JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
2 May 1995 *

In Joined Cases T-163/94 and T-165/94,

NTN Corporation, a company incorporated under Japanese law whose registered office is in Osaka (Japan), represented by Jürgen Schwarze and Malte Sprenger, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Claude Penning, 78 Grand-Rue,

and

Koyo Seiko Co. Ltd, a company incorporated under Japanese law whose registered office is in Osaka, represented by Jacques Buhart of the Paris Bar and Charles Kaplan, Barrister, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicants,

v

Council of the European Union, represented by Ramon Torrent and Jorge Monteiro, Legal Advisers, acting as Agents, and by Hans-Jürgen Rabe and

* Language of the case: English.

Georg Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Bruno Eynard, Director of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Federation of European Bearing Manufacturers' Associations, represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg in Case T-163/94 at the Chambers of Messrs Arendt and Medernach, 8-10 Rue Mathias Hardt, and in Case T-165/94 at the Chambers of Marc Lucius, 6 Rue Michel Welter,

and, in Case T-165/94, supported also by

Commission of the European Communities, represented by Éric White, of its Legal Service, acting as Agent, assisted by Claus-Michael Happe, a national civil servant on secondment to the Commission, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

interveners,

APPLICATION for the annulment of Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball-bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85 (OJ 1992 L 286, p. 2),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: J. Biancarelli, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 19 October 1994,

gives the following

Judgment

Relevant legislation and facts of the case

1 These applications seek the annulment of Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball-bearings with a greatest external diameter exceeding 30 mm originating in

Japan imposed by Regulation (EEC) No 1739/85 (OJ 1992 L 286, p. 2, corrigendum OJ 1993 L 72, p. 36; hereinafter 'Regulation No 2849/92' or 'the contested regulation'). The contested regulation was based on the provisions of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1; hereinafter 'Regulation No 2423/88' or 'the basic regulation').

2 Council Regulation (EEC) No 1739/85 of 24 June 1985 instituting a definitive anti-dumping duty on imports of certain ball-bearings and tapered roller bearings originating in Japan (OJ 1985 L 167, p. 3; hereinafter 'Regulation No 1739/85'), the regulation modified by the contested regulation, introduced definitive anti-dumping duties varying from 1.2% to 21.7% on imports of ball-bearings with a greatest external diameter of more than 30 mm originating in Japan, as a result of which the products manufactured by NTN Corporation ('NTN') and by Koyo Seiko Co. Ltd ('Koyo Seiko') were subjected to a definitive anti-dumping duty of 3.2% and 5.5% respectively.

3 Under Article 14(1) of Regulation No 2423/88 a review of anti-dumping duties is to be held, *inter alia*, 'where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation'. According to 14(2), where it is apparent that a review is warranted, the investigation is to be re-opened where the circumstances so require.

4 Article 15(1) of Regulation No 2423/88 provides that 'anti-dumping ... duties ... shall lapse after five years from the date on which they entered into force'. However, Article 15(4) provides that where a review of a measure under Article 14 is still in progress at the end of the five-year period, 'the measure shall remain in force

pending the outcome of such review. A notice to this effect shall be published in the Official Journal of the European Communities before the end of the relevant five-year period'.

5 On 27 December 1988 the Federation of European Bearing Manufacturers' Associations ('FEBMA') requested a review of the anti-dumping measures introduced by Regulation No 1739/95. The Commission considered that the request contained sufficient evidence to justify a review and commenced an investigation in accordance with Article 14 of Regulation No 2423/88. Notice of the initiation of a review was published in the Official Journal of the European Communities of 30 May 1989 (C 133, p.3).

6 Before the review had been completed, the five-year period for the application of existing measures referred to in Article 15(1) of Regulation No 2423/88 lapsed. The Commission therefore published a notice on 31 May 1990 (OJ C 132, p. 5) stating that the existing measures remained in force, in accordance with Article 15(4) of Regulation No 2423/88, pending the outcome of the review.

7 After the initiation of the review, the applicants replied to questionnaires sent to them by the Community institutions. The information requested concerned the period from 1 April 1988 to 31 March 1989 (hereinafter 'the investigation period' or 'the reference period').

8 Koyo Seiko claims that on 15 February 1991 the Commission informed the Anti-dumping Advisory Committee pursuant to Article 9(1) of Regulation No 2423/88 of its intention to terminate the review and to allow the

anti-dumping duties to lapse, and that the committee rejected the Commission's proposal in May 1991.

9 The information communicated by the Commission to Koyo Seiko by letter of 5 December 1991 and NTN by letter of 11 December 1991 included two tables of data on the Community market for the products in question. The tables, which are not contested by any of the parties, are reproduced here, with the exception of the data for 1987.

Ball bearings > 30 mm — Total EC market excluding Japanese production in Europe

Sales in million ECU

	1986	1988	Ref. period*	INC/DEC 1986/Ref.
Sales of: EC producers in the EC	819.7	903	922.4	+ 12.5 %
Japanese imports in the EC	65.1	68.4	70.5	+ 8.3 %
Imports from: USA	45.3	39.4	39.9	– 11.9 %
Other countries	160.8	155.8	163.6	+ 1.7 %
TOTAL MARKET	1 090.9	1 166.6	1 196.4	+ 9.7 %
Share of total market EC producers	75.1 %	77.4 %	77.1 %	+ 2.7 %
Japanese imports	6.0 %	5.9 %	5.9 %	– 1.7 %
USA	4.1 %	3.4 %	3.3 %	– 19.5 %
Other countries	14.8 %	13.3 %	13.7 %	– 7.4 %

* If the Japanese production in the EC is included for the year/reference period based on an estimated sales value of the Japanese product of ECU 68 500 000 (40 000 000 pieces), the 'EC' producers market share drops from 77.1% to 72.9%. The Japanese market share increases from 5.9% to 11.0%.

Ball-bearings > 30 mm — Total EC market

Millions of pieces

	1986	1988	Ref. period	INC/DEC 1986/Ref.
Sales of: EC producers* in the EC	265.8	300.2	305.2	+ 14.8 %
Japanese imports to the EC	33.5	34	34.4	+ 2.7 %
Imports from: Other countries*	124.9	121.4	125.1	+ 0.2 %
TOTAL MARKET	424.2	455.6	464.7	+ 9.5 %
Share of total market: EC Producers	62.7 %	65.9 %	65.7 %	+ 4.8 %
Japanese producers	7.9 %	7.5 %	7.4 %	− 6.3 %
Imports from: Other countries	29.4 %	26.6 %	26.9 %	− 8.5 %

* Estimation based on Eurostat data in tonnes.

