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 relating to named addressees.
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 121/77

NACHI FUJIKOSHI CORPORATION, Tokyo (Japan),

NACHI (DEUTSCHLAND) GMBH, Düsseldorf (Federal Republic of Germany)

and

NACHI (UK) LTD., Birmingham (United Kingdom),

represented by Lothar Nagel, Advocate at the Düsseldorf Bar, with an address for service at the Chambers of Claude Penning, Advocate, 43 Avenue du Dix-Septembre,

applicants,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Hans-Jürgen Lambers, Director at the Legal Department of the Council, acting as Agent, assisted by Arved Deringer, Advocate at the Cologne Bar, with an address for service at the office of J. N. Van den Houten, European Investment Bank, 2 Place de Metz,

defendant,

and

FEBMA (Federation of European Bearing Manufacturers' Associations), Frankfurt, represented by Dietrich Ehle, Advocate at the Cologne Bar, with an address for service in Luxembourg at the offices 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

The facts of the case, procedure, conclusions and submissions and arguments of the parties may be summarized as follows:

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 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, No 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-dumping 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 in particular 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 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 (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 a 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 the 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, 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 Ltd.

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 purpose 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 and provides that if the Commission finds that these undertakings are being evaded, are not being observed or have been withdrawn it must 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 KK."

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 applicants have lodged the present application against Council Regulation (EEC) No 1778/77. They claim that during the discussions which followed the entry into force of Regulation (EEC) No 261/77 imposing a provisional anti-dumping duty they undertook by agreement of 20 June 1977 no longer to have recourse to practices considered unacceptable by the Commission and that by telex message of 3 August 1977 the Commission declared that it was satisfied with the undertakings given.

In those circumstances, Regulation (EEC) No 1778/77 is not justified. More generally, the applicants claim that dumping complained of has not been sufficiently established in law and in accordance with the requirements both of the rules of the General Agreement on Tariffs and Trade and of the Community rules.

(d) Procedure

The application, dated 7 October 1977, was entered in the Court Register on 10 October 1977. On 12 October 1977, the applicants requested the Court to adopt interim measures. On 9 November 1977, the President of the Court of Justice ordered, as an interlocutory decision, *inter alia* that the application to Nachi (UK) Limited of Article 3 of Regulation No 1778/77 should be suspended until the final judgment in Case 121/77 as far as concerned the sum owed but not yet paid by Nachi (UK) Ltd. under the above-mentioned provision, on condition that and for so long as Nachi (UK) Limited continued to provide security for the performance of its obligation in that amount ([1977] ECR 2107).

Following its application, which was entered on the Court Register on 7 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.

By document lodged on 30 September 1977, the Council, pursuant to Article 91 of the Rules of Procedure, requested the Court 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 16 February 1978 and the applicants lodged their observations on 3 March 1978.

After hearing 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.

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.

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

II — Conclusions of the parties

The applicants claim that the Court should:

— Declare Council Regulation (EEC) No 1778/77 of 26 July 1977 null and void;

— Order the defendant to pay the costs;

In the alternative:

— Declare Article 3 of Regulation (EEC) No 1778/77 of 26 July 1977 null and void;

— Order the defendant to pay the costs.

The defendant contends that the Court should:

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

— Order the applicants to pay the costs.

The intervener claims that the Court should:

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

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

III — Submissions and arguments of the parties.

Admissibility

The *applicants* state in the application that Regulation No 1778/77 must be considered to be a decision within the meaning of the second paragraph of Article 173 of the Treaty. It is of direct and individual concern to them, which is confirmed by the fact that the Commission's investigation was carried out exclusively at the premises of the four above-mentioned Japanese companies and their subsidiaries.

In its document on admissibility and in the defence, the *Council* alleges that Regulation No 1778/77 is a legislative measure which cannot be of direct or individual concern to the applicants as required by Article 173.

Article 2 of the regulation requires the Commission only to monitor closely the observance of the undertakings given by the Japanese producers and the import trends and developments on the Community market.

Even Article 3 is not of direct *and* individual concern either to the producer or to importers.

According to the *intervener* the applicants do not have a legally protected interest in bringing an action against Articles 1 and 2 of the contested regulation which contains, so far as they are concerned, only the suspension of the duty imposed.

In their observations on the preliminary objection, the *applicants,* dismissing the arguments of the Council and the intervener, maintain that the application is admissible.

In the rejoinder the *Council* states that the imposition of an anti-dumping duty is neither an individual prohibitive measure nor a penalty comparable to the measures adopted under the rules on competition. It is a measure of commercial policy aiming to protect certain sectors of the Community industry and is therefore of a general nature.

