OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 February 1989 *

Mr President,
Members of the Court,

1. The Finanzgericht München (Finance Court, Munich) has submitted for a preliminary ruling a question on the validity of Commission Regulation No 3453/81 [1] and Council Regulation No 789/82. [2]

2. Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co. (hereinafter referred to as 'Continentale Produkten'), which regularly imports cotton yarn originating in Turkey and classified under subheading 55.05 B II of the Common Customs Tariff, has brought proceedings before the Finanzgericht München to challenge customs notices issued by the Hauptzollamt München-West (Principal Customs Office, Munich West) charging Continentale Produkten, upon the importation on 15, 20, 27 and 28 April 1982 of four consignments of cotton yarn, a definitive anti-dumping duty equal to 12% of the value for customs purposes. It claims that both of the regulations mentioned above are invalid.

3. Continentale Produkten is no stranger to this Court. By application of 28 December 1984 it brought an application under the second paragraph of Article 173 of the EEC Treaty seeking the partial annulment of a Commission decision which had granted it a partial refund of the anti-dumping duties it had paid pursuant to Regulation No 789/82. The purpose of the application by Continentale Produkten was to challenge the validity of that regulation. In that case I concluded that the procedure for the refund of anti-dumping duties established by Article 16 of the basic regulation, Council Regulation No 2176/84, which was introduced later but applied to procedures still pending, could not be regarded as enabling the regulation imposing anti-dumping duties to be challenged. [3] The Court endorsed that view and dismissed the application of Continentale Produkten by judgment of 24 February 1987, in which it held that Article 16 of Regulation No 2176/84

'does not permit the validity of the regulation instituting the duties to be challenged or a review of the general findings made during the previous investigations to be requested'. [4]

4. In my Opinion in that case I suggested that, in accordance with the Court's judgment in *Allied Corporation* v *Commission*, [5] Community importers could resist demands for the payment of anti-dumping duties by bringing proceedings before the national courts, in which they could claim that the regulation imposing

* Original language: French.

1 — 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 (OJ L 347, 3.12.1981, p. 19).

2 — 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 (OJ L 90, 3.4.1982, p. 1).

3 — Opinion in Case 312/84 [1987] ECR 841, at p. 858.

4 — Judgment of 24 February 1987 in Case 312/84 *Continentale Produkten-Gesellschaft* v *Commission* [1987] ECR 841, paragraph 12.

5 — Judgment of 21 February 1984 in Joined Cases 239 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005, paragraph 15.

those duties was illegal and could request the Court to make use of the procedure available so as to seek a preliminary ruling on its validity. That was the course chosen by Continentale Produkten.

5. The Finanzgericht München has referred to this Court the question of the validity not only of Regulation No 789/82, which imposed definitive anti-dumping duties of 12% the charging of which is at issue before that Court, but also of Regulation No 3453/81 which imposed provisional duties of 16%. Since the assessment notices of 15, 20, 27 and 28 April 1982, charging anti-dumping duty at 12%, are based on Regulation No 789/82 [6] alone, it seems that no decision on the validity of Regulation No 3453/81 is required by the Finanzgericht for its judgment. Regulation No 3453/81 was no longer applicable by the time that the Hauptzollamt München-West issued the notices charging anti-dumping duties, since Regulation No 789/82 imposing the definitive duty [7] had entered into force in the mean time. Furthermore, by virtue of Article 11(1) of Council Regulation No 3017/79, [8] which was then in force, the sole effect of Regulation No 3453/81 was to make the entry of the goods into home use within the Community subject to the provision of a security equal to the amount of the provisional duty. The definitive collection of the anti-dumping duty was to take place later, pursuant to the Council regulation imposing a definitive duty. Nevertheless, for the purposes of collecting the definitive anti-dumping duty, Article 2 of Regulation No 789/82 takes account of the sums provided as a security for the provisional duty. As was discussed during the oral procedure, if Regulation No 3453/81 were found to be invalid, this would not affect the entry into force of Regulation No 789/82 but the date on which it would become applicable. It would enter into force on the day of its publication, namely 3 April 1982, but an anti-dumping duty could be collected only as from that date and not from 1 January 1982, as Article 2 of Regulation No 789/82 provides, since the legal basis of the system whereby sums provided as security are definitively collected would cease to exist. Contrary to the arguments put forward by the Commission at the hearing, the Court's judgment of 5 October 1988 in the *Canon* cases [9] did not rule on those difficulties, since the only regulation whose validity was challenged by the applicants was the regulation imposing the definitive anti-dumping duty. However, it does not appear that the Court needs to resolve this issue in the present case; although the need to determine the validity of Regulation No 3453/81 [10] is open to doubt, it must be recalled that the Court interprets Article 177 of the EEC Treaty as meaning that, as a rule, only the national court before which the main proceedings are pending is to judge the relevance of the questions submitted. [11] I therefore propose to consider the validity of both regulations together.