10 On 28 September 1992 the Council adopted Regulation No 2849/92. Article 1 of that regulation, which entered into force on 2 October 1992, reads as follows:

'The definitive duties imposed by Article 1 of Regulation (EEC) No 1739/85 on the products defined below are hereby modified in accordance with the following provisions:

(1) a definitive anti-dumping duty is hereby imposed on imports of ball-bearings with a greatest external diameter exceeding 30 mm falling within CN Code 8482 10 90 and originating in Japan;

(2) the anti-dumping duty, expressed as a percentage of the net, free at Community frontier price of the product before duty shall be 13.7% (Taric additional Code 8677) except when manufactured by the following companies for which the rate of anti-dumping duty is set out below:

(...)

NTN Corporation Osaka 11.6%

(...)

(3) no anti-dumping duties shall apply to ball-bearings with a greatest external diameter exceeding 30 mm manufactured by:

... (list of companies concerned);

(4) free-at-Community-frontier prices shall be net if the terms of sale provide for payment within 180 days of the B/L date;

They shall be increased or reduced by 1% for each month's increase or decrease in the period of payment;

(5) The provisions in force concerning customs duties shall apply.'

11 On 13 September 1993 the Council adopted Regulation (EEC) No 2554/93 repealing Article 1(4) of Regulation (EEC) No 2849/92 (OJ 1993 L 235, p. 7; hereinafter 'Regulation No 2554/93').

Procedure

12 It was in those circumstances that NTN and Koyo Seiko brought these actions, which were lodged at the Registry of the Court of Justice on 20 December 1992 and 13 January 1993 respectively.

13 By application lodged at the Registry of the Court of Justice on 29 April 1993, FEBMA applied to intervene in support of the forms of order sought by the defendant in *NTN* v *Council*. The application was granted by order of the President of the Court of Justice of 15 September 1993.

14 By applications lodged at the Registry of the Court of Justice on 18 and 24 May 1993 respectively, the Commission and FEBMA applied to intervene in support of the forms of order sought by the defendant in *Koyo Seiko* v *Council*. The applications were granted by orders of the President of the Court of Justice of 16 June and 15 September 1993 respectively.

15 By a separate document dated 28 July 1993 Koyo Seiko applied for an order from the Court that the Council produce the Commission's proposal of 15 February 1991 to the Anti-dumping Advisory Committee and any subsequent letters or documents sent by the Commission to the members of that committee in relation to the proposal. The Council submitted its observations on the application on 20 August 1993.

16 By orders of 18 April 1994 the Court referred the cases to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EEC of 7 March 1994 (OJ 1994 L 66, p. 29).

17 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry.

18 The parties presented oral argument and their replies to the oral questions put by the Court of First Instance at the public hearings conducted on 19 October 1994.

19 On 21 March 1995 the President of the Third Chamber (Extended Composition) of the Court of First Instance made an order joining Cases T-163/94 and T-165/94 for the purposes of the judgment.

Forms of order sought

Case T-163/94

20 The applicant claims that the Court should:

(i) annul Article 1 of Regulation No 2849/92 in so far as it imposes an anti-dumping duty on the applicant;

(ii) order the Council to pay the costs of the application.

21 The defendant contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to bear the costs of the proceedings.

22 The intervener contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to bear the costs of the proceedings, including those of the intervener.

Case T-165/94

23 The applicant claims that the Court should:

(i) declare Regulation No 2849/92 void in so far as it affects the applicant;

(ii) order the Council to pay the costs.

24 The defendant contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

25 The interveners did not lodge a statement in intervention in Case T-165/94.

Substance

26 NTN, the applicant in Case T-163/94, relies on four pleas in support of its application. The first alleges that the contested regulation was adopted in breach of Article 7(9)(a) of the basic regulation inasmuch as it fails to give adequate reasons for setting aside the usual time-limit of one year provided for therein. In its second plea the applicant maintains that the contested regulation is illegal because the Council failed to establish injury to Community industry and did not correctly determine the possible effects of the expiry of the existing measures. The third plea alleges an abuse of powers: the applicant maintains that if the procedure had been brought to a close within the period provided for in Article 7(9)(a) of the basic regulation the Community institutions would not have found any injury. The fourth plea alleges infringement of Article 12(1) of the basic regulation, in so far as Article 1(4) of the contested regulation introduced a flexible anti-dumping duty.

27 Koyo Seiko, the applicant in Case T-165/94, relies on seven pleas in support of its application. The first plea alleges infringement of Articles 2(1) and 4(1) and (3) of Regulation No 2423/88 inasmuch as the Council imposed definitive anti-dumping measures in the absence of any finding whatsoever of injury or threat of injury. The second plea alleges infringement of Article 2(1) and (4) of Regulation No 2423/88 inasmuch as the Council imposed definitive anti-dumping duties in the absence of any likelihood of recurrence of material injury. The third plea alleges misuse of powers on the ground that the Council imposed anti-dumping duties when it was aware that there was neither injury nor a threat of injury to the Community industry. The fourth plea alleges infringement of Article 7(9)(a) of Regulation

No 2423/88 inasmuch as the review took 41 months to complete. The fifth plea relates to the level of anti-dumping duty and alleges infringement of Article 13(3) of Regulation No 2423/88. The sixth plea alleges infringement of an essential procedural requirement, the Community institutions having failed to disclose to the applicant the considerations on which Article 1(4) of Regulation 2849/92 was based. Finally, the last plea alleges infringement of Article 190 of the EEC Treaty.

28 Following the adoption on 13 September 1993 of Regulation No 2554/93 repealing Article 1(4) of the contested regulation, NTN and Koyo Seiko formally abandoned at the hearing their fourth and their sixth pleas respectively. However, they maintain that the Council should nevertheless be ordered to pay the costs relating to those pleas.

29 The Court considers it necessary to examine first the plea that the Council failed to establish the existence of injury within the meaning of Article 4(1) of Regulation No 2423/88 and the plea that Article 7(9)(a) of the basic regulation was infringed. Those pleas have been raised in both cases.

The plea that the Council failed to establish the existence of injury within the meaning of Article 4(1) of Regulation No 2423/88

Analysis of the reasons given in the contested regulation as regards the situation of the Community industry and of the possible effects of the expiry of the existing duties

30 As regards the definition of Community industry, paragraph 24 of the reasons given in the contested regulation states that 'some companies having production

facilities in the Community have not been considered as forming part of Community industry within the meaning of Article 4(5) of Regulation (EEC) No 2423/88, since they are wholly or majority-owned subsidiaries of the Japanese exporters for which substantial dumping was found. Indeed, these subsidiaries benefit from the dumping of their parent companies.'

