JUDGMENT OF THE COURT
10 February 1998 *

In Case C-245/95 P,

Commission of the European Communities, represented by Eric White and Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 2 May 1995 in Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, seeking to have that judgment set aside,

the other parties to the proceedings being:

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

Koyo Seiko Co. Ltd, a company incorporated under Japanese law, whose registered office is in Osaka (Japan), 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,

* Language of the case: English.

applicants at first instance,

supported by

NSK Ltd, a company incorporated under Japanese law, whose registered office is in Tokyo (Japan), and eight of its European subsidiaries, **NSK Bearings Europe Ltd,** a company incorporated under English law, whose registered office is in London, **NSK-RHP France SA,** a company incorporated under French law, whose registered office is in Guyancourt (France), **NSK-RHP UK Ltd,** a company incorporated under English law, whose registered office is in Ruddington (United Kingdom), **NSK-RHP Deutschland GmbH,** a company incorporated under German law, whose registered office is in Ratingen (Germany), **NSK-RHP Italia SpA,** a company incorporated under Italian law, whose registered office is in Milan (Italy), **NSK-RHP Nederland BV,** a company incorporated under Netherlands law, whose registered office is in Amstelveen (The Netherlands), **NSK-RHP European Distribution Centre BV,** a company incorporated under Netherlands law, whose registered office is in Amstelveen (The Netherlands), and **NSK-RHP Iberica SA,** a company incorporated under Spanish law, whose registered office is in Barcelona (Spain), all represented by David Vaughan QC, instructed by Robin Griffith, Solicitor, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

interveners in the appeal,

Council of the European Union, represented by Antonio Tanca, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant at first instance,

and

Federation of European Bearing Manufacturers' Associations, whose registered office is in Frankfurt am Main (Germany)

intervener at first instance,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm (Rapporteur) and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 July 1995, the Commission of the European Communities lodged an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 2 May 1995 in Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381 ('the contested judgment') annulling 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 (OJ 1992 L 286, p. 2, corrigendum OJ 1993 L 72, p. 36), in so far as it imposed an anti-dumping duty on NTN Corporation ('NTN') and Koyo Seiko Co. Ltd ('Koyo Seiko').

2 Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation') lays down, in Article 2(1), the principle that an anti-dumping duty may be applied to any dumped product 'whose release for free circulation in the Community causes injury'.

3 Article 4 of that regulation sets out the factors relevant to the determination of the existence of material injury or threat of material injury to an established Community industry or retarding the establishment of such an industry.

4 Article 7(9)(a) of the basic regulation provides that conclusion of a Commission investigation 'should normally take place within one year of the initiation of the proceeding'. The investigation may be terminated for various reasons: under Article 9, protective measures may be unnecessary; pursuant to Article 10, undertakings may be accepted by the parties in question; or, under Article 12, definitive duties may be imposed.

5 Article 14 provides that regulations imposing anti-dumping duties are to be subject to review, in whole or in part, either at the request of a Member State, or on the initiative of the Commission, or 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. The investigation is then to be re-opened in accordance with Article 7, where the circumstances so require.

6 Article 15(3) of the basic regulation provides: 'Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury' the Commission is to carry out a review of the measure.

7 Council Regulation (EEC) No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan (OJ 1985 L 167, p. 3), which was amended by Regulation No 2849/92, introduced definitive anti-dumping duties of between 1.2% and 21.7% on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan. The products manufactured by NTN and Koyo Seiko were thus subjected to a definitive anti-dumping duty of 3.2% and 5.5% respectively.

8 On 27 December 1988, the Federation of European Bearing Manufacturers' Associations (hereinafter 'FEBMA') requested a review of the anti-dumping duties introduced by Regulation No 1739/85.

9 The Commission considered that the request contained sufficient evidence to justify a review and commenced an investigation in accordance with Article 14 of the basic regulation.

10 On 28 September 1992, the Council adopted Regulation No 2849/92, Article 1 of which provides *inter alia*:

'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%;

...'

11 In the contested judgment, the Court of First Instance granted the order sought by NTN and Koyo Seiko and annulled Article 1 of Regulation No 2849/92 in so far as it imposed an anti-dumping duty on them. The Court of First Instance considered that a number of the Council's findings were vitiated by errors of fact or law or, in the evaluation of the injury or threat of injury, were misleading because they were incomplete. The Court of First instance further considered that there had been an unreasonable delay in concluding the review proceedings.

12 A fuller account of the facts that gave rise to the dispute is to be found at paragraphs 1 to 25 of the contested judgment.

The appeal

13 The Commission asks the Court to set aside the judgment under appeal, refer the case back to the Court of First Instance and order NTN and Koyo Seiko to pay the costs. The Council has not lodged any formal pleading, but informed the Court that it supported the Commission's observations. FEBMA allowed the time-limit to expire and was unable to lodge a response (order of 14 February 1996, Case C-245/95 P *Commission* v *NTN Corporation* [1996] ECR I-553).

