ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
12 July 2002 *

In Case T-163/02 R,

Montan Gesellschaft Voss mbH Stahlhandel, established in Planegg (Germany),

Jepsen Stahl GmbH, established in Nittendorf (Germany),

LNS — Lothar Niemeyer Stahlhandel GmbH & Co. KG, established in Essen (Germany),

Metal Traders Stahlhandel GmbH, established in Düsseldorf (Germany),

represented by K. Friedrich, lawyer, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by J. Forman and R. Raith, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for, first, suspension of the operation of Commission Regulation (EC) No 560/2002 of 27 March 2002 imposing provisional safeguard measures against imports of certain steel products (OJ 2002 L 85, p. 1), and, secondly, other interim measures deemed necessary,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal framework

1 Article 8 of Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94 (OJ 1994 L 349, p. 53) reads as follows:

'1. The provisions of this Title [Community investigation procedure] shall not preclude the use, at any time, of surveillance measures in accordance with

Articles 11 to 15 or provisional safeguard measures in accordance with Articles 16, 17 and 18.

Provisional safeguard measures shall be applied:

— in critical circumstances where delay would cause damage which it would be difficult to repair, making immediate action necessary, and

— where a preliminary determination provides clear evidence that increased imports have caused or are threatening to cause serious injury.

2. The duration of such measures shall not exceed 200 days.

...

4. The Commission shall immediately conduct whatever investigation measures are still necessary.

5. Should the provisional safeguard measures be repealed because no serious injury or threat of serious injury exists, the customs duties collected as a result of the provisional measures shall be automatically refunded as soon as possible. The procedure laid down in Article 235 et seq of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code... shall apply.'

2 On 27 March 2002 the Commission adopted Regulation (EC) No 560/2002 of 27 March 2002 imposing provisional safeguard measures against imports of certain steel products (OJ 2002 L 85, p. 1, 'the contested regulation').

3 According to recital 18 of the contested regulation:

'The Commission has made a preliminary determination that there is clear evidence that imports of 15 of the products concerned have recently increased in a manner which is sudden, sharp and significant. These are non alloy hot rolled coils, non alloy hot rolled sheets and plates, non alloy hot rolled narrow strip, alloy hot rolled flat products, cold rolled sheets, electrical sheets (other than GOES), tin mill products, quarto plates, wide flats, non alloy merchant bars and light sections, alloy merchant bars and light sections, rebars, stainless steel wire, fittings (< 609.6 mm) and flanges (other than of stainless steel)....'

4 Recital 36 of the contested regulation reads as follows:

'Based on its preliminary analysis, the Commission has made a preliminary determination that, in relation to each of the 15 products concerned, the Community producers are threatened with significant overall impairment in their position which is clearly imminent. It is anticipated that actual serious injury will occur even more rapidly both as a result of the announcement of US measures on 5 March, and of those measures being brought into force.'

5 Under the title 'Provisional measures — form and level', recitals 65 and 66 state as follows:

'(65) By taking provisional safeguard measures, the Commission seeks to prevent the occurrence of serious injury, and damage which it would be difficult to repair, to the Community producers arising from diverted trade, whilst preserving, in so far as possible, the openness of the Community market, and maintaining the flow of imports at their current historically high levels.

(66) In conformity with the Community's international obligations, the provisional measures should take the form of tariff measures relative to each of the 15 products concerned. To preserve the flow of imports to the Community at their current historically high levels, they should take the form of tariff quotas in excess of which an additional duty requires to be paid. To ensure access to the Community market to all traditional suppliers, such tariff quotas should be based on the average of the annual level of imports in the years 1999, 2000 and 2001, plus 10% thereof. As the tariff quotas will be in operation for six months, they should be set at one half of that annual figure.'

6 Article 1 of the contested regulation provides as follows:

'1. A tariff quota is hereby opened in relation to imports into the Community of each of the 15 products concerned specified in Annex 3 (defined by reference to the CN codes specified in relation to it) from the date on which this Regulation enters into force until the day before the corresponding date of the sixth month following.

2. The conventional rate of duty provided for these products in Council Regulation (EC) No 2658/97, or any preferential rate of duty, shall continue to apply.

3. Imports of those products which are in excess of the volume of the relevant tariff quota specified in Annex 3, or without a request for benefit, shall be subject to an additional duty at the rate specified in Annex 3 for that product. That additional duty shall apply to the customs value of the product being imported.

...'

7 Article 3 provides that '[t]he tariff quotas shall be managed by the Commission and the Member States in accordance with the management system for tariff quotas provided for in Articles 308a, 308b and 308c of Regulation (EEC) No 2454/93, as last amended by Regulation (EC) No 993/2001....'.

8 Article 308a of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended by Regulation (EC) No 1427/97 (OJ 1997 L 196, p. 31), reads as follows:

'1. Save as otherwise provided, where tariff quotas are opened by a Community provision, those tariff quotas shall be managed in accordance with the chronological order of dates of acceptance of declarations for release for free circulation.