31 With regard to imports from Japan and the situation of the Community industry, paragraphs 26 to 32 of Regulation No 2849/92 contain the following explanations:

'(26) When examining the effects of Japanese imports into the Community, it has to be borne in mind that measures were already in force which should normally have eliminated the injurious effects of dumping.

Therefore it has only to be examined whether the situation of the Community industry is such that the expiry of the measures would again lead to injury.

(27) The total volume of dumped imports by Japanese manufacturers into the Community shows an increase of 2.7% between 1986 and the end of the investigation period.

(28) Although prices of Japanese dumped imports have increased and Community industry prices have fallen, there is still a certain amount of price undercutting by Japanese imports when comparing weighted average prices for each type of bearing of the Japanese exporters with the prices of identical bearing types produced by Community industry or types closely resembling them.

(29) Community production remained relatively stable between 1986 and the end of the investigation period.

(30) The total value of the Community industry sales increased by 12.5% between 1986 and the end of the investigation period. This increase however is less than the total growth in the market.

(31) In terms of value, the market share of the Community industry based on sales of bearings produced by the bearing industry in the Community between 1986 and the end of the investigation period decreased from 75.1 to 72.9%.

(32) An examination of the above indicators leads the Council to conclude that although the measures in force had a certain effect, the Community industry is still in a relatively weak position.'

32 With regard to the possible effects of expiry of the measures, paragraphs 33 to 39 state:

'(33) Given this precarious situation, the Council is of the opinion that the expiry of the measures would worsen this situation.

(34) Indeed, without measures, it has to be expected that the undercutting by Japanese imports would increase and the Community industry would suffer reduced profitability and further losses in market share, since the Community industry will be unable to resist this additional market pressure.

(35) In this respect, the Council notes further that at present the market is in a recession. The Community bearings industry has therefore become much more vulnerable particularly as the market is getting tighter and sales quantities and prices come under increasing pressure. Low-priced dumped imports would even aggravate this precarious situation.

(36) In addition, it has to be borne in mind that Japanese exports to the United States are facing high anti-dumping duties. If measures imposed on their imports into the Community are removed, import volumes are likely to increase, possibly even at lower prices if undercutting persists.

(37) Finally, since the Japanese producers have expanded their production capacity in Japan, while consumption in the Community has not increased, it can be assumed that, without measures in force, there will be increased Japanese export sales to the Community. In contrast, the Community producers did not expand their production facilities in the Community.

(38) In view of the above factors, it can be clearly foreseen that the Community industry will suffer material injury from the dumped imports in the event of the expiry of the anti-dumping measures.

(39) The Council therefore concludes that removing the existing anti-dumping measures would lead to a recurrence of material injury.'

Arguments of the parties

33 The applicants claim that paragraphs 24 to 39 of the reasons given in the contested regulation, on which the finding of injury was based, contain various errors of fact and law and that consequently the contested regulation fails to establish the existence of injury to the Community industry within the meaning of Article 4(1) of the basic regulation.

34 The Council denies that it made errors of law and contends that the facts as established by the Community institutions and as stated in Regulation No 2849/92

clearly support its finding that the removal of the existing measures would have led to the recurrence of injury for the Community industry. It refers to the case-law of the Court of Justice to the effect that the Community institutions enjoy a wide discretion when assessing the injury and when determining the effects of the removal of existing anti-dumping duties, and points out that judicial review of such an appraisal is limited 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 (judgment of the Court of Justice in Case C-179/87 *Sharp* v *Council* [1992] ECR I-1635, paragraph 58).

35 As regards more particularly the individual paragraphs of the statement of reasons in the contested regulation the parties rely on the following arguments.

Paragraph 24

36 As regards the exclusion for the purposes of defining the Community industry of production by companies linked to Japanese exporters, NTN claims that that approach is permitted, under Article 4(5) of the basic regulation, only if reasons are given justifying it. The statement in paragraph 24 that the Japanese subsidiaries in Europe 'benefit from the dumping of their parent companies' must, in the applicant's view, be disregarded because it is not accompanied by any evidence.

37 The Council contends that Article 4(5) of the basic regulation permits the Community institutions to exclude producers in the Community from the 'Community production' on the sole ground that they are related to the Japanese exporters or themselves import the products under investigation. The Council argues that the basic regulation makes no other condition. It adds that even if the statement that

the subsidiaries of Japanese exporters in the Community benefit from the dumping of their parent companies were unfounded, that would not render Article 4(5) of the basic regulation inapplicable.

Paragraph 27

38 The applicants consider that the assertion in paragraph 27 of the contested regulation that dumped Japanese imports increased by 2.7% between 1986 and the end of the reference period is misleading. They point out that the tables reproduced in paragraph 9 of this judgment show that despite the increase in sales of ball-bearings imported from Japan the market share (in volume) of Japanese producers fell by 6.3% during that period, whereas that of Community producers increased by 4.8%.

39 The Council observes that the applicants do not deny that the volume of dumped imports by Japanese manufacturers rose by 2.7% between 1986 and the end of the reference period.

Paragraph 29

40 Koyo Seiko challenges the assertion in paragraph 29 that Community production remained relatively stable between 1986 and the end of the reference period, bearing in mind the fact that during that period stocks fell considerably and capacity utilization increased.

41 The Council made no observations on this point.

Paragraph 30

42 NTN considers that the statement in this paragraph that the value of Community industry sales increased by 12.5% between 1986 and the end of the investigation period is misleading. It points out that in the table of sales by value communicated to it by the Commission (see paragraph 9, above) the latter came to the conclusion that the value of sales of ball-bearings imported from Japan increased by only 8.3%, whereas the value of sales by Community producers increased by 12.5%. The market share of Japanese importers thus fell by 1.7%, whereas that of Community producers rose by 2.7%. The table thus shows, according to NTN, that it is the Japanese producers and not the Community producers which have suffered injury.

43 The Council made no observations on this point.

Paragraph 31

44 The applicants claim that the statement in this paragraph that the market share of the Community industry decreased from 75.1% to 72.9% is based on a 'misleading manipulation' by the Community institutions of their own findings. They claim that it is apparent from the tables reproduced in paragraph 9 of this judgment that far from suffering a reduction of its market share Community industry progressed from 75.1% in 1986 to 77.1% during the reference period.

