# OPINION OF ADVOCATE GENERAL LÉGER

delivered on 16 September 1997 *

1. By this appeal the Commission is asking the Court of Justice to review 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*, [1] which annulled Article 1 of Council Regulation (EEC) No 2849/92 (also referred to hereinafter as 'the regulation at issue'). [2]

2. The contested judgment was the first given by the Court of First Instance in an anti-dumping case since it was given jurisdiction to hear such cases [3] and it is the first time that the Court of Justice has been requested to give judgment in that connection pursuant to Article 168a of the EC Treaty.

3. In essence, the Court of Justice is asked to clarify whether the concept of 'injury' or 'threat of injury' to an established Community industry by the release into free circulation of a dumped product is the same, and must therefore be assessed in the same way, in a review [4] and in the original investigation. [5] More specifically, the question is whether, in both those cases, the existence of injury must be established in accordance with the criteria laid down by Article 4(1) of Regulation No 2423/88 ('the basic regulation').

4. In the alternative, the Court is asked whether the fact that an investigation was carried out after the period prescribed by Article 7(9)(a) of the basic regulation *necessarily* means that the regulation at issue must be annulled.

5. I shall first summarize the legal, factual and procedural background to the dispute (I), before considering the admissibility of the appeal (II). I shall then examine the appellant's first plea and set out the reasons

* Original language: French.

1 — [1995] ECR II-1381 (hereinafter 'the contested judgment').

2 — Regulation 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); and the corrigendum thereto (OJ 1993 L 72, p. 36).

3 — Council Decision 94/149/ECSC/EC of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1994 L 66, p. 29).

4 — Procedure provided for by Articles 14 and 15 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), as amended by Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), which has since entered into force.

5 — Article 7 of Regulation No 2423/88.

for which I consider it unnecessary to examine the second plea, before suggesting that the appeal should be dismissed (III). I shall concluded by considering the question of costs (IV).

## I — Legal, factual and procedural background to the case

*Legal background*

6. Before considering the relevant provisions of the Community anti-dumping regulations, it seems worthwhile calling to mind their legal basis and their general structure.

*Basis of the Community's common commercial policy*

7. Regulation No 2423/88 was adopted on the basis [6] of Article 113 of the Treaty — which was incorporated into Title VII on the common commercial policy — and pursuant to the international agreements to which the Community is a party, in particular the General Agreement on Tariffs and Trade ('GATT') and the Agreement on Implementation of Article VI of GATT [7] ('the Anti-Dumping Code').

8. Article 113(1) of the Treaty provides that '[t]he common commercial policy shall be based on uniform principles, particularly in regard to ... measures to protect trade such as those to be taken in the event of dumping or subsidies'.

9. However, the first paragraph of Article 110 of the Treaty places limits on the Community institutions' discretion in framing the common commercial policy and, in particular, in implementing instruments to protect trade, by providing that '[b]y establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the

6 — Second recital in the preamble to that regulation.

7 — Council Decision 80/271/EC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, pp. 1 and 90) is in point in this case. That decision has been replaced by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). A new Agreement on the implementation of Article VI of the 1994 General Agreement on Tariffs and Trade has also been concluded (OJ 1994 L 336, p. 103).

lowering of customs barriers'. It follows from that provision that recourse to trade protection measures must not *unjustifiably* impede international trade.

10. Likewise, the Court of Justice has consistently held that even though in the context of the common commercial policy and more particularly in regard to trade protection measures, the Community legislature has, on account of the complexity of the economic situations which must be examined by the institutions, [8] *a wide discretion* [9] in regard, in particular, to the assessment of the dumping margin [10] and injury or the threat of injury [11] and the determination of the period to be taken into consideration for the purpose of determining injury in the course of an anti-dumping proceeding, [12] there are limits to that discretion.

11. Accordingly, the judgments given before jurisdiction was assigned to the Court of First Instance show that, in the course of its review of the exercise of that discretion, the Court of Justice was at pains to ascertain that the procedural guarantees afforded by the Community provisions in question were observed; [13] that objectively correct facts were taken into account; [14] that no manifest error was made in appraising those facts; [15] that there had been no failure to take an essential matter into consideration; [16] and, finally, that the Community institutions had not included in their reasoning any considerations amounting to an abuse of power or an infringement of essential procedural requirements. [17]

12. Lastly, Community anti-dumping legislation must also comply with the obligations assumed by the Community in the context of GATT and the Anti-Dumping Code. Because it was contractually bound by those agreements, the Community could not adopt anti-dumping rules and take measures in that area conflicting with those agreements without incurring liability under international law.

13. As the Court of First Instance has pointed out, [18] the Court of Justice concluded from this, in particular in *Nakajima* v *Council*, [19] that the Community legislation must be interpreted in the light of Article VI of GATT and the Anti-dumping Code.

