fact constitutes a collective decision relating to named addressees.

2. The