45 The Council contends that it was right to exclude from Community production during the reference period production by companies situated in the Community which were wholly or majority-owned subsidiaries of the Japanese exporters for which substantial dumping was found, because those subsidiaries benefited from the dumping practices of the parent companies. The fact that the sales made by those subsidiaries were not excluded from the calculations for 1986 does not mean, in the Council's view, that Regulation No 2849/92 is based on incorrect facts. In the first place, the development of the market share was only one of several elements taken into account when assessing the effects of the existing measures. Furthermore, the Council submits that the tables referred to above indicate that if the production of Japanese subsidiaries in the Community is not excluded from Community production, the increase in the market share of Community production during the reference period was only 2.7% and the fall in the market share of Japanese imports only 1.7%. The Council explains that taking into account the fact that anti-dumping duties were already applicable to dumped Japanese imports, their market share could have been expected to fall by more than 1.7% and the market share of Community production to have risen by more than 2.7%. If account is also taken of the fact that the existing measures had the effect of raising prices, but still did not prevent some price undercutting, the Council considers that the facts stated in Regulation No 2849/92 fully support the finding in paragraph 32 that 'although the measures in force had a certain effect the Community industry is still in a relatively weak position.'

Paragraph 35

46 The applicants point out that Article 4(1) of the basic regulation expressly precludes the Community institutions from taking a fall in demand into account when assessing injury caused by dumped imports. Consequently, they consider that the Council made an error of law in paragraph 35 when it took into consideration, in order to assess the injury, the recession in the market. NTN adds that the statement in paragraph 35 that 'at present the market is in a recession', whether or not correct, is defective in law because it refers neither to the reference period nor to the subsequent year, the period at the end of which the investigation ought to be

completed, according to Article 7(9)(a) of the basic regulation. It adds that if the Community institutions had completed the procedure in 1990, within the one-year period laid down by that provision, the Council would have found no injury at all, since 1990 was the best year for the main Community producers.

47 The Council points out that it did not take the recession into account in determining the injury. The recession is referred to in the contested regulation as one of several factors characterizing the state of Community production when the existing measures expired. When it considered whether removing the duties would lead to a recurrence of injury, it had to take account of that factor because an industry in a weak market situation is more exposed to the negative effects of dumping.

48 The Council also claims that the recession referred to by NTN had already commenced at the beginning of 1990, that is to say during the year following the beginning of the review of the existing anti-dumping duties.

Paragraph 36

49 The applicants claim that in this paragraph the Council made an error of fact in stating that 'Japanese exports to the United States are facing high anti-dumping duties'. Although when FEBMA requested a review American anti-dumping duties on ball-bearings from Japan were high (in the region of 70%), they were fairly low when the contested regulation was adopted. Koyo Seiko notes that according to

information published in the Federal Register of 24 June 1992, and amended in that publication on 14 December 1992, American duties for Japanese producers who were also exporting ball-bearings to the Community varied from 2.24% to 7.86% when the contested regulation was adopted. Consequently, the applicants consider that there was no reason to suppose at that time that there would be a significant diversion of trade from the United States to the Community.

50 The Council observes that in the ball-bearing industry, which is a mass-production industry, the profit margins are relatively low, and consequently any increase in costs must be considered to be a big disadvantage. It was therefore right to conclude that the volume of Japanese imports was likely to increase if the existing duties were removed, *inter alia* because Japanese exports to the United States were subject to high anti-dumping duties. The Council contends that the reference to the duties imposed by the United States on imports from Japanese exporters and published in the Federal Register on 24 June 1992 is misleading. It points out that the reference in paragraph 36 of the reasons given in Regulation No 2849/92 is to Japanese exporters as a whole and not to particular exporters. The figures published in the Federal Register on 24 June 1992 show that several companies were facing extremely high duties and that the new duties imposed by the United States and published in the Federal Register on 14 December 1992 were merely a correction of calculation errors made with regard to a few exporters. The duties remained unchanged for most companies, in particular for those facing the highest duties.

Paragraph 37

51 Koyo Seiko notes that in this paragraph the Council states that Japanese production capacity has increased so that it can be assumed that Japanese sales to the Community will increase. Koyo Seiko regards that assumption as an insufficient

ground for concluding that there is a threat of injury, since Article 4(3) of the basic regulation requires the Community institutions to show that there is a 'particular situation', 'likely to develop into actual injury'.

52 Koyo Seiko also claims that prices of Community imports increased between 1986 and 1989 and that profits rose in the Community industry by 4.3% during the reference period. Moreover, the contested regulation contains no findings with respect to cash flow or employment during the reference period.

53 Together those observations show that the factual findings in the contested regulation are not sufficient to justify the conclusion that actual injury was suffered by the Community industry.

54 The Council considers that paragraph 37 provides a sufficient statement of reasons and fully supports its conclusions and that it was not necessary to provide a detailed table showing the development of the production capacity of Japanese producers. It adds that for reasons of confidentiality it would also not have been possible to disclose to the applicant the production capacity of its Japanese competitors.

55 Furthermore, the Council considers that although the existing measures had the effect of raising the prices of the dumped Japanese imports, those prices remained well below the prices of the Community industry, which fell because of undercutting. As regards the fact that the profits of the Community industry rose, the Council contends that those profits remained below those which could reasonably have been expected in a market not distorted by dumped Japanese imports.

Findings of the Court

Preliminary observations

56 The Court finds that in this case the Community institutions proceeded to review Regulation No 1739/85, in accordance with Article 14 of the basic regulation. The five-year period for application of the existing measures provided for in Article 15(1) of the basic regulation expired before the review had been completed and the Commission published a notice announcing that the existing measures would remain in force, in accordance with Article 15(4) of the basic regulation, pending the outcome of the review. On 28 September 1992 the Council adopted the contested regulation modifying Regulation No 1739/85.

57 It should be noted, first, that Article 2(1) of the basic regulation lays down the principle that anti-dumping duties may be applied to any dumped product 'whose release for free circulation in the Community causes injury'. 'Injury' is defined in Article 4(1) of the basic regulation, and the factors which may or must be taken into account in determining the injury are set out in Article 4(2) and (3).

58 As far as the review of a regulation imposing anti-dumping duties is concerned, the basic regulation indicates only the factors which must be established in order for a review to be initiated. In the first place, Article 14(2) provides that 'where ... it becomes apparent that review is warranted, the investigation shall be re-opened in accordance with Article 7, where the circumstances so require'. Accordingly, the Court held in Case C-216/91 *Rima Electrometalurgia* v *Council* ([1993] ECR I-6303, paragraph 16), referring to Article 7(1) of the basic regulation, that 'the existence of sufficient evidence of dumping and the injury resulting therefrom is always a pre-requisite for the opening of an investigation, whether at the initiation of an anti-dumping proceeding or in the course of a review of a regulation imposing anti-dumping duties.' In the second place, Article 15(3) of the basic regulation provides that 'where an interested party shows that the expiry of the measure would lead again to injury or threat of injury', the Commission is to proceed to review the measure. Consequently, although the basic regulation includes provisions regarding the factors which must be established before a review may be

initiated, it does not include specific provisions regarding the injury, the existence of which must be established in a regulation modifying the existing duties.