8 — See, in particular, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 86 and 87.

9 — See, in particular, Case C-121/86 *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Council* [1989] ECR 3919, paragraph 8.

10 — See, in particular, Case 240/84 *Toyo and Others* v *Council* [1987] ECR 1809, paragraphs 13 and 14.

11 — See, in particular, Joined Cases C-320/86 and C-188/87 *Stanko France* v *Commission and Council* [1990] ECR I-3013.

12 — See, in particular, *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Council*, cited above, paragraph 20.

13 — Ibid., paragraph 8.

14 — See, in particular, Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 26.

15 — See, in particular, Case 240/84 *Toyo and Others* v *Council*, cited above, paragraphs 21 to 24.

16 — See, in particular, Case 187/85 *Fediol* v *Commission* [1988] ECR 4155, paragraph 6.

17 — See, in particular, Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraphs 30 and 31.

18 — Paragraph 65 of the contested judgment.

19 — Paragraphs 30, 31 and 32.

14. Under Article VI of GATT, dumping is to be condemned if it causes or threatens to cause injury to an industry in the importing country.

15. The Anti-Dumping Code contains useful particulars on the implementation of anti-dumping measures.

16. Article 2(1) provides that '[f]or the purpose of this Code a product is to be considered as being dumped, i. e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.

17. Article 2(2) states that 'the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i. e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'.

18. Article 3 refers to the criteria to be taken into account when determining what constitutes 'injury'. I shall deal with this point later.

19. 'Industry', the conduct of a proceeding and its conclusion are also dealt with by the Anti-Dumping Code.

*The relevant Community regulations*

(a) Regulation No 2423/88, the basic regulation

20. The basic regulation aims [20] to incorporate at Community level the new policies determined within GATT and to take account of the experience gained by the Community institutions in applying the previous Community anti-dumping rules. [21]

20 — Second and third recitals.

21 — Namely, Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1).

21. The objectives of the basic regulation are, first, to present certain concepts in a clear and detailed fashion [22] and, second, to set out certain aspects of the procedure leading to the imposition of anti-dumping duties. [23]

22. Article 2(1) lays down the principle that an anti-dumping duty may be applied to any dumped product 'whose release for free circulation in the Community causes injury'.

23. Article 4(1) lists the various relevant factors for determining the existence of injury or a threat of injury to an established Community industry or a material retardation in the establishment of such an industry.

24. Article 5 provides that any natural or legal person, or any association, acting on behalf of a Community industry which considers itself injured or threatened by dumped imports may lodge a written complaint with the Commission or a Member State. In the latter case, the complaint is to be forwarded to the Commission. The complaint must contain sufficient evidence of the existence of dumping and the injury resulting therefrom.

25. According to Article 6(4), consultations may take place within an Advisory Committee consisting of representatives of each Member State and a representative of the Commission. The consultations may cover the existence of dumping, injury and the causal link between dumping and injury, together with the measures to be taken.

26. Article 7 deals with the investigation carried out by the Commission, that is to say, its formal aspects and subject-matter. An investigation should *normally* be completed within one year of the initiation of the proceeding. Under Article 8 information submitted by the parties to the Commission during the investigation may be treated as confidential.

27. At the end of a preliminary examination, provisional duties may be imposed by the Commission, for a maximum period of four months (Article 11).

28. The investigation may be terminated where protective measures are unnecessary

22 — Fourth to ninth recitals.

23 — Tenth recital et seq.

(Article 9), undertakings are accepted (Article 10) or definitive anti-dumping duties are imposed (Article 12).

29. Under Article 14(1), a review of anti-dumping duties is to be held at the request of an interested party where there is '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'. Article 14(2) provides that, 'where, after consultation, it becomes apparent that review is warranted, the investigation shall be reopened in accordance with Article 7, where the circumstances so require'.

30. Article 15(1) provides that the anti-dumping duties and undertakings are to lapse after five years from the date on which they entered into force. However, Article 15(3) provides that: 'Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury, the Commission shall, after consultation, publish in the *Official Journal of the European Communities* a notice of its intention to carry out a review of the measure'.

(b) Regulation No 2849/82, the regulation at issue

31. The purpose of the regulation at issue, which entered into force on 2 October 1992, is to review, pursuant to Articles 14 and 15 of the basic regulation, the definitive anti-dumping duties imposed by Council Regulation (EEC) No 1739/85 [24] on the relevant type of ball-bearings originating in Japan. Regulation No 1739/85 had imposed 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. The products manufactured by NTN and Koyo Seiko had been subjected to a definitive anti-dumping duty of 3.2% and 5.5% respectively.

