they should have been put on notice about the commencement of the anti-dumping proceeding by the notice published in the *Official Journal of the European Communities* and should have known that the matter was still pending, since the closure of the investigation is also published. Accordingly, even if the proceeding was protracted, the importers should have inserted into their general terms of sale a clause allowing anti-dumping duties to be passed on. The fact that no anti-dumping duty was levied for December 1981, so that the undertakings concerned could adjust themselves to the new situation, shows that legitimate expectations were taken into account.

18. The Council observes that retroactivity is expressly excluded by Article 13(4)(a) of the basic regulation, with the exception of the cases set out in subparagraph (b) thereof. However, since Commission Regulation No 3453/81 entered into force on 3 December 1981, the Council regulation could apply the anti-dumping duty to all imports declared after that date. Nevertheless, for reasons of fairness, Article 2 of Council Regulation No 789/82 exempted from the anti-dumping duty all goods imported between 3 and 31 December 1981. That measure was adopted in order to make it easier for undertakings to adjust themselves to the new situation (25th recital). Moreover, the plaintiff in the main proceedings, like every importer of cotton originating in Turkey, should have been aware of the commencement of an anti-dumping investigation. An importer should conduct himself as a 'circumspect and prudent trader' and keep abreast of the trends affecting his business, by consulting advisors as need be. A general derogation in respect of pre-existing contracts would, in the Council's opinion, conflict with the purpose of the anti-dumping legislation, because it would afford no effective protection of Community production.

19. The Greek Government essentially makes the same observations as those discussed above, adding that the anti-dumping measures were forseeable since the anti-dumping proceeding had been duly announced (last recital of the preamble to Regulation No 789/82); it takes the view

that the Council's decision was extremely lenient in the circumstances because, on the basis of the evidence before it, the Council could have opted for indirect retroactivity under Article 13(4)(b)(i) of the basic regulation.

20. For the reasons set out above both the Commission and the Council, and the Greek Government, propose that the Court should uphold the validity of the regulations at issue.

C. N. Kakouris
Judge-Rapporteur