14 NTN and Koyo Seiko contend that the Court should dismiss the appeal and order the Commission to pay the costs. In the alternative, and in the event that the contested judgment should be set aside, Koyo Seiko contends that the Court should annul Regulation No 2849/92 in so far as it concerns Koyo Seiko.

15 By order of 14 February 1996 (Case C-245/95 P *Commission* v *NTN Corporation and Koyo Seiko* [1996] ECR I-559), the Court granted leave to NSK Ltd and eight of its European subsidiaries, NSK Bearings Europe Ltd, NSK-RHP France SA, NSK-RHP UK Ltd, NSK-RHP Deutschland GmbH, NSK-RHP Italia SpA, NSK-RHP Nederland BV, NSK-RHP European Distribution Centre BV and NSK-RHP Iberica SA (hereinafter referred to collectively as 'NSK'), to intervene in support of the forms of order sought by NTN and Koyo Seiko.

16 NSK contends that the Court should grant the forms of order sought by NTN and Koyo Seiko, confirm that the annulment of Article 1 of Regulation No 2849/92 applies equally to NSK and, lastly, order the Commission to pay the costs relating to NSK's intervention.

17 The Commission claims that NSK's costs should be reserved pending the final judgment of the Court of First Instance.

18 The Commission puts forward two pleas in law in support of its appeal. It maintains that the Court of First Instance committed an error of law, first, in its interpretation of the definition of injury under the basic regulation and, secondly, in its interpretation and application of Article 7(9)(a) of that regulation, in so far as it considered that the excessive duration of the investigation necessarily entailed the annulment of Regulation No 2849/92.

Admissibility

19 Koyo Seiko contends that the appeal is inadmissible on the ground that the Commission may not take advantage of the Court's decision on extension of time-limits on account of distance (Article 1 of Annex II to the Rules of Procedure of the Court of Justice), according to which 'In order to take account of distance, procedural time-limits for all parties save those habitually resident in the Grand Duchy of Luxembourg shall be extended as follows: — for the Kingdom of Belgium: two days...' It states that the appeal was lodged two months and two days after notification of the contested judgment, that is to say, after the expiry of the period of two months prescribed in the first paragraph of Article 49 of the EC Statute of the Court of Justice, unless that time-limit be extended on account of distance on the ground that the Commission has its seat in Brussels. Koyo Seiko considers, however, that extension of the time-limit on account of distance does not apply where proceedings have already taken place and the parties have appointed agents with an address for service in Luxembourg.

20 The Court notes that the decision on extension of time-limits on account of distance — Annex II to the Rules of Procedure of the Court of Justice — provides, in Article 1, that in order to take account of distance, procedural time-limits for all parties save those habitually resident in the Grand Duchy of Luxembourg are to be extended by a number of days that varies according to the distance from Luxembourg of the State in which the party concerned resides.

21 For that provision to apply, only the place of habitual residence of the party concerned is taken into consideration, not the address for service given by that party,

in accordance with Article 44(2) of the Rules of Procedure of the Court of First Instance or Article 38(2) of the Rules of Procedure of the Court of Justice.

22 Moreover, Article 112(1) of the Rules of Procedure of the Court of Justice refers expressly to Article 38(2) of those Rules, which indicates that appeal proceedings before the Court are distinct from previous proceedings before the Court of First Instance, so that the choice of an address for service for the purposes of those proceedings does not apply for the purposes of any appeal.

23 It follows that the Commission, whose seat is in Brussels, was entitled to a procedural extension on account of distance of two days. The appeal lodged on 12 July 1995 against the judgment of 2 May 1995, notified to the Commission on 10 May 1995, is therefore admissible.

24 With regard to the forms of order sought by NSK, under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. Consequently, the form of order sought by NSK, to the effect that the annulment of Article 1 of Regulation No 2849/92 should apply equally to it, is inadmissible.

Injury

25 The Commission contends that, in the context of review procedure, application of the criteria in Article 4 of the basic regulation for the purpose of assessing the existence or threat of injury constitutes an error of law.

26 That plea in law concerns paragraphs 58 to 60 of the contested judgment, which read as follows:

'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.'

27 According to the Commission, the Court of First Instance interpreted the basic regulation erroneously and did not apply the proper test as regards injury. Use of the wrong test influenced the findings of fact and law and the conclusion reached in paragraph 115 of the contested judgment.

28 The Commission maintains that, since review is carried out in order to establish whether the measures in force are still necessary and adequate to eliminate the injury caused by dumping, account must be taken of the fact that anti-dumping measures are in force. The correct test to be applied is therefore not whether there is still injury or threat of injury, but whether dumping and injury would continue or recur if the measures were discontinued.

29 The Commission points out that Article 14(3) of the basic regulation provides for the amendment of existing anti-dumping measures '[w]here warranted by the review'. That very general wording shows that the initial investigation requires a finding of injury but the amendment of an anti-dumping measure does not. That provision also indicates that anti-dumping duties may be adjusted even if no additional injury is found, as happened in the present case.