32. Having found that the Community industry was in a weak position despite the duties imposed by Regulation No 1739/85, [25] the Council concluded that upon the expiry of the existing anti-dumping measures there was a danger of recurrence of the injury suffered by that industry, [26] and adopted new measures.

24 — Regulation No 1739/85 of 24 June 1985 imposing a definitive anti-dumping duty on imports of certain ball-bearings and tapered roller bearers originating in Japan (OJ 1985 L 167, p. 3).

25 — Points 26 to 32 of the preamble to the regulation at issue.

26 — Ibid., point 39.

33. Article 1 of the regulation at issue provides in particular 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%.'

*Factual and procedural background*

34. On 27 December 1988 the Federation of European Bearing Manufacturers' Associations ('FEBMA') requested a review, on the basis of Article 14(1) of the basic regulation, of the anti-dumping measures taken against imports of ball-bearings originating in Japan, on the ground that there had been a change of circumstances since the imposition of definitive duties by Regulation No 1739/85.

35. Taking the view that this request contained sufficient evidence to justify the initiation of a review, the Commission ordered an investigation on 30 May 1989. Since definitive duties lapse after a period of five years, the Commission published a notice on 30 May 1990 [27] stating that, in accordance with Article 15(4) of the basic regulation, the existing measures would remain in force pending the outcome of the review.

36. On 28 September 1992, after an investigation lasting 41 months — *May 1989 to September 1992* — the Council adopted the regulation at issue, which increased the anti-dumping duty applicable to NTN to 11.6%.

27 — Notice 90/C 132/06 concerning the continuation of anti-dumping measures in force on imports of ball-bearings with a greatest external diameter exceeding 30 mm, originating in Japan (OJ 1990 C 132, p. 5).

37. NTN and Koyo Seiko then brought actions before the Court of First Instance, on 20 December 1992 and 30 January 1993 respectively, for annulment of Article 1 of the regulation at issue.

38. FEBMA was granted leave to intervene in support of the Council in Case T-163/94 *NTN* v *Council*. The Commission and FEBMA were granted leave to intervene in support of the Council in Case T-165/94 *Koyo Seiko* v *Council*.

39. NTN and Koyo Seiko claimed that the Court of First Instance should annul Article 1 of Regulation No 2849/92 in so far as it imposed an anti-dumping duty on them, and should order the Council to pay the costs. The Council, supported by FEBMA and the Commission, contended that the Court should dismiss the applications and order the applicants to pay the costs.

40. In support of their actions, NTN and Koyo Seiko relied on various pleas in law: the Council's failure to establish the existence of injury to the Community industry; its failure correctly to determine the possible effects of the expiry of the existing measures; and also abuse of powers. They are therefore claiming that, if the review investigation had been carried out within a reasonable period, the Community institutions could not have established the existence of any injury. Finally, the regulation at issue had imposed a flexible anti-dumping duty contrary to the basic regulation. [28]

*The judgment of the Court of First Instance*

41. Dealing with the various pleas under two heads, the Court of First Instance gave a detailed judgment which annulled Article 1 of the regulation at issue in so far as it imposed an anti-dumping duty on the applicants. Endorsing the applicants' arguments, it held that the Council had not established injury within the meaning of Article 4(1) of the basic regulation and had not complied with the time-limit prescribed by Article 7(9)(a) of that regulation.

*The appeal*

42. The Commission claims that the Court of Justice should set aside the contested judgment, refer the case back to the Court of First Instance and order NTN and Koyo Seiko to pay the costs.

28 — Paragraphs 26 and 27 of the contested judgment.

43. NTN and Koyo Seiko ('the respondents') claim that the Court of Justice should uphold the contested judgment, dismiss the appeal and order the Commission to pay the costs. In the alternative, in the event that the contested judgment is set aside, Koyo Seiko asks the Court to annul the contested regulation so far as it is concerned.

44. NSK Ltd and its European subsidiary companies (hereinafter 'NSK'), which have been given leave to intervene in the appeal in support of the respondents, claim that the Court should grant the forms of order sought by NTN and Koyo Seiko and rule that the annulment of Article 1 of the regulation at issue also applies to NSK.

45. As regards that claim, since NSK did not bring an action within the period prescribed by the third paragraph of Article 173 of the Treaty for annulment of the individual decision addressed to them, which was part of the regulation at issue, that decision remains valid and binding as far as they are concerned. [29] The effects of that decision have become final and cannot therefore be challenged in this appeal.

46. Furthermore, the fourth paragraph of Article 37 of the EC Statute of the Court of Justice provides that: 'submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties'.

47. On the basis of that provision the Court held, by order of 14 February 1996, that 'since [NSK] did not bring an action for annulment, its rights as intervener must be confined to supporting the forms of order sought by the respondents'. [30]

48. The Council has not lodged any written observations. Nevertheless, it has intimated that it supports all the submissions and pleas of the Commission.