59 Consequently, in the absence of specific provisions regarding the determination of injury, in the context of a review initiated under Articles 14 and 15 of the basic regulation, a regulation modifying existing anti-dumping duties after such a procedure must establish the existence of injury within the meaning of Article 4(1) of the basic regulation.

60 It is therefore necessary to ascertain whether the reasons given in the contested regulation establish the existence of injury within the meaning of Article 4(1) of the basic regulation.

61 For that purpose it must be borne in mind that under Article 4(1) of the basic regulation injury can be established only if the dumped or subsidized imports either (i) cause material injury to an established Community industry, or (ii) threaten to cause material injury to an established Community industry or (iii) materially retard the establishment of such an industry.

62 Since it is common ground between the parties that there is a Community ball-bearings industry, it is necessary to ascertain whether the grounds listed in the

contested regulation contain proof that the dumped imports (i) caused it material injury or (ii) threatened to cause it such injury.

63 Next, Article 4(2) and (3) of the basic regulation list various factors which may or must be taken into account in assessing the existence or threat of material injury. Thus Article 4(2) of the basic regulation provides:

'An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

(a) volume of dumped or subsidized imports, in particular whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;

(b) the prices of dumped or subsidized imports, in particular whether there has been a significant price undercutting as compared with the price of a like product in the Community;

(c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as:

— production,

— utilization of capacity,

— stocks,

— sales,

— market share,

— prices (i. e., depression of prices or prevention of price increases which otherwise would have occurred),

— profits,

— return on investment,

— cash flow,

— employment.'

64 Article 4(3) of the basic regulation provides as follows:

'A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

(a) rate of increase of the dumped or subsidized exports to the Community;

(b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community;

(c) the nature of any subsidy and the trade effects likely to arise therefrom.'

65 It must also be borne in mind that according to the second and third recitals in the preamble to the basic regulation the latter was adopted in accordance with existing international obligations, in particular those arising from Article 6 of the General Agreement on Tariffs and Trade ('GATT') and the Agreement on Implementation of Article VI of the GATT (hereinafter 'the 1979 Anti-Dumping Code'). Consequently, the provisions in the basic regulation must be interpreted in the light of Article VI of the GATT and the 1979 Anti-Dumping Code (see *inter alia* Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 30 to 32).

66 In this respect Article 3(6) of the 1979 Anti-Dumping Code provides that 'a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.'

The determination of injury, within the meaning of Article 4(1) of the basic regulation, in the contested regulation

67 The Court finds, first of all, that paragraphs 24 to 32 of the contested regulation contain a description of the 'situation of the Community industry'. From a consideration of various factors the Council concludes, in paragraph 32, that 'the Community industry is still in a relatively weak position'. In view of that

weakness the Council states in paragraph 33 that it 'is of the opinion that the expiry of the measures would worsen this situation'. It goes on to consider, in paragraphs 33 to 39, the 'possible effects of expiry of the measures' and concludes in paragraph 39 that 'removing the existing anti-dumping measures would lead to a recurrence of material injury'.

68 The Council's decision to modify the duties applied by Regulation No 1739/85 is thus based on the view that the dumped imports threatened to cause material injury to the Community industry within the meaning of Article 4(1) of the basic regulation. It is therefore clear that the contested regulation contains no evidence of actual material injury. Paragraph 26 of the grounds in the contested regulation states expressly in that regard that '... it has only to be examined whether the situation of the Community industry is such that the expiry of the measures would again lead to injury'.

Consideration of the reasons given in the contested regulation

69 Paragraph 24 of the contested regulation states that for the purposes of the investigation 'some companies having production facilities in the Community have not been considered as forming part of the Community industry within the meaning of Article 4(5) of Regulation (EEC) No 2423/88, since they are wholly or majority-owned subsidiaries of the Japanese exporters for which substantial dumping was found'.

70 Article 4(5) of the basic regulation provides that Community producers who are related to the exporters or importers or are themselves importers of the allegedly dumped product may be excluded from Community industry for the purposes of

assessing the injury to that industry caused by dumping. It is for the institutions, in the exercise of their discretion, to determine in each case whether they should make that exclusion (Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 49, and Case C-177/87 *Sanyo Electric* v *Council* [1992] ECR I-1535, paragraph 24).

71 Accordingly, the Community institutions were entitled to exclude from Community production that of certain companies established in the Community on the ground that those companies were wholly or majority-owned subsidiaries of the Japanese exporters for which substantial dumping had been found. The Court also notes that there is no indication in any of the documents on the Court's file that the Council exceeded its power of assessment by excluding them.

72 As regards the existence of a threat of injury, the Council based its finding on the following factors: it found that the volume of dumped imports had risen by 2.7% (paragraph 27); that Community industry prices had fallen whilst there was still a certain amount of price undercutting by Japanese imports (paragraph 28); that Community production had remained relatively stable (paragraph 29); that the increase in the value of Community industry sales (in the region of 12.5%) had been less than the total growth in the market (paragraph 30); that the Community industry's market share had decreased (in value) from 75.1% to 72.9% for the products concerned (paragraph 31); that without measures the undercutting by Japanese imports could be expected to increase and the Community industry would suffer reduced profitability and further losses in market share (paragraph 34); that the Community industry was very vulnerable because of the recession on the market (paragraph 35); that the high anti-dumping duties in the United States would lead to an increase in the volume of Japanese imports if measures imposed on those imports into the Community were removed (paragraph 36); and finally that

without measures Japanese imports to the Community would increase because Japanese producers had increased their production capacity in Japan, whereas consumption in the Community had not increased (paragraph 37).

73 Each of the paragraphs referred to above, with the exception of paragraphs 28 and 34, in which the factors which led the Council to find that there was a threat of material injury are discussed, has been challenged by the applicants on the grounds that it contains statements which are misleading or wrong in fact or in law. It is therefore necessary to consider each of those paragraphs in the light of the observations made by the parties.

Paragraph 27

74 In this paragraph the Council stated that the total volume of dumped imports of ball-bearings rose by 2.7% between 1986 and the end of the investigation period.

75 The tables reproduced in paragraph 9, above, which have not been challenged by the parties, indicate that the statement in paragraph 27 is correct but incomplete. They show that the increase in the volume of Japanese imports is far less than the total increase in volume of the Community market for those products during the same period, which was 9.5%, and the increase in the volume of sales by Community producers in the Community, which was 14.8%. Consequently, despite the increase of 2.7% in the volume of Japanese imports it is clear that the market share of Japanese imports fell in volume by 6.3% between 1986 and the end of

the reference period. The market share of Community producers rose by 4.8% in volume in the same period.