6 — The regulation entered into force on the day of its publication in the *Official Journal of the European Communities*, that is, on 3 April 1982.

7 — See Article 2 of Regulation No 3453/81.

8 — Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ L 339, 31.12.1979, p. 1).

9 — Judgment of 5 October 1988 in Joined Cases 277 and 300/85 *Canon Inc.* v *Council* [1988] ECR 5731.

10 — See the observations of the Commission, paragraph 1.3.

11 — In this connection, see the judgments of 9 July 1969 in Case 10/69 *Portelange* v *Smith Corona Marchant International* [1969] ECR 309, paragraph 6, of 15 December 1976 in Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871, paragraph 7, of 5 October 1977 in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 17, of 30 November 1977 in Case 52/77 *Cayrol* v *Rivoira* [1977] ECR 2261, paragraph 32, of 22 March 1977 in Case 78/76 *Steinike and Weinlig* v *Federal Republic of Germany* [1977] ECR 595, paragraph 14, and of 30 April 1974 in Case 155/73 *Sacchi* v *Italian Republic* [1974] ECR 409, paragraph 3.

6. Four objections have been raised in their regard:

(a) Article 7(9) of the basic regulation, which requires the termination of the proceeding or the adoption of a definitive measure within one year of initiation of the proceeding, was not complied with, since the anti-dumping proceeding was initiated on 3 August 1979 but the definitive anti-dumping duties were not introduced until Regulation No 789/82 of 2 April 1982 was adopted, 32 months later. The Council further failed to fulfil its obligation to give reasons, by providing no explanation of this delay in the regulation in question.

(b) The three Turkish undertakings chosen for the assessment of the dumping margin were not representative.

(c) No injury was suffered by the Community undertakings, which is a necessary condition for the introduction of an anti-dumping duty.

(d) Regulation No 789/82 was retroactive, in that it applied to contracts concluded prior to its entry into force; the importer could not have foreseen the introduction of an anti-dumping duty so long after the initiation of the proceeding.

7. Those four objections, which I propose to consider in turn, do not seem unfounded.

8. The allegation that Article 7(9) of the basic regulation was infringed because the proceeding lasted longer than a year does not seem to have been made previously before the Court. The complaint is in fact divisible into two parts;

(i) infringement of Article 7(9) of the basic regulation for non-observance of the period prescribed;

(ii) failure to state the reasons for the delay.

9. As regards the first limb of the complaint, Article 7(9) of the basic regulation actually provides that 'conclusion should *normally* take place within one year of initiation of the proceeding'. As we have seen, the proceeding in this case lasted 32 months. In its observations, [12] the Council claimed that it was not unusual for the one-year period to be so exceeded. It gave the following examples:

(i) ball-bearings originating in Japan, Poland, Rumania and the USSR; the proceeding was initiated on 18 September 1979 and was terminated by Decision No 81/406/EEC of 4 June 1981, giving a period of 20 months. The decision was not challenged;

(ii) steel tubes originating in Spain: the proceeding was initiated on 19 October 1979 and was terminated by Decision No 81/430/EEC of 15 June 1981, giving a period of 20 months. The decision was not challenged;

12 — P. 6 of the French translation.

(iii) wrist-watches originating in the USSR: the proceeding was initiated on 19 July 1980 and an anti-dumping duty was introduced on 12 July 1982, giving a period of 24 months. Council Regulation No 1882/82 of 12 July 1982 was the subject of proceedings brought under the second paragraph of Article 173 of the EEC Treaty by Timex Corporation, and led to the judgment of the Court of 20 March 1983.[13] The duration of the proceeding was not one of the complaints made by the applicant in challenging the validity of Regulation No 1882/82;

(iv) codein originating in Czechoslovakia, Hungary, Poland and Yugoslavia; the proceeding was initiated on 1 April 1981 and was terminated by a Council decision of 17 January 1983, giving a period of 21 months. The decision was not challenged.