49. On 10 October 1995, FEBMA lodged its application to intervene with the Registry of the Court of Justice. Since it was a party to the proceedings before the Court of First Instance, it could intervene only under Article 115(1) of the Rules of Procedure of the Court of Justice, which provides as follows: 'Any party to the proceedings before the Court of First Instance may lodge a response within two months after service on him of notice of the appeal. The time-limit for lodging a response shall not be extended.' Notice was served on 24 July 1995. The

29 — See, for instance, Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 13.

30 — Case C-245/95 P *Commission* v *NTN Corporation*, Intervention II, [1996] ECR I-559, paragraph 9.

period allowed to FEBMA for submitting its response, as extended by time on account of distance under Article 81(2) of those rules, expired on 2 October 1995.

50. The Court therefore held, by order of 14 February 1996, that FEBMA was time-barred from intervening in the appeal. [31]

## II — Admissibility of the appeal

51. In its response [32] Koyo Seiko claims that the Commission's appeal is inadmissible.

52. It claims that the Commission did not bring its appeal 'within two months of the notification of the decision appealed against', as required by Article 49 of the Statute of the Court of Justice.

53. Furthermore, Article 1 of Annex II to the Rules of Procedure of the Court of Justice — which provides that '[i]n 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 ...' — cannot be relied on by parties, such as the Commission, which have already appointed an agent with an address for service in Luxembourg.

54. Koyo Seiko concludes that, by bringing this appeal two months and two days after the judgment was notified, the Commission is time-barred.

55. To my mind, the Court has settled this question in its judgment in *Commission* v *BASF and Others*, [33] a case which raised the same issue, by holding that 'in lodging its appeal the Commission was entitled to two additional days, as provided for by the Decision on extensions of time-limits on account of distance [Article 1 of Annex II to the Rules of Procedure of the Court of Justice] for persons having their habitual residence in Belgium'. [34]

56. In this case, the judgment was notified to the Commission on 10 May 1995. By lodging its appeal on 12 July 1995, namely two

31 — Case C-245/95 P *Commission* v *NTN Corporation*, Intervention I, [1996] ECR I-553.

32 — Paragraphs 3 to 6.

33 — Case C-137/92 P *Commission* v *BASF* [1994] ECR I-2555.

34 — *Commission* v *BASF*, paragraph 42.

months and two days later, it complied with the rules.

57. The objection of inadmissibility raised by Koyo Seiko must therefore be rejected.

## III — Examination of the appellant's pleas

*The first plea: misinterpretation of the concept of 'injury' in Articles 14 and 15 of the basic regulation*

58. By its first plea, which has two limbs, the Commission claims that the Court of First Instance misinterpreted the concept of 'injury' in Articles 14 and 15 of the basic regulation. First, it is necessary to establish whether the Court of First Instance correctly interpreted the concept of 'injury' in the context of a review. Second, it should be examined whether, in that context, injury caused by a contraction in demand on the market must be taken into account.

First limb: the concept of 'injury' in the context of a review

59. The Commission [35] claims that, by applying the criteria set out in Article 4 of the basic regulation in order to assess the existence of injury in the context of a review — a procedure provided for in Articles 14 and 15 of that regulation — the Court of First Instance [36] committed an error of law.

60. The Court of First Instance found as follows: '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'. [37] It concluded that, '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'. [38]

35 — Paragraphs 12 to 31 of the appeal.
36 — Paragraphs 30 to 116 of the contested judgment.
37 — Ibid., paragraph 58.
38 — Ibid., paragraph 59.

61. The Commission claims that Article 4 of the basic regulation applies only in the context of the original investigation.

62. It claims that a teleological interpretation of that regulation would produce a result diametrically opposed to that reached by the Court of First Instance. It states that the effectiveness of the provisions of the basic regulation providing for the organization of separate procedures for the original investigation and for a review would be frustrated if no legal implication was inferred from the existence of distinct procedures.

63. It submits that: '[t]he test to be applied in a review is therefore not whether there is still injury, but whether there would be injury if the duty were to be abolished and whether the existing measure is effective in preventing the dumping or removing the injury'. [39] It further submits that it follows from Articles 13 and 14 of the basic regulation that the object of a review investigation must be 'to establish whether the measures are still necessary and appropriate to remove the injury caused by the dumping'. [40] It concludes that 'it is necessary to assess what the situation would be in the absence of measures and in particular whether a situation would *recur* in which the dumping causes injury'. [41]

64. The respondents contend that the Court of First Instance applied the appropriate test — *namely the existence of injury or of a threat of injury within the meaning of Article 4 of the basic regulation.*

65. They claim that the concept of 'recurrence of injury' is irrelevant inasmuch as it was 'invented' for the purposes of the action: the Community legislation makes no reference to it. That concept is therefore not the product of an interpretation of that legislation but of 'rewriting' it. [42] Besides, the question of recurrence of the injury was indeed dealt with by the Court of First Instance in the course of interpreting the concept of 'threat of injury'.