2. Where a declaration for release for free circulation incorporating a valid request by the declarant to benefit from a tariff quota is accepted, the Member State concerned shall draw from the tariff quota, through the Commission, a quantity corresponding to its needs.

3. Member States shall not present any request for drawing until the conditions laid down in Article 256(2) and (3) are satisfied.

4. Subject to paragraph 8, allocations shall be granted by the Commission on the basis of the date of acceptance of the relevant declaration for release for free circulation, and to the extent that the balance of the relevant tariff quota so permits. Priority shall be established in accordance with the chronological order of these dates.

5. The Member States shall communicate to the Commission all valid requests for drawing without delay. Those communications shall include the date referred to in paragraph 4, and the exact amount applied for on the relevant customs declaration.

6. For the purposes of paragraphs 4 and 5, the Commission shall fix order numbers where none are provided by the Community provision opening the tariff quota.

7. If the quantities requested for drawing from a tariff quota are greater than the balance available, allocation shall be made on a pro rata basis with respect to the requested quantities.

...

9. Where a new tariff quota is opened, drawings shall not be granted by the Commission before the 11th working day following the date of publication of the provision which created that tariff quota.

10. Member States shall immediately return to the Commission the amount of drawings which they do not use. However, where an erroneous drawing representing a customs debt of ECU 10 or less is discovered after the first month following the end of the period of validity of the tariff quota concerned, Member States need not make a return.

11. If the customs authorities invalidate a declaration for release for free circulation in respect of goods which are the subject of a request for benefit of a tariff quota, the complete request shall be cancelled in respect of those goods. The Member States concerned shall immediately return to the Commission any quantity drawn, in respect of those goods, from the tariff quota.

...'

9 On 3 June 2002 the Commission adopted Regulation (EC) No 950/2002 amending the contested regulation (OJ 2002 L 145, p. 12). Recital 2 of the amending regulation reads as follows:

'... [T]aking into account the need to pursue unhindered access to the benefit of the tariff quotas, whilst at the same time taking account of the need to ensure payment of customs debts arising upon exhaustion of the tariff quotas, the

Commission considers it desirable to remove the requirement for customs authorities to take security in relation to those products until 75% of the initial volume of the relevant tariff quotas has been used.'

10 Article 3 of the contested regulation was amended accordingly.

Procedure

11 By application lodged at the registry of the Court of First Instance on 27 May 2002, the applicants brought an action under the fourth paragraph of Article 230 EC for, first, annulment of the contested regulation and, secondly, compensation for the damage allegedly caused to the applicants as a result of the adoption of the said regulation.

12 By separate document lodged at the registry of the Court of First Instance on 29 May 2002, they also applied for interim measures seeking, first, suspension of the operation of the contested regulation and, secondly, other interim measures deemed necessary.

13 On 19 June 2002 the Commission submitted its observations on the present application for interim measures.

14 Having regard to the material in the file, the President of the Court of First Instance considers that he has all the information needed to rule on the present application for interim measures, without it being necessary first to hear oral argument from the parties.

Law

15 Under Article 242 EC in conjunction with Article 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (OJ 1993 L 144, p. 21, the Court of First Instance may, if it considers that circumstances so require, order that application of a contested act be suspended or prescribe any other necessary interim measures.

16 The first subparagraph of Article 104(1) of the Rules of Procedure states that an application to suspend the operation of any measure is to be admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is not a mere formality but is based on the premiss that the main action to which the application for interim measures relates can in fact be considered by the Court of First Instance.

17 Article 104(2) of the Rules of Procedure provides that an application relating to interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for suspension of the operation of an act must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge

hearing an application for interim relief must also balance the interests involved (order of the President of the Court of Justice in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

Admissibility of the application for interim measures

Arguments of the parties

18 The applicants claim that the main action is admissible. Since they obtain supplies of steel products covered by the contested regulation in non-member countries and they have concluded long-term contract with their suppliers, the regulation is of direct and individual concern to them according to recent case-law, namely the judgment of the Court of First Instance of 3 May 2002 in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365.

19 The Commission considers that the application for interim measures must be dismissed because the main action to which it relates is manifestly inadmissible. In this connection the Commission claims that the contested regulation is not of individual concern to the applicants within the meaning of the fourth paragraph of Article 230 EC because it applies in the same way to all Community importers of the 15 steel products covered by the regulation, so that the applicants have no standing to bring an action for its annulment.

20 In addition, the Commission maintains that nor is the contested regulation of direct concern to the applicants. On this point, the Commission refers to the order of the President of the Court of First Instance in Case T-1/00 R *Hölzl and Others* v *Commission* [2000] ECR II-251.

Assessment by the President

21 It is settled case-law that in principle the issue of the admissibility of the main action should not be examined in relation to an application for interim measures so as not to prejudge the substance of the case. Nevertheless, where, as in this case, it is contended that the main action to which the application for interim measures relates is manifestly inadmissible, it may prove necessary to establish whether there are any grounds for concluding prima facie that the main action is admissible (orders of the President of the Court of Justice in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21, and in Case 160/88 R *Fédération européenne de la santé animale and Others* v *Council* [1988] ECR 4121, paragraph 22; orders of the President of the Court of First Instance in Case T-6/95 R *Cantine dei Colli Berici* v *Commission* [1995] ECR II-647, paragraph 26; in Case T-219/95 R *Danielsson and Others* v *Commission* [1995] ECR II-3051, paragraph 58, and in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 121).