Relying upon the case-law of the Court, it maintains that the applicants cannot claim that either the contested measure in general of Article 3 thereof is of direct and individual concern to them.

Nor may the *first applicant* be considered directly and individually concerned by virtue of the undertaking which it has given.

The substance of the case.

According to the *applicants,* Regulation No 261/77 is null and void for lack of competence. Only the Council could have adopted a provisional measure. Article 15 of Regulation No 459/68 is not in conformity with the principle of the distribution of powers enshrined in the Treaty.

Moreover, this regulation is null and void because it contains an insufficient statement of the reasons upon which it is based, since it does not show which factors the Commisson used as the basis of its conclusion of the existence of dumping and of material injury.

It is impossible to know whether Regulation No 1778/77 was adopted by a qualified majority. Moreover, this regulation is also vitiated for failure to give a sufficient statement of the reasons upon which it was based as regards both the finding of the existence of dumping and as regards that of the existence of material injury.

Besides, Article 10 (4) of Regulation No 459/68 has been infringed since the Commission did not give the applicants an opportunity to see all information that was relevant to the defence of their interests.

Finally, Regulation No 1778/77 is not in conformity with the provisions of Article 3 (3) and (4) of Regulation No 459/68. It presumed that there were links between the Japanese exporters and the importers in Europe without producing evidence of manipulation of prices. This applies in particular as regards the deliveries made by the *first applicant* to the Import Standard Office undertaking in Paris, which is in no way legally a part of the Nachi group.

By the method adopted for the calculation of export prices the Commission, followed in this by the Council, failed to take as a reference sales "made as nearly as possible at the same time".

Since the first applicant had signed an agreement it could assume that the anti-dumping procedure would stand terminated. It observed that agreement; the Council and the Commission therefore violated by the contested decision the principle of good faith, which applies not only to the private law of the Member States of the Community but also to public law.

After describing the situation on the market in ball-bearings and the history of the case the *Council* states that the anti-dumping procedure concerns situations in which, as a general rule, it is necessary to appraise complex economic facts which are contested in fact, whilst it is necessary to make decisions, either provisional or final, within a very short period of time. The procedure should be sufficiently practicable for the bodies concerned, in particular for the Commission, to enable its economic objective ("effectiveness") to be achieved.

The duty for the authorities to investigate the facts is limited by the corresponding duty for individuals to co-operate in the investigation, in particular where the facts involved are solely accessible to the undertakings concerned. It cannot therefore be complained that the authorities have infringed the duty to investigate if the persons concerned do not supply sufficient information. The duty to co-operate is not limited to the communication of facts but also extends to justification of them. The defendant relies in this respect on certain passages in the judgment of 16 December 1963 (Case 18/62, *Emilia Barge* v *High Authority of the European Coal and Steel Community* [1963] ECR 259).

The complaint that the Commission did not give the applicants the opportunity to see all information that is relevant to their defence is unfounded. The Commission took into account only information which had been communicated to it by the applicants or by the other undertakings concerned and which had not been contested by them. The Commission is not bound to discuss with the applicants the interpretation of those facts, in particular the calculation of the margin of dumping. The statements of the reasons upon which Regulation No 261/77 and Regulation No 1778/77 were based complied with the rule laid down in case-law that the statement of reasons upon which a regulation is based need do no more than indicate on the one hand the general situation which has led to its adoption and, on the other, the general objectives which it proposes to achieve.

As regards the indication that Regulation No 1778/77 was adopted by a qualified majority the Council states that no provision requires that this should be indicated in the measure itself.

As regards the complaints from the point of view of substantive law it is observed that Regulation No 1778/77 is based not only on Regulation No 459/68 but also on Article 113 of the Treaty. Consequently, even if the contested regulation is not covered by the provisions of Regulation No 459/68, Article 113 still constitutes a sufficient legal basis since the imposition of an anti-dumping duty constitutes a very important measure coming within commercial policy. Article 1 (2) of Regulation No 459/68 provides expressly that the provisions of that regulation do not preclude the adoption of special measures.

Having regard to the special nature of the anti-dumping measures the Commission was justified in basing its calculations on a representative choice of the products in question; this choice was moreover discussed with the undertakings concerned.

In the circumstances the Commission in fact compared the prices charged on the domestic market and the export prices on dates which were as close as possible, in the present case the first six months of 1976. The complaint that Article 3 (3) of Regulation No 459/68 is not applicable to the applicants and to the relationship between the first applicant and the Import Standard Office undertaking is

unfounded. This provision does not require either evidence of any manipulation of prices or the existence of a presumption in this respect. It refers to the fact, which, according to the Council, is indisputable, that the price policy between the exporter and an importer associated with it within a group or in some other manner cannot in principle serve as a viable basis for a comparison of prices.