66. Lastly, they contend that the Court of First Instance rejected the first plea on account of the numerous factual errors committed by the Council. Since the question of those findings cannot be reopened by the Court of Justice, on the ground that it is not a question of law, the plea must be rejected.

67. Taking the last argument first, I would note that the grounds put forward by the Court of First Instance based on the view that the Council adopted measures on the basis of incorrect or misleading findings may not be reviewed by the Court of Justice.

39 — Paragraph 23 of the appeal.

40 — Ibid., paragraph 24.

41 — Ibid., paragraph 25; my emphasis.

42 — Paragraph 15 of the response of NTN and Koyo Seiko Co Ltd.

That appraisal falls within the exclusive competence of the Court of First Instance.

68. Article 168a of the Treaty provides that an appeal is limited to points of law. That restriction is called to mind in the first paragraph of Article 51 of the Statute of the Court of Justice, which specifies the grounds on which an appeal may be based, namely 'lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant ... [and] the infringement of Community law by the Court of First Instance'. The Court has concluded from this that 'the appeal may rely only on grounds relating to the infringement of rules of law by the Court of First Instance, to the exclusion of any appraisal of the facts ...'. [43]

69. I have three main reasons for considering, contrary to the view taken by the Commission, that the Court of First Instance correctly interpreted the concept of 'injury' in Articles 14 and 15 of the basic regulation.

70. *First*, it appears from the general scheme of that regulation that, when the legislature intends *to adopt a rule or define a rule* or *draw a distinction*, it must do so *expressly and clearly*. As has been seen [44] that is, moreover, one of the objectives of that legislation.

71. As regards the procedural rules, the legislature states, in the fourth, eighth and tenth recitals respectively [45] that it is desirable (a) 'that *the rules* for determining normal value should be *presented clearly* and in sufficient *detail* ...'; (b) '*to lay down, in adequate detail* the manner in which the amount of any subsidy is to be determined'; and (c) '*to lay down the procedures* for anyone acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports to lodge a complaint ...'.

72. As regards the definition of specific concepts, the seventh, ninth and fourteenth recitals, respectively, [46] provide as follows: 'the term "dumping margin" should be *clearly defined* ...'; 'it seems appropriate *to set out certain factors which may be relevant for the determination of injury*' and '*to avoid confusion, the use of the terms "investigation" and "proceeding"* in this regulation should be *clarified*'.

43 — See, for instance, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12.

44 — Point 21, supra.

45 — My emphasis.

46 — Ibid.

73. The Community legislature also clearly indicates when it intends that a distinction should be made between rules of procedure or between concepts. Thus, the very wording of the 14th recital establishes '*a distinction*' between the concepts of 'investigation' and 'proceeding', since it states that it is also an aim of the basic regulation to avoid 'confusion' arising between those terms. Then again, the 27th recital provides, in the procedural sphere, that *specific periods* must elapse before a review may be conducted.

74. This finding is borne out by the body of the basic regulation itself.

75. Thus, where specific procedural rules are applicable to the original proceeding or to a review, articles in the basic regulation set them out clearly and precisely.

76. This is so in the case of the rule relating to *locus standi*. In the case of the original proceeding, Article 5(1) of the basic regulation provides that: '[a]ny natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint'. In contrast, in the case of a review, the second subparagraph of Article 14(1) grants *locus standi* to the Member States, the Commission or an interested party.

77. Likewise, the heading and the wording of Article 14 of the basic regulation, which lays down the procedural rules to be followed, expressly indicate that the procedure to which that provision relates applies only to a review.

78. Neither the regulation at issue nor the basic regulation define the concept of 'recurrence' of the injury as one specifically applicable in the context of a review investigation.

79. Moreover, as far as the provisions governing investigations are concerned, it is a fact not only that the actual terms 'original investigation' and 'review investigation' do not appear in the preamble to the basic regulation and appear only very exceptionally in the body of its provisions, [47] but also that the legislature does not give any indication that it intends to lay down separate, specific rules in regard to those different situations.

47 — Only Article 16 refers to the concept of 'original investigation' whereas 'review investigation' is never used. On the other hand, the term 'investigation' appears in Articles 7, 10, 12, 13 and 14.

80. Thus, the heading to Article 7 of the basic regulation is 'Initiation and subsequent investigation', without otherwise specifying the nature of the investigation in question, and the very wording of that provision uses only the term 'investigation' without ever indicating whether the original investigation or a review investigation is meant.