22 It is not possible in this case for the President of the Court of First Instance to consider prima facie that the contested regulation is of direct concern to the applicants and that it is open to them to seek the annulment of the regulation under the fourth paragraph of Article 230 EC, since the additional duties have prima facie been imposed on them only in so far as the Commission refuses to grant them a tariff quota. The payment of additional duties in turn presupposes that the quota allowed has been used up or that no application has been made for a quota. On the other hand, with regard to the claims for compensation for the

damage allegedly incurred as a result of the adoption of the contested regulation, there is nothing to preclude the admissibility of the action. Consequently the present application for interim measures must be declared admissible.

Urgency

The arguments of the parties

23 The applicants merely assert that, if the contested regulation is applied immediately, they are likely to suffer serious and irreparable damage. This situation is said to arise from the fact that, after the import quotas specified by the contested regulation have been used up, the applicants will finally be entirely prevented, because of the additional duties, from importing the products necessary for continuing their business, particularly as the contested regulation contains no specific rules for imports of steel products from any particular non-member country.

24 The applicants state that, as a result of the adoption of the contested regulation, the restrictions on imports and the associated expenses, contracts entered into by one of the applicants have been cancelled by its main customers and deliveries which were made to it have been suspended. The other applicants fear a similar reaction from their customers.

25 The Commission claims that the applicants have not shown that they were likely to suffer serious and irreparable damage if no order were made to suspend operation of the contested regulation.

26 In its observations, the Commission observes in particular that the applicants have not produced precise figures which would establish the veracity of their claims.

27 With regard to the tariff quotas fixed by the contested regulation, the Commission adds that, as at 5 May 2002, no additional duty had been paid and, on average, only approximately 10% of the said quotas had been used.

Assessment by the President

28 It has consistently been held that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for the party in question to prove that it cannot wait for the outcome of the main proceedings without suffering such damage (order of the President of the Court of Justice in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14, and orders of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 36, and Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43).

29 Although in order to establish the existence of serious and irreparable damage it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability, the applicants are none the less required to prove the facts forming the basis of their claim that serious and irreparable damage is

likely (orders of the President of the Court of Justice in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67; Case C-377/98 R *Netherlands* v *Parliament and Council* [2000] ECR I-6229, paragraph 51, and *Greece* v *Commission*, cited above, paragraph 15).

30 The serious and irreparable damage alleged by the applicants is said to be material damage, namely the loss of customers. This loss is of a pecuniary nature because it consists in a loss of earnings. It has consistently been held that pecuniary damage cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and order of the President of the Court of First Instance in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 42).

31 Pursuant to those principles, suspension of the operation of the contested regulation would, in the circumstances of the present case, be justified only if it appeared that, without suspension, the applicants would be in a situation capable of threatening their very existence or of altering their market shares irretrievably.

32 According to recital 66 of the contested regulation, to ensure access to the Community market to all traditional suppliers, tariff quotas should be based on the average of the annual level of imports in the years 1999, 2000 and 2001, plus 10% thereof, and those tariff quotas will be in operation for only six months. In addition, it appears from the file that, as at 5 May 2002, no additional duty had been paid and that, on average, only approximately 10% of the said quotas had been used up (see annex 25 to the application for interim measures).

33 In those circumstances, it must be concluded that the loss feared by the applicants is entirely hypothetical in that it presupposes the occurrence of future and uncertain events, namely that the Commission will grant the applicants tariff quotas which are substantially less than their imports into the Community in 1999, 2000 and 2001 (see, to that effect, orders of the President of the Court of First Instance in Case T-239/94 R *EISA* v *Commission* [1994] ECR II-703, paragraph 20; Case T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 31; Case T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 37, and Case T-214/01 R *Bank für Arbeit und Wirtschaft* v *Commission* [2001] ECR II-3993, paragraph 66).

34 It must be added that, within nine months of 28 March 2002, namely, the date of publication of the notice of the opening of a safeguard investigation into imports of certain steel products, including the 15 affected by the contested regulation, the Commission must determine whether the safeguard measures are necessary. If that is not the case and it turns out that the provisional safeguard measures are repealed because no serious injury or threat of serious injury exists, the customs duties collected as a result of those measures will be automatically refunded as soon as possible under Article 8(5) of Regulation No 3285/94.

35 It follows that the applicants have not succeeded in showing that, without an order to suspend the operation of the contested regulation, they would suffer serious and irreparable damage.

36 Consequently, since the condition of urgency is not fulfilled, the application must be dismissed and it is unnecessary to consider whether the other conditions for ordering suspension are fulfilled.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 12 July 2002.

H. Jung

Registrar

B. Vesterdorf

President