30 Further, according to the Commission, by not applying the proper test with regard to injury, the Court of First Instance wrongly concluded, at paragraph 99 of the contested judgment, that the Council had erred in law in taking into consideration the recession in the industry concerned.

31 NTN, Koyo Seiko and NSK consider, however, that the Court of First Instance properly applied the appropriate test, namely the existence of injury or threat of injury, within the meaning of Article 4 of the basic regulation. They maintain in particular that the Commission invented the 'standard of the risk of recurrence of injury', which is not mentioned in the applicable rules and which, moreover, is not relevant. In any case, at paragraphs 111 to 115 of the contested judgment, the Court of First Instance expressly dealt with the question of recurrence of injury in

the context of a broad interpretation of the definition of threat of injury, and concluded by rejecting that argument, principally on the ground that errors of fact had been committed by the Council.

32 On that point, it should be noted that regulations introducing anti-dumping duties may, under Articles 14 and 15 of the basic regulation, be subject to review.

33 Article 14 of the basic regulation states that a review, carried out with or without re-opening of the investigation, is to be held where an interested party submits evidence of changed circumstances sufficient to justify the need for such review. According to Article 14(3), review may result in the amendment, repeal, or annulment of the duties introduced.

34 It follows that the absence of a reference to injury in Article 14 of the basic regulation can be explained by the fact that the decisive criterion for holding a review is not, under that provision, necessarily the existence of injury or threat of injury, but more generally a change of circumstances, including a return to sound commercial practices.

35 Under Article 15 of the basic regulation, where an interested party produces evidence that the expiry of the anti-dumping duties would lead once more to injury or threat of injury, the Commission is to carry out a review of the measure.

36 No specific provision governs the investigation carried out in the course of a review opened under Articles 14 and 15 of the basic regulation. As the Court of First Instance stated at paragraph 59 of the contested judgment, neither are there any specific provisions regarding the determination of injury.

37 Article 14 of the basic regulation expressly refers, however, to Article 7 thereof in connection with investigations. It follows that Article 7 applies equally to the initial investigation and to the re-opening of an investigation.

38 Under Article 7(1)(c) of the basic regulation, the investigation is to cover both dumping and injury resulting therefrom. The existence of sufficient evidence of dumping and the injury resulting therefrom is always a prerequisite for the opening of an investigation, within the meaning of Article 7, whether at the initiation of an anti-dumping proceeding or in the course of a review of a regulation imposing anti-dumping duties (see Case C-216/91 *Rima Eletrometalurgia* v *Council*, cited above, paragraph 16).

39 Article 4(2) of the basic regulation sets out the criteria to be taken into consideration in the assessment of the existence of injury during an investigation. Article 4(1) of that regulation states that injuries caused by certain other factors must not be attributed to the dumped imports.

40 In that connection, it should be noted that in the contested judgment the Court of First Instance merely applied, without indeed citing it, the Court's case-law where the Court, in similar circumstances, examined the conditions under which the Council, in the course of a review, had substituted price undertakings for anti-dumping duties in order to verify whether that substitution was based on a correct determination of injury in accordance with the criteria set out in Article 4(2) of the basic regulation then applicable (see Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 50, and Case C-323/88 *Sermes* [1990] ECR I-3027, paragraph 27).

41 Even if no criterion relating to the risk of recurrence of injury appears in the basic regulation, it is nevertheless true that in the course of a review consideration must be given to whether the expiry of an anti-dumping measure previously imposed

could once more lead to injury or to a threat of injury. However, such consideration must comply with the provisions of Article 4 of the basic regulation.

42 Consequently, in applying the criteria set out in Article 4 of the basic regulation for the purposes of examining whether the expiry of the anti-dumping duties introduced by Regulation No 1739/85 could once more lead to injury or to a threat of injury, the Court of First Instance did not commit an error of law.

43 It follows that the Court of First Instance was also correct in holding, at paragraphs 98 and 99 of the contested judgment, that the Council had committed an error of law in taking account of the recession in the industry when Article 4(1) of the basic regulation does not allow this. That provision states: '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 subsidised imports'.

44 The first plea in law must therefore be rejected as unfounded.

45 Since the Council's failure, as found by the Court of First Instance, to establish that there was injury or threat of injury within the meaning of Article 4 of the basic regulation suffices to warrant the annulment of Article 1 of Regulation No 2849/92, it is not necessary to examine the second plea in law alleging a breach of Article 7(9)(a) of the basic regulation.

Costs

46 Under Article 69(2) of the Rules of Procedure, which applies to the procedure on appeal pursuant to Article 118, 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 appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs of this appeal.**

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Mancini

Moitinho de Almeida Kapteyn Murray

Edward Puissochet

Hirsch Jann Sevón

Delivered in open court in Luxembourg on 10 February 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President