81. Likewise, Article 14(2) of the basic regulation, which is wholly concerned with the review procedure, refers, for the rules governing the investigation, to Article 7, which applies to the original proceeding. As a result of that express reference, the Community legislature makes it clear that the same rules are to be followed in regard to the 'original' and 'review' investigations.

82. Not only is the concept of 'recurrence of injury' never explained, it is not even used in the basic regulation.

83. Only the term 'injury' [48] is used in the preamble to that regulation and only the terms 'injury' [49] and 'threat of injury' [50] are specified in its provisions.

84. Article 14 of the regulation, which lays down the procedural rules to be followed in the event of a review, does not refer to 'injury' or 'threat of injury', let alone to 'recurrence of injury'. It merely indicates that a review is to take place if a Member State, the Commission or an interested party 'submits *evidence of changed circumstances* sufficient to justify the need for such review'. [51]

85. The Commission argues from the fact that Article 14 does not refer to the existence of injury that the existence of injury within the meaning of Article 4 of the basic regulation does not have to be proved in the context of a review as provided for in Articles 14 and 15 of that regulation. It adds that, by taking the opposite view, the Court of First Instance adopted an inappropriate approach. [52] The Commission submits that to require the Community institutions, in a review, to prove the existence of injury, *without taking into account the anti-dumping measures applied*, would be tantamount to abolishing the anti-dumping measure as from its entry into force, since the aim of such measures is precisely to prevent injury. [53]

86. In my view it is wholly logical that Article 14 should make no reference to the concept of injury. Contrary to what the Commission appears to be implicitly arguing, the review procedure not only allows

48 — See the 9th, 11th and 19th recitals.
49 — Articles 4, 5, 6, 7, 10, 11, 12, 13 and 15.
50 — Articles 4, 10, 12 and 15.
51 — Article 14(1), second subparagraph; my emphasis.
52 — Paragraph 29 of the appeal.
53 — Ibid.

the Community institutions to adopt new anti-dumping measures but also, as Article 14(3) of the basic regulation indicates, to repeal or annul the anti-dumping measures originally adopted. That is the reason why the second subparagraph of Article 14(1), unlike Article 5, [54] entitles a request for a review to be more widely made, that is to say by any interested party who submits evidence of changed circumstances.

87. That change in circumstances may be a resumption of sound commercial practices — which might justify the repeal or annulment of the anti-dumping measures initially adopted [55] — but also the continuation, or even the aggravation, of dumping in a given sector and of the resultant injury — which would result in the imposition of new anti-dumping measures. [56]

88. Accordingly, as regards the second of those hypotheses, Article 15(3) of the basic regulation provides that: '[w]here an interested party shows that the expiry of a measure would lead *again to injury or threat of injury*, the Commission shall ... carry out a review of the measure'. [57]

89. *Second*, the GATT agreements and the Anti-Dumping Code, in the light of which the basic regulation must be interpreted, [58] confirm the interpretation reached by the Court of First Instance.

90. Although Article 5 of the Anti-Dumping Code is headed 'Initiation and subsequent investigation', the rules governing the original and the subsequent investigations are identical.

91. Article 5(1), (2) and (3) of the Anti-Dumping Code provide as follows:

'1. An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of:

(a) dumping;

54 — See point 76, infra.

55 — Article 14(3) of the basic regulation.

56 — Ibid., Article 15(3).

57 — My emphasis.

58 — See points 12 and 13, infra.

(b) *injury within the meaning of Article VI of the General Agreement as interpreted by this Code*; and

(c) a causal link between the dumped imports and the alleged injury.

If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

2. *Upon initiation of an investigation and thereafter*, the evidence of both dumping and injury caused thereby should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously:

(a) in the decision whether or not to initiate an investigation, and

(b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Code provisional measures may be applied, except in the cases provided for in paragraph 3 of Article 10 in which the authorities accept the request of the exporters.

3. An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.' [59]

92. By the same token, examination of Article 3 of the Anti-Dumping Code concerning injury shows that injury or threat of injury must be determined in accordance with the same criteria, irrespective of the purpose of the investigation — *namely the 'initiation of a proceeding' or a 'subsequent investigation'*.

93. *Third*, in *Rima Eletrometalurgia* v *Council* this Court held that 'the existence of sufficient evidence of dumping and the injury resulting therefrom is always a prerequisite for the opening of an investigation,

59 — My emphasis.

whether at the initiation of an anti-dumping proceeding or in the course of a review of a regulation imposing anti-dumping duties'. [60]

94. I do not consider that the Court intended to confine the effects of the judgment in *Rima Eletrometalurgia* v *Council* and, in particular, the scope of paragraph 16 thereof, to the particular facts of that case, but that it wished its interpretation to be of general scope.