10. The question is therefore a new one. Although it does not seem possible to interpret the wording of Article 7(9) of the basic regulation as imposing a strict one-year period beyond which the adoption of a measure for the protection of the Community market would be illegal — which would run counter to the very wording of that article — it cannot, on the other hand, be accepted that no legal force at all attaches to that provision, whereby the Council decided to limit its own powers by imposing a time-limit whose observance is, in normal circumstances, compulsory. The need to afford a degree of legal certainty and, as far as possible, to enable traders to carry on their business in a stable legal environment demands that the uncertainty caused by the initiation of an anti-dumping proceeding should not continue beyond a reasonable period. The Community institutions cannot enjoy a discretion in the matter. Consequently, it is for the Court to verify in each individual case whether there are special circumstances justifying the exceeding of the one-year period. That is the verification which I suggest the Court should undertake.

11. Are there circumstances in the present case which could have justified the considerable length of time by which the proceeding exceeded the period mentioned in Article 7(9) of the basic regulation? The reply would appear be in the affirmative. Apparently, the Commission did not enjoy the full cooperation of the Turkish exporters.[14] The selection of representative export undertakings necessitated lengthy negotiations with the Association of Turkish Textile Exporters (hereinafter referred to as 'the TTEA').[15] The political and economic circumstances prevailing in Turkey during 1979 and 1980 further complicated the Commission's task, particularly on account of the disruption to the production of cotton yarn. Lastly, the delay in the proceeding is partly attributable to the request from the Turkish exporters to extend the reference period — originally running from 1 January to 30 September 1981 — until 31 December 1981, in order that the usual decline in the price of raw cotton during the last months of the year could be taken into account. Indeed, it appears that the extension was not without effect on the definitive fixing at 12% of an anti-dumping duty provisionally set at 16%.

13 — Case 264/82 [1985] ECR 849.

14 — See the annex to the Council's observations, paragraphs 2, 10 and 11.

15 — See the annex to the Council's observations, paragraphs 5, 6, 8 and 9.

12. With regard to the second limb of the first complaint, the Court has consistently held that

'the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such as way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction'. [16]

13. Since the Court verifies whether there are special circumstances justifying the non-observance of the period prescribed in Article 7(9) of the basic regulation, the Community institution must give reasons for the adoption of a measure protecting the Community against dumping practices even when a much longer period has elapsed since the initiation of the proceeding than was envisaged by the basic regulation. As was explained above, traders are entitled to expect that the uncertainty arising from the initiation of anti-dumping proceedings will not continue indefinitely. Similarly, they are entitled to know the reasons for the non-observance of the one-year period.

14. However, the Court has also held that:

'A statement of reasons for a regulation cannot be required to cover specifically all the often very numerous details which may be contained in such a measure'. [17]

Similarly, the Court has accepted that the reasons may be set out succinctly, provided that they are adequate. [18]

15. In that connection, the sixth recital in the preamble to Regulation No 789/82 states that the Commission carried out a supplementary investigation in Turkey on exports made in the final quarter of 1981 and that this extension of the period of investigation was made at the request of the Turkish exporters. That recital is thus a sufficient explanation for the non-observance of the period prescribed by Article 7(9) of the basic regulation. In my opinion, therefore, the first complaint cannot be accepted.

16. The second and third complaints, alleging that the Turkish undertakings chosen for the assessment of the dumping margin were unrepresentative and that no injury was incurred by the Community undertakings, involves the appraisal of complex economic situations, with regard to which the Court has held that:

'The Court must . . . limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers'. [19]

16 — Judgments of 7 May 1987 in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, paragraph 28, and of 26 June 1986 in Case 203/85 *Nicolet Instrument GmbH* v *Hauptzollamt am Main-Flughafen* [1986] ECR 2049, paragraph 10.

17 — Judgment of 22 March 1979 in Case 134/78 *Danhuber* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1979] ECR 1007, paragraph 6.

18 — Judgment of 11 February 1971 in Case 37/70 *Rewe-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Emmerich* [1971] ECR 23, paragraph 8.

19 — Case 258/84, quoted above, paragraph 21; judgment of 11 July 1985 in Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 34; Opinion of Mr Advocate General Warner in Case 113/77 *NTN Toyo Bearing Company* v *Council* [1979] ECR 1212, at p. 1259; see also the Opinion of Mrs Advocate General Rozès in Case 191/82 *Fediol* v *Commission* [1983] ECR 2937, at p. 2947.

17. The complaint alleging that the undertakings chosen for the assessment of the dumping margin were unrepresentative is based on the fact that the Commission had to make special adjustments in respect of those undertakings since the company Taris Pam. Tar. Sat. Koop. Birligi Iplik Fab. had not permitted the Commission to check or to supplement the information supplied on its production costs and secondly since the Commission had had to make adjustments to the overheads communicated by Cukurova Sanayi Isl. AS and to the manufacturing costs communicated by Trakya Iplik Sanayi AS.