76 The Court is therefore of the opinion that the incompleteness of the statement in paragraph 27 was capable of distorting the Council's assessment of the injury caused by the dumped imports.

Paragraph 29

77 In this paragraph it was stated that 'Community production remained relatively stable between 1986 and the end of the investigation period'.

78 The tables reproduced in paragraph 9, above, show that ball-bearing sales by Community producers increased between 1986 and the end of the reference period by 14.8% in volume and 12.8% in value. Moreover, the information communicated by the Commission to Koyo Seiko in its letter of 5 December 1991 reveals that utilization of Community capacity increased from 74.38% to 82.27% during that period whilst the value of Community stocks fell from 114.53 to 84.72 million Deutschmarks, and their volume from 58.82 to 54.02 million pieces.

79 In the light of that information the Court finds that the Commission's statement in paragraph 29 that Community production remained relatively stable does not accurately reflect the evolution in that production and is therefore vitiated by an error of fact.

Paragraph 30

80 In this paragraph the Council states that the total value of Community industry sales increased by 12.5% between 1986 and the end of the investigation period and that 'this increase however is less than the total growth in the market'.

81 However, the tables reproduced above in paragraph 9 indicate that total market growth (in value) was 9.7%. Consequently, contrary to what is stated in paragraph 30, the total increase in Community industry sales was greater than total market growth.

82 Paragraph 30 is therefore also vitiated by an error of fact.

83 At the hearing the Council explained that if Community production included 'Japanese production in Europe', that is to say, that of Community producers which were wholly or majority-owned subsidiaries of Japanese exporters, total market growth was greater than 12.5%. However, the Court considers that that statement, which is not supported by figures or documentary evidence, is not sufficient to rebut a conclusion based on precise information which has not been challenged by the parties, such as that contained in the tables reproduced in paragraph 9 hereof.

Paragraph 31

84 The Council states in this paragraph that in terms of value the market share of the Community industry based on sales of bearings produced by the Community

industry between 1986 and the end of the investigation period decreased from 75.1% to 72.9%.

85 The tables reproduced above in paragraph 9 show clearly, however, that during that period the market share (in value) of Community production increased from 75.1% to 77.1%.

86 The Council endeavours to explain the apparent anomaly by pointing out that Japanese production in Europe was excluded from Community production for the reference period.

87 However, the title of the table 'Sales in million ECU' (see above, paragraph 9) shows that that adjustment was not confined to the reference period. The Court considers that the words above the table, 'Total EC market excluding Japanese production in Europe', refer to all the figures contained in the table and not only to those relating to the reference period. It follows that the Community market share, excluding Japanese production in Europe, was 75.1% in 1986 and 77.1% during the reference period.

88 Accordingly, the Court considers that the Council's explanation with regard to the market shares referred to in paragraph 31 of the grounds in the contested regulation, to the effect that it had excluded Japanese production in Europe from Community production for the reference period, is misleading.

89 The note which appears below the table of 'Sales in million ECU' (in paragraph 9, above) reveals that in order to arrive at the figure of 72.9% for the market share of the Community industry during the reference period, stated in paragraph 31 of the contested regulation, the Council treated Japanese production in Europe as

Japanese imports. If the value of Japanese production in Europe, which that note indicates was ECU 68.5 million for the reference period, is added to Japanese imports into the Community for the same period, which amounted to ECU 70.5 million, Japanese 'imports' for the reference period represent a total value of ECU 139 million. The total market value must have increased by the same amount (ECU 1196.4 million + ECU 68.5 million) and becomes, on the basis of that adjustment, ECU 1264.9 million. That brings the market shares to those indicated in the notes appearing below the table, namely 11% for Japanese imports and 72.9% for Community producers.

90 On the contrary, the market share for 1986 indicated in paragraph 31, which was 75.1%, was calculated without making the adjustment of treating Japanese production in Europe as Japanese imports, the note appearing below the table referring solely to the reference period.

91 The Court therefore finds that in paragraph 31 of the contested regulation the Community industry's market share for 1986 was not calculated on the same basis as the market share for the reference period and that any conclusion as to the evolution of the market which rests on a comparison of those figures is based on an inaccuracy. Moreover, it is noteworthy that the figures contained in the table of 'Sales in million ECU' (see paragraph 9, above) show that if the Community industry's market share is calculated by the same method for 1986 and the period of investigation, it shows, in terms of value, an increase from 75.1% to 77.1%.

92 Accordingly, the statement in paragraph 31 to the effect that the market share of the Community industry decreased from 75.1% to 72.9% between 1986 and the end of the investigation period is vitiated by an error of fact.

Conclusion regarding the situation of the Community industry: paragraph 32

93 It is explained in paragraph 32 that 'an examination of the above indicators leads the Council to conclude that although the measures in force had a certain effect, the Community industry is still in a relatively weak position'. That conclusion is based on the previous findings, which were that dumped imports had increased (paragraph 27), that 'although prices of Japanese dumped imports have increased and Community industry prices have fallen, there is still a certain amount of price undercutting by Japanese imports' (paragraph 28), that Community production remained relatively stable (paragraph 29), that the increase in Community sales was less than the total growth of the market (paragraph 30) and that the market share had decreased from 75.1% to 72.9% (paragraph 31).

94 It has been established above, however, that paragraphs 27, 29, 30 and 31 each contain erroneous or misleading statements. The Court considers therefore that the Council's conclusion in paragraph 32 of the reasons, in so far as it is based on those statements, is itself wrong in fact and in law.

95 In those circumstances the conclusion reached in paragraph 32 should be considered in the light of, first, the figures contained in the tables reproduced above in paragraph 9 and, secondly, the information produced by the parties during the written procedure and not contested by them. The tables indicate that Community industry progressed as follows between 1986 and the end of the reference period: the Community industry's market share increased by 2.7% in value and 4.8% in volume; the market share of Japanese imports fell by 1.7% in value and 6.3% in volume; and the increase in Community industry sales (14.8% in volume and 12.5% in value) was greater than total market growth (9.5% in volume and 9.7%

in value). In addition, the Commission's letters of 5 and 11 December 1991 (see above, paragraph 9) indicate that during the reference period the Community industry showed a profit of approximately 4.3% of its turnover. That last factor, in the light of the statement made by FEBMA in paragraph 3.4 of the letter it sent to the Commission on 7 June 1990, which has not been challenged by the other parties, to the effect that the Community industry made no profit in 1986 and 1987, likewise shows that the Community industry progressed. Lastly, the figures communicated by the Commission to Koyo Seiko with the letter of 5 December 1991 indicate that utilization of Community production capacity increased from 74.38% to 82.27% whilst the value of Community stocks fell from 114.53 to 84.72 million Deutschmarks and in volume from 58.82 to 54.02 million pieces.