The investigations of the Commission concerning the injury caused by dumping have been exhaustively set out in the thirteenth to seventeenth recitals of the preamble to the contested regulation, on which the defendant has commented.

The argument of the applicants that the signing of an undertaking should terminate the procedure cannot be based upon the wording of Article 14 (2) (a) of the basic regulation. As objections had been expressed within the advisory committee against the immediate termination of the procedure the Commission was bound to submit a report and a proposal to the Council. It was unable to consider the undertaking as sufficient except within the context of general rules such as those which it proposed to the Council, especially since objections had been raised within the committee to the immediate termination of the procedure. Account was in fact taken of the existence of that undertaking, since Article 2 of Regulation No 1778/77 suspended the anti-dumping duty for the future.

The collection of the securities lodged by the importers under Regulation No 261/77 in no way represents a penalty but a logical consequence of the existence of dumping. A solution other than that contained in Article 3 of the contested regulation would have been quite unfair. The Japanese producers only very gradually agreed to take part in discussion on an undertaking. That undertaking was signed more than seven months after the commencement of the procedure and more than five months after the imposition of the provisional duty; it is therefore clear that to release the securities lodged would amount to granting a clear reward for a successful stalling tactic.

Finally, as regards the alleged nullity of Regulation No 261/77, the Council states that the Commission was empowered to adopt it by Article 15 of the basic regulation. As regards the remainder, it refers to the observations already made on the complaints raised against Regulation No 1778/77. Finally, even if Regulation No 261/77 was invalid it would not follow that Article 3 of Regulation No 1778/77 was also invalid since that article was adopted on the basis of fresh and more complete examinations of the matter.

The *intervener* supports, in its document, all the arguments of the Council.

In their reply, the *applicants* continue to maintain that only the Council may fix a provisional anti-dumping duty. They observe that although the statements of the reasons upon which Regulations No 261/77 and 1778/77 are based comply with the conditions laid down with regard to the statements of the reasons upon which regulations are based, in the present case these are decisions.

They request that the Court should require the defendant to produce evidence that the contested measure was in fact adopted by a qualified majority.

The argument of the Council that Article 113 of the Treaty may provide a sufficient legal basis for the contested regulation regardless of the provisions of Regulation No 459/68 is rejected by the applicants as also the interpretation given by the Council to Article 1 (2) of the latter regulation.

The applicants also maintain that they were not informed that the Commission intended to reconstruct the export prices by the method laid down in Article 3 (3) of the basic regulation.

According to the applicants, the defendant itself admits that the comparison between the export prices and the domestic prices was not carried out by reference to dates which were as close as possible. In other respects too this method was misapplied and therefore led to substantial inaccuracies.

Apart from that, the application of that method was not justified as regards both the relationship between the applicants and more particularly the relationship between the first applicant and the Import Standard Office undertaking. On the latter point, the defendant is merely making assumptions with not the slightest shred of evidence.

As regards the effects of the undertaking given by the first applicant, the applicants maintain that in the light of the explanations given by the Council Article 3 of Regulation No 1778/77 has proved to be a penalty on account of the fact that the undertaking was signed only five months after the fixing of the provisional anti-dumping duty.

The *Council* begins its rejoinder by recalling the case-law from which it claims that it follows that, as regards decisions coming within economic policy, judicial review is limited to manifest error.

As regards the validity of Article 15 of Regulation No 459/68, it is maintained that the imposition of provisional duties by the Commission is in conformity with the separation of powers laid down in the Treaty. The provisional nature of such an imposition requires only preliminary examination of the matter without its being obligatory to hear the interested parties. As the provisional duties were collected only at the time of the imposition of a definitive duty, those concerned were adversely affected only by the infringements of procedural requirements during their preparation.

Moreover only the full Commission or the Council can decide the definitive calculation of the margin of dumping; the officials responsible for the investigations are not therefore able or empowered to supply any information on those calculations. Secondly it is not customary in matters of customs and tax law for the authorities to have exhaustive preliminary discussions on a draft decision with the persons concerned. This applies all the more to the present case in which the adoption of a regulation was involved.

Moreover the statement of the applicants that they contributed in an exemplary manner to the clarification of the fact is inaccurate. The information for the determination of the domestic prices was supplied in the form of a hand-written calculation most of which was worded in Japanese. There were also other inaccuracies. The Commission was therefore reduced to determining the domestic prices by its own calculations on the basis of various factors.