18. The mere fact that the Commission had to make specific adjustments in order to establish the dumping margin does not in itself indicate that the undertakings chosen were unrepresentative. Admittedly, Article 2B(3)(b) of the basic regulation states, in relation to the calculation of the normal value, that 'when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison', the normal value may be a value 'constructed' from costs in the ordinary course of trade, of materials and manufacture, in the country of origin, plus a reasonable margin for overheads and profit. Article 2B(3)(b) allows the use of a constructed value only in cases where there are no sales of similar products in the ordinary course of trade on the domestic market of the exporting country, or where such sales do not permit a proper comparison. In fact the Court has held, with reference to the identical provisions of Article 2(3)(a) of Regulation No 2176/84, which replaced Regulation No 3017/79, that:

'It is clear from the wording and scheme of the above provisions that regard must primarily be had to the price actually paid or payable in the ordinary course of trade in order to establish the normal value, the other possibilities being merely subsidiary'. [20]

However, the Court further held that:

'The institutions . . . enjoy a margin of discretion in that respect'. [21]

19. After finding that the three Turkish undertakings chosen, although perfectly representative as regards exports to the Community market, did not sell enough goods on the domestic Turkish market to enable a normal value to be established from the prices actually paid, the Commission decided to determine the normal value from costs, pursuant to the abovementioned Article 2B(3)(b). It is not expressly complained that the Commission used a constructed value, although the Turkish situation did not prevent the selection of other, representative, undertakings on the Turkish domestic market and the determination of the prices actually paid; yet, behind the criticism that the three undertakings chosen were unrepresentative, that seems to be the burden of the charge made against the Commission.

20 — Joined Cases 277 and 300/85, quoted above, paragraph 11.
21 — *Ibidem*, paragraph 17.

20. In that regard, Article 2B(3)(b) should be read in conjunction with Article 7(7)(b) of the same regulation, which provides that: 'In cases in which any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available'.

21. In the present case, the length of the investigations, the difficulties encountered by the Commission in obtaining the necessary information, and the political and economic situation prevailing in Turkey at that time are all arguments demonstrating that the Commission could legitimately take the view that it would not be supplied with the necessary information within a reasonable time and that the outcome of the proceeding should not be further delayed by selecting other undertakings for the purpose of ascertaining the prices actually paid but that, on the basis of the information available, recourse should be had to a value constructed from the costs. I therefore regard this objection as unfounded.

22. As far as the actual representativity of the three undertakings chosen is concerned — after considering all that the complaint left unsaid, the criticism must now be dealt with at its face value — the Commission does not appear to have committed any manifest error of appraisal. The three undertakings in question were chosen in agreement with the TTEA. The attention of that organization was drawn to the need for the undertakings chosen to be representative. Eleven leading Turkish undertakings, accounting for 56% of cotton yarn exports to the Community over the first seven months of 1981, were selected. The three principal undertakings were finally chosen. At a meeting on 20 November 1981, the TTEA confirmed that the three undertakings were indeed representative. Once again, the complaint appears to be unfounded.

23. As regards the complaint alleging that no injury was incurred by the Community undertakings, and that the Commission was wrong to use an anti-dumping duty as a means of protecting competition within the Community, reference is made to the case-law of the Court on manifest error of appraisal and the misuse of powers. Here, too, I consider that the complaint cannot succeed.

24. The 14th to 20th recitals in the preamble to Regulation No 789/82 set out in detail the consequences of the dumping found to have occurred: a fall in the volume of production of the Community industry, from 613 000 tonnes in 1977 to 557 000 tonnes in 1981, a reduction in the utilization of capacity to less than 65% in several Member States, a decline in the numbers employed in the production of cotton yarn from 100 000 in 1979 to 92 000 in 1980 and less than 84 000 in 1981. By contrast, Turkish imports, which had represented a market share in the Community of 6.6% in 1980, reached 10.8% in 1981. Throughout that period, the market share held by non-member countries other than Turkey remained relatively stable. The Commission therefore appears to have substantiated a material injury to an established Community industry, as is required by Article 4 of the basic regulation, and it cannot be alleged that it committed a manifest error in the

appraisal of the facts set out above or that it misused its powers in doing so.