96 The result of that analysis is that the conclusion in paragraph 32 to the effect that 'the Community industry is still in a relatively weak position' is borne out neither by paragraphs 27, 29, 30 and 31 nor by any other information on the Court's file.

Paragraph 35

97 The Court finds that in this paragraph the Council relied on the existence of a recession in the relevant industry, in the Community, to establish the threat of injury.

98 However, the last sentence of Article 4(1) of the basic regulation does not permit such a factor to be taken into consideration in order to determine the existence of injury or the threat of injury: it provides that 'injuries caused by other factors,

such as ... contraction in demand, which ... also adversely affect the Community industry must not be attributed to the dumped or subsidized imports.'

99 The Council has therefore made an error of law in so far as it relied in paragraph 35 on the existence of a recession in order to determine whether dumped imports of the relevant products were threatening to cause injury, within the meaning of Article 4(1) of the basic regulation.

Paragraph 36

100 In this paragraph the Council states that the volume of imports into the Community is likely to increase if measures are removed because 'high' anti-dumping duties are applied to Japanese exports to the United States.

101 The Court finds, first of all, that the contested regulation contains no concrete information regarding the anti-dumping duties applicable in the United States to the relevant products, despite the fact that such information is in no way confidential.

102 Next, the application for review lodged by FEBMA on 27 December 1988 indicates that a decision of the U. S. Department of Commerce dated 27 October 1988 imposed, *inter alia*, anti-dumping duties on imports of ball-bearings manufactured by Koyo Seiko and NTN amounting to 73.65% and 25.85% respectively. The duty applicable to products manufactured by Japanese companies not mentioned by

name in the decision was 44.7%. None of the parties has challenged the figures for the amount of the American duty given in the application for review.

103 The applicants do not deny that the duties applicable at the time of the introduction of the application for review were high, but they consider that when the contested regulation was adopted in September 1992 the duties applicable for Japanese producers who also exported ball-bearings to the Community, which varied at that time, according to the applicants, from 2.24% to 7.86%, could no longer be described as high and therefore likely to increase Japanese exports to the Community if the Community measures were removed.

104 The Court notes that the anti-dumping duties imposed on ball-bearings by Regulation No 1739/85, which varied from 1.2% to 21.7%, were significantly lower than the American duties introduced on 27 October 1988. If, as the Council maintains, the profit margins in the ball-bearing industry are small, so that any increase in costs has a direct repercussion on trade patterns, the high American duties imposed in October 1988 ought to have brought about a significant increase in Japanese imports to the Community as a result of their effect on trade patterns.

105 However, a comparison based on the information in the tables reproduced in paragraph 9 (above) of Japanese imports of ball-bearings into the Community in 1988, in which year the American duties introduced on 27 October 1988 were in force for two months, with imports during the reference period, during which the same American duties were in force for five months, shows clearly that the Community share for Japanese imports fell by 0.1% in volume and remained unchanged in value. Consequently, and in the absence of any other precise information on the matter, the Court finds that the introduction of high anti-dumping duties in the

United States had a negligible effect on the Community market. Furthermore, it is plain that when the contested regulation was adopted the applicable American duties (2.24% to 7.86% according to the applicants; at the hearing the Council referred to an average of 7.5%) were significantly lower than the American duties applicable when the application for review was lodged by FEBMA (73.65% for Koyo Seiko; 25.85% for NTN; 43.47% for Nachi; 58.32% for NSK and a residual duty of 44.70%).

106 In the circumstances the Court considers that the fear expressed by the Council regarding the diversion of Japanese exports to the Community is mere hypothesis and is not sufficient to justify a finding of threat of injury within the meaning of Article 4(1) of the basic regulation, a term which must in any event be interpreted in the light of the 1979 Anti-Dumping Code and in particular Article 3(6) thereof. Paragraph 36 of the contested regulation is thus not based on the facts, as required by Article 3(6) of the 1979 Anti-Dumping Code, but 'merely on allegation, conjecture or remote possibility'.

Paragraph 37

107 In this paragraph the Council claims that 'since the Japanese producers have expanded their production capacity in Japan, while consumption in the Community has not increased, it can be assumed that, without measures in force, there will be increased Japanese export sales to the Community'.

108 However, there is no indication, even approximate, in the contested regulation of the size of that increase in Japanese production. Moreover, it is possible that the Japanese producers increased their production capacity as a result of increased consumption of ball-bearings on the Japanese market or on other non-Community

markets. Neither paragraph 37 nor any other information produced by the parties contains the slightest indication of the level of consumption on the Japanese market or on other markets for the products.

109 The Court is of the opinion that only if it were established that the increase in capacity did not reflect an increase in consumption in Japan or in another third country would it be possible to speak of a risk of increased Japanese exports in general and to the Community in particular. If that were the case the Japanese producers seeking export markets for their surplus production might, if there was not sufficient demand in other countries, have endeavoured to increase their exports to the Community, notably by means of dumping.

110 It follows that in so far as paragraph 37 relies on the increased production capacity of Japanese producers and the absence of increased consumption in the Community in order to justify the conclusion that there is a risk of Japanese exports to the Community increasing, it is too vague to support the Council's conclusion that there was a threat of injury in this case.

Effects on the finding of a threat of injury

111 The Council states in paragraph 38 of the contested regulation that 'in view of the above factors, it can be clearly foreseen that the Community industry will suffer material injury from the dumped imports in the event of the expiry of the

anti-dumping measures' and concludes, in paragraph 39, that 'removing the existing anti-dumping measures could lead to a recurrence of material injury'.

112 The analysis made above shows that paragraphs 27, 29, 30, 31, 32, 35, 36 and 37 each contain statements which are vitiated by errors of fact or of law, or which are misleading because they are incomplete. Consequently, the Council's conclusion in paragraph 39 of the contested regulation that dumped imports threaten to cause the Community ball-bearing industry material injury is, in so far as it is based on those statements, itself wrong in law and in fact.

113 At this stage it should be remembered that the applicants, who seek the annulment of the anti-dumping regulation, are entitled to put before the Court all the information which is necessary to enable it to be ascertained whether the Community institutions have observed the procedural guarantees accorded to them and whether they have not made errors of law or of fact or been influenced by considerations which would amount to a misuse of powers. In that context the Court may not intervene in the appraisal reserved to the Community authorities by the basic regulation but must exercise its normal power of review over a discretion granted to a public authority (see *inter alia* Case 191/82 *FEDIOL* v *Commission* [1983] ECR 2913, paragraph 30, and Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 16).