95. In my view, paragraph 16 of that judgment must be appraised in the light of the judgments in *Neotype Techmashexport* v *Commission and Council* [61] and *Sermes* v *Directeur des Services des Douanes de Strasbourg*. [62] An examination of those judgments suffices to show that the specific circumstances of the *Rima Electrometalurgica* case in no way influenced the scope which the Court intended to give to the approach which it adopted.

96. In the *Neotype Techmashexport* case, which was concerned with adoption of a definitive duty following a review, [63] the Court applied Article 4(2) of Regulation No 2176/84, [64] which concerns the criteria to be taken into account in appraising the existence of injury in the original investigation, and held, in a paragraph of general scope, that: 'As regards the reduction in market share for imported electric motors, relied on by Neotype, it should be pointed out that, in accordance with Article 4(2) of Regulation No 2176/84, the examination of injury must take account of a whole series of factors and no single factor can in itself be decisive'. [65] As a result, the Court held that the concept of injury must be assessed in accordance with the same criteria in the original investigation and in an investigation initiated following a request for a review.

97. I would point out that Article 4(2) of Regulation No 2423/88 reproduces verbatim the wording of Article 4(2) of Regulation No 2176/84.

98. In the *Sermes* case, following a review under Article 14 of Regulation No 2176/84, the Council adopted a regulation imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but

60 — Case C-216/91 *Rima Eletrometalurgia* v *Council* [1993] ECR I-6303, paragraph 16.

61 — Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945.

62 — Case C-323/88 *Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027.

63 — See *Neotype Techmashexport* v *Commission and Council*, paragraphs 6 to 9.

64 — That regulation, which was in force at the material time, has been repealed and replaced by Regulation No 2423/88 (see point 20, infra).

65 — *Neotype Techmashexport* v *Commission and Council*, paragraph 50.

not more than 75 kW, originating in various countries of Eastern Europe and the Soviet Union. The Sermes company, from which anti-dumping duties had been claimed under that regulation in respect of the import of electric motors, maintained that the Community institutions had not established that Community producers had suffered injury within the meaning of Article 4(2)(b) of Regulation No 2176/84 [66] as a result of the imports in issue. Giving judgment in the context of a review, the Court of Justice held that 'in accordance with Article 4(2) of the basic regulation, an examination of the injury suffered by the Community must involve a series of factors no one of which can give decisive guidance'. [67]

99. It follows from the above observations that, in the context of a review, when assessing whether the expiry of an anti-dumping measure previously adopted would again lead to injury or a threat of injury, the criteria laid down by Article 4 of the basic regulation must be applied. Consequently, the first limb of the first plea, alleging an error of law by the Court of First Instance in applying the concept of 'injury' cannot be accepted.

66 — *Sermes*, paragraph 26.
67 — Ibid., paragraph 27.

Second limb: the possibility of taking into consideration, in the context of a review, the existence of a period of recession in order to establish the threat of injury

100. The Commission [68] claims that the Court of First Instance committed an error of law in holding that, in a review, the Council could not rely on the existence of a period of recession in the Community ball-bearing industry in order to establish the threat of injury. [69]

101. In view of my reasoning so far and the conclusions which I have reached, [70] I submit that, as the Court of First Instance correctly observed, [71] that factor could not be validly taken into account by the Council without infringing the last sentence of Article 4(1) of the basic regulation, which provides as follows: 'Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidized, or contraction in demand, which, individually or in combination, also adversely affect the Community industry *must not be attributed to the dumped or subsidized imports.*' [72]

68 — Paragraph 30 of the appeal.
69 — Paragraph 97 of the contested judgment.
70 — First limb of the first plea.
71 — Paragraph 98 of the contested judgment.
72 — My emphasis.

102. I must therefore conclude that the Court of First Instance was right in law to take the view that, in a review, the existence of injury must be determined on the basis of the factors exhaustively listed in Article 4(2) and (3) of the basic regulation.

103. In the light of the above considerations, I submit that the first plea of the appeal must be rejected as the Court of First Instance did not commit any error of law.

*The second plea: failure to comply with the time-limit for the investigation prescribed by Article 7(9)(a) of the basic regulation*

104. In its second plea the Commission seems [73] to be asking the Court, in the alternative, to set aside the contested judgment *but only if* Article 1 of Regulation No 2849/92 was also annulled on the ground of the infringement of Article 7(9)(a) of the basic regulation considered by itself.

105. In my view, it follows from the very grounds of the contested judgment that the fact that the first plea of the appeal must be rejected *in itself affords confirmation that Article 1 of Regulation No 2849/92 should be annulled* in so far as it imposes an anti-dumping duty on the respondents.