25. Lastly, as far as the retroactive character of Regulation No 789/82 is concerned, the Court's case-law on the subject is now well established. On numerous occasions the Court has declared that:

'According to a generally accepted principle, a law amending a legislative provision applies, save as otherwise provided, to the future effects of situations which arose under the previous law'. [22]

26. As Mr Advocate General Capotorti explained in his Opinion in *IFG* v *Commission*,

'there can . . . be no question . . . of the mere existence of a contract conferring on the parties the right to a guarantee on the part of the Community institutions that, until the contract is executed, the legal conditions applicable at the time of its conclusion shall remain unchanged . . . '. [23]

27. The complaint in question appears to arise from a confusion between the immediate application of a new legislative provision and its retroactivity. The entry into force of a new provision may not be delayed until new contracts have been concluded, the effect of which would be to allow importers, through the conclusion of general contracts or multiple delivery contracts, to delay indefinitely the entry into force of a Community regulation and thereby render it totally ineffective. On the other hand, dealings in which all the obligations have been discharged cannot be affected. Such is the case when the contract has been finally performed.

28. However, in its judgments the Court has made an exception to those principles, by holding that a new legislative provision may not be immediately applicable if it conflicts with the protection of legitimate expectation. [24]

29. Could Continentale Produkten legitimately have expected, when concluding the contracts under which it imported cotton yarn from Turkey, that no anti-dumping duties would be imposed in the future?

30. It seems clear that in this case as least two of the conditions laid down by the Court for Community institutions to be held liable on the grounds of infringement of legitimate expectation are not satisfied. [25]

31. In the first place, the adoption of Regulation No 789/82 imposing a definitive anti-dumping duty was not unforeseeable by Continentale Produkten. As was noted

22 — Judgments of 4 July 1973 in Case 1/73 *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 723, paragraph 5, of 5 December 1973 in Case 143/73 *Société des produits alimentaires et diététiques* v *Fonds d'orientation et de regularisation des marchés* and *Fonds d'intervention et de régularisation du marché du sucre* [1973] ECR 1433, paragraph 8, and of 15 February 1978 in Case 96/77 *SA Ancienne Maison Marcel Bauche and SARL François Delquignies* v *Administration française des douanes* [1978] ECR 383, paragraph 48.

23 — Case 68/77 *IFG* v *Commission* [1978] ECR 353.

24 — Case 1/73, quoted above, paragraph 6.

25 — Judgments of 27 April 1978 in Case 90/77 *Hellmut Stimming KG* v *Commission* [1978] ECR 995, and of 1 February 1978 in Case 78/77 *Johann Lühr* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169.

above, Continentale Produkten regularly imports cotton yarn from Turkey and should therefore have acted like a 'circumspect and prudent trader', in particular by keeping itself informed of possible amendments to Community legislation which would affect the products covered by its business. The initiation of anti-dumping proceedings regarding cotton yarn originating in Turkey had been published in the *Official Journal of the European Communities*.[26] As an importer of those products, Continentale Produkten could not have been unaware that the initiation of the proceeding would, in accordance with Article 7(9) of the basic regulation, lead either to a decision terminating it — which is also published in the Official Journal — or to the imposition of an anti-dumping duty. As far as that importer was concerned, therefore, there was nothing unforeseeable about the Council's adoption of Regulation No 789/82.

32. In the second place, there were certainly grounds of public interest — namely the protection of the Community market — to justify the entry into force of Regulation No 789/82 as early as possible. It should also be observed that the Council thought it equitable to 'facilitate, as an exceptional measure, the adjustment of those operators who had entered into trade commitments, to the new situation created by the provisional anti-dumping duty'[27] by introducing an adjustment period of four weeks starting from the day on which the provisional anti-dumping duty entered into force, namely on 2 December 1981. Accordingly, Article 2(2) of the regulation provides that amounts secured by way of provisional anti-dumping duty in respect of products released for consumption before 1 January 1982 are to be released. Consequently, by inserting that provision, the Council took into account the principle of the protection of legitimate expectation.

33. Lastly, on the subject of import licences, the Court has held that

'If an importer finds that the performance of the contract under the new system is detrimental to his interests he must seek the appropriate remedy on the basis of his legal relationship with his co-contractor . . . '.[28]

34. It follows that the last complaint is no more acceptable than the previous one.

35. On those grounds I conclude that the Court should rule that consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulation No 3453/81 or Council Regulation No 789/82.

26 — OJ C 196, 3.8.1979.

27 — Twenty-fifth recital in the preamble to Regulation No 789/82.

28 — Judgment of 14 February 1978 in Case 68/77, quoted above, [1978] ECR 353, paragraph 11.