114 In this respect the Court finds that the general result of the errors of fact made by the Council is to show trends contrary to the true evolution of the market. Thus paragraph 29 states that Community production remained relatively stable between 1986 and the end of the investigation period when in fact it increased; paragraph 30 explains that the increase in the total value of Community industry sales was lower

than the total growth in the market when in reality it was higher; paragraph 31 adds that in terms of value, the market share of the Community industry based on sales of bearings produced by the Community industry between 1986 and the end of the investigation period decreased from 75.1% to 72.9% when in fact it increased from 75.1% to 77.1%. In addition, there is an error of law in paragraph 35 inasmuch as it takes into account a factor which is not relevant in assessing the injury.

115 In the light of those factors and bearing in mind, furthermore, the misleading or inaccurate statements in paragraphs 27, 32, 36 and 37, it is possible that in the absence of those errors of fact and law the Council would not have found that there was a threat of injury. Consequently, the forms of order sought by the applicants should be granted and the contested regulation annulled in so far as it affects them.

116 In view of the circumstances of the case it is also necessary to consider the plea that Article 7(9)(a) of Regulation No 2423/88 was infringed.

The plea that Article 7(9)(a) of Regulation No 2423/88 was infringed

Arguments of the parties

117 The applicants claim that the contested regulation infringes Article 7(9)(a) of Regulation No 2423/88 because it does not provide an adequate statement of reasons to show why the normal period of one year should not apply. Although the one-year time-limit is not mandatory the procedure may not take longer than is reasonable

(Case 246/87 *Continentale Produkten-Gesellschaft* [1989] ECR 1151, paragraph 8). The applicants claim that the Council has not shown adequate reasons in law for having taken 41 months to complete the procedure.

118 The Council contends that the one-year time-limit laid down in Article 7(9)(a) of Regulation No 2423/88 is not mandatory, as is evident from the wording of the provision, which states that 'normally' the investigation is to be concluded within one year. One of the reasons for the fact that this investigation lasted longer than previous ones is that in 1990 the Commission re-examined the profitability of the Community industry. It adds that in 1989 the Court found that an investigation which had lasted four years did not constitute a breach of Article 7(9)(a) of Regulation No 2423/88 (Case C-121/86 *Epicheiriseon Metalleftikon Viomichanikon Kai Naftiliakon* v *Council* [1989] ECR I-3919, paragraphs 22 to 23).

Findings of the Court

119 Article 7(9)(a) of the basic regulation provides that the investigation should be concluded 'normally ... within one year of the initiation of the proceeding'. The Court has held that that is a guideline rather than a mandatory time-limit (*Continentale Produkten Gesellschaft*, cited above, paragraph 8, and *Epicheiriseon Metalleftikon Viomichanikon Kai Naftiliakon* v *Council*, cited above, paragraph 22). However, the investigation must not be extended beyond a reasonable period, to be determined in the light of the circumstances of the case (*Continentale Produkten Gesellschaft*, paragraph 8, and *Epicheiriseon Metalleftikon Viomichanikon Kai Naftiliakon* v *Council*, paragraph 22).

120 The review which led to the adoption of the contested regulation took 41 months, from May 1989 to 28 September 1992. It must therefore be determined whether in the circumstances of this case the procedure lasted longer than was reasonable, within the terms of the Court's case-law.

121 In paragraph 8 in the contested regulation the Council sought to justify the length of the investigation by, first, the complexity of the data which had to be gathered and examined and, secondly, the fact that the completion of the investigation required the examination of new issues which arose during the review and could not have been foreseen at its outset. During the written proceedings the Council explained the second point by referring to its 1990 re-examination of the profitability of Community production.

122 As regards the first part of the explanation the Court notes that the Community institutions commenced their investigations of the ball-bearings sector as early as 1976 (OJ 1976 C 268, p. 2). They were therefore familiar with the sector, a fact which ought to have facilitated the review. It may also be noted that Regulation No 1739/85, which was modified by the contested regulation, was itself the outcome of a review: on 21 December 1984 the Commission adopted Regulation (EEC) No 3669/84 imposing a provisional anti-dumping duty on imports of certain ball-bearings and tapered roller bearings originating in Japan (OJ 1984 L 340, p. 37), after having re-examined Commission Decision 81/406/EEC of 4 June 1981 accepting undertakings in connection with the anti-dumping proceedings concerning imports of ball and tapered roller bearings originating in Japan, Poland, Rumania and the Soviet Union and terminating that proceeding (OJ 1981 L 152, p. 44). The Council went on to impose definitive duties in Regulation No 1739/85 of 24 June 1985. The re-examination which led to the adoption of Regulation No 3669/84 of 21 December 1984, cited above, took ten months, despite the fact that it covered a wider range of products (ball-bearings and tapered roller bearings

originating in Japan), which is much less time than that taken for the review which led to the adoption of the contested regulation and which covered solely ball-bearings from Japan with a greatest external diameter exceeding 30 mm.

123 In those circumstances the Council cannot rely on the complexity of the data to be gathered and examined in order to explain why the procedure in this case took more than three years. Moreover, the Court considers that the re-examination of the profitability of Community production is not sufficient in itself to justify such a long period.

124 The Council has therefore failed to demonstrate to the satisfaction of the Court that the review proceeding was concluded in this case within a reasonable period. Consequently, the plea of infringement of Article 7(9)(a) of the basic regulation is likewise well founded.

125 In the light of all those considerations Article 1 of the contested regulation must be annulled, in so far as it concerns the applicants. It is not necessary for the Court to rule on the other pleas relied on by the applicants, nor to order the measures of inquiry sought by Koyo Seiko in Case T-165/94.

Costs

126 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the defendant has failed in its submissions and the applicants applied for costs against it, it must be ordered to pay the costs.

127 The interveners in Case T-165/94 did not lodge a statement in intervention. The Court considers that having regard to the fact that they were unsuccessful in their submissions they should be ordered to pay their own costs. The intervener in Case T-163/94 took part in the written procedure and therefore occasioned costs for the applicant. However, the latter did not apply for costs relating to the intervention and the intervener was unsuccessful in its submissions; accordingly, it is appropriate to order that the applicant and the intervener should support their own costs relating to the intervention.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Annuls Article 1 of Council Regulation (EEC) No 2849/92 of 28 September 1992 modifying the definitive anti-dumping duty on imports of ball-bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85, in so far as it imposes an anti-dumping duty on the applicants;

2. Orders the Council to bear its own costs and those of the applicants, with the exception of the costs of the applicant in Case T-163/94 relating to the intervention, which are to be paid by the applicant. Each of the interveners shall pay its own costs.

Biancarelli Schintgen Briët

García Valdecasas Bellamy

Delivered in open court in Luxembourg on 2 May 1995.

H. Jung J. Biancarelli

Registrar President