106. At the end of its consideration of the first plea and after stating that '[i]n the light of those factors and bearing in mind, furthermore, the misleading or inaccurate statements ... 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', [74] the Court of First Instance reaches the conclusion that: '[c]*onsequently*, the forms of order sought by the applicants should be granted and the contested regulation annulled in so far as it affects them'. [75]

107. While the Court of First Instance, after considering the second plea, states that '[t]he 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*', [76] it does not conclude from this that the infringement of Article 7(9)(a) of the basic regulation also warrants the annulment of Article 1 of the regulation at issue, but that '*in the light of all those considerations* Article 1 of the contested regulation must be

73 — The Commission's observations in support of the second plea are not very clear (see, in particular, paragraphs 5, 7, 8 and 32 of those observations).

74 — Paragraph 115 of the contested judgment.

75 — Ibid., my emphasis.

76 — Paragraph 124, my emphasis.

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.' [77]

108. Consequently, I am of the opinion that the Court of First Instance did not draw any express conclusion from the infringement of Article 7 of the basic regulation as regards the validity or invalidity of the regulation at issue. Consequently, it is unnecessary to consider the second plea.

109. I shall, however, consider the second plea for the sake of completeness.

110. It should be borne in mind that the Court of Justice has never ruled on the consequences of a failure to comply with the time-limit prescribed by Article 7(9)(a) of the basic regulation, even though the Court was invited to do so in *Continentale Produkten Gesellschaft* v *Council* [78] and *Epicheiriseon Metalleftikon and Others* v *Council*.

111. Advocate General Darmon [79] and Advocate General Tesauro [80] argued that failure to comply with Article 7(9)(a) of the basic regulation should not result automatically in the regulation's being annulled. However, since the Court did not consider that the duration of the investigations in question had to be regarded as 'unreasonable', it did not have to consider that question.

112. I share the view of Advocate General Darmon and Advocate General Tesauro essentially for two reasons.

113. First, the one-year period prescribed by the Community and international legislators for the duration of the investigation is not a firm time-limit.

114. Thus, the second sentence of Article 7(9)(a) of the basic regulation merely provides that: 'conclusion [of the investigation] should *normally* take place within one year of the initiation of the proceeding'. [81] The use of the adverb 'normally' reduces the imperative nature of the verb 'should' and emphasizes the non-binding nature of the time-limit.

77 — Paragraph 125, my emphasis.

78 — Case 246/87 *Continentale Produkten Gesellschaft* v *Council* [1989] ECR 1151.

79 — Point 10 of his Opinion in *Continentale Produkten Gesellschaft*.

80 — Point 9 of his Opinion in *Epicheiriseon Metalleftikon*.

81 — My emphasis.

115. Likewise, Article 5(5) of the Anti-Dumping Code provides that: 'investigations shall, *except in special circumstances*, be concluded within one year after their initiation'. [82] The international legislator has not explained what is to be understood by 'special circumstances'. In that way, it leaves a degree of discretion to the competent authorities as regards the period for carrying out an investigation.

116. Second, nowhere in the basic regulation or in the Anti-Dumping Code is there any reference to a penalty in the event of a failure to comply with that time-limit.

117. The Court of Justice has inferred from the first point that the imprecise wording used does not allow the time-limit in Article 7 of the basic regulation to be construed as mandatory, but as a mere guideline. [83]

118. Since the Court has held that the lack of precision of the wording of Article 7 of the basic regulation does not allow the time-limit laid down in it to be construed as mandatory, I consider that, *a fortiori*, in the absence of any reference to a penalty, the Court cannot *construe the provisions* as meaning that annulment of the final decision adopted by the competent institutions — after having correctly followed the procedure in other respects — is the proper penalty to be imposed for failure to comply with the time-limit for the investigation and nothing more.

119. Moreover, the interpretation which I suggest also reflects the principle adopted by a number of Member States, according to which there can be no presumption that a penalty is to be imposed. In my view, that principle constitutes in the present case the necessary corollary to the general principle of legal certainty recognized by Community law.

120. Lastly, since the Court has held that this time-limit is merely a guideline, a failure to comply with it cannot be equated to an 'infringement of an essential procedural requirement' within the meaning of the second paragraph of Article 173 of the Treaty.

121. In the light of the whole of the foregoing, I am of the opinion that annulment of the regulation at issue cannot constitute the proper penalty for a mere infringement of Article 7 of the basic regulation.

82 — Ibid.

83 — Consistent case-law of the Court of Justice (see, in particular, the judgments cited by the Court of First Instance in paragraph 119 of the contested judgment).

## Costs

122. Under the first subparagraph of Article 69(2) of the Rules of Procedure of the Court of Justice the unsuccessful party is to be ordered to pay the costs in proceedings between the Community institutions and individuals. Consequently, the Commission, as appellant, should be ordered to pay the costs of the appeal.

## Conclusion

123. Having regard to the foregoing observations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs of the appeal.