As regards the statement of the reasons upon which the regulation is based, the applicants have not indicated in their reply factors which the Council could have divulged in the statement of reasons upon which Regulation No 1778/77 is based without violating its confidential nature.

As regards the date of the comparison of prices, the arguments put forward by the applicants are at the least imprecise if not contradictory. The correct method is to compare the prices obtained on the sale of the same category of products at the

same date on the one hand on the national market and on the other in the foreign country. Correcting factors used in the calculation of export prices were discussed with the first applicant for two days in Tokyo.

As regards the use of the method of calculation laid down in Article 3 (3) of Regulation No 459/68, the Commission merely applied the principle generally acknowledged in tax law as in customs law according to which in the case of groups of undertakings or undertakings linked in some other way not the actual prices but the prices obtained "under full competitive conditions" or which may be so obtained must be adopted. In these cases undertakings which are "associated in business" means not only undertakings which, under the legislation governing limited companies or groups of companies, are interconnected, but those which maintain other contractual or non-contractual relationships which create a special link, regardless of the relationships created by the very fact of the purchase or sale transaction. The Commission was therefore justified in applying that method of calculation to the Import Standard Office undertaking.

As regards the undertaking given by the exporters, the representatives of the Commission, when having discussions with the applicants, always drew their attention to the fact that it is for the Council to take the final decision. Following the viewpoints adopted within the advisory committee, it was necessary to expect that the Council would approve only the solution which was adopted which consisted, it is true, in the imposition of an anti-dumping duty, but in suspending it while reserving to itself the possibility to re-impose it where an undertaking was not observed. This solution, which is not expressly provided for in Regulation No 459/68, is covered both by Article 17 of Regulation No 459/68 and by Article 113 of the EEC Treaty.

The *intervener* supplements, in its document, the observations on the market situation, dumping and injury contained in its previous document. It supports the arguments of the Council to refute the complaints made by the applicants.

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 7 October 1977, received at the Court Registry on 10 October 1977, the applicants, Nachi Fujikoshi Corporation (hereinafter referred to as "Nachi"), Nachi (Deutschland) GmbH and Nachi (UK) Limited (hereinafter referred to as "the subsidiaries") 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 7 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. 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. During the procedure initiated by the Commission the four major Japanese producers, including Nachi, gave voluntary undertakings signed on 20 July 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. 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.

The admissibility of the application

4 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. 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.

5 The applicants reply that the contested measure, although drafted in abstract terms, in fact affects only the first applicant and three other Japanese undertakings which produce the products in question (hereinafter referred to as "the major producers"), as well as their subsidiaries in the Community. 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 then at the premises of the major producers in Japan. 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. 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. The contested measure therefore constitutes a decision which affects only the major producers and their subsidiaries and must therefore be considered to be a decision concerning them adopted in the form of a regulation.

6 Before commencing the examination of the admissibility of the application, it should be stated that Nachi and its subsidiaries 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. In these circumstances there is no need, as regards the question whether the contested measure is of direct and individual concern to the applicants, to make a distinction in relation to them between producers on the one hand and importers on the other.

7 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 regulations of a provisional duty.

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

8 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". "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".

9 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. 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.

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

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

12 Article 3 of Regulation No 1778/77 is therefore of direct and individual concern to those importers and consequently the applications lodged by the subsidiaries, as importers of Nachi products, are admissible.

13 As a result the application lodged by Nachi against that article is also admissible.

The substance of the application

14 As regards Articles 1 and 2 of Regulation No 1778/77, the applicants claim in substance, amongst other complaints against the reasoning on which that regulation is based and the procedure which led up to it, that Regulation No 459/68 does not permit the definitive anti-dumping duty to be imposed at the same time as undertakings by the producers concerned to revise prices are accepted.

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

16 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."

17 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."

18 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.

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

20 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. 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. 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.

21 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. 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. 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.

22 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. 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.

23 The application is therefore well founded in this respect.

24 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.

25 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. 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. 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.

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

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

28 It follows from the preceding statements and from the arguments put forward by the applicants in the parallel applications in Cases 113/77,

118/77, 119/77 and 120/77 that Regulation No 1778/77 is unlawful and that the application is therefore well founded. It is therefore necessary, in accordance with the applicants' request, to annul that regulation. 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

29 Nachi's application has been successful. It is therefore necessary to order the Council to pay the costs in connexion with the application for the adoption of interim measures and the main action, except for the costs caused by the intervention. The intervener must be ordered to bear its own costs and those incurred by the applicants 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 in connexion with the application for the adoption of interim measures and the main action, except for those caused by the intervention;**

3. **Orders the intervener to bear its own costs and those incurred by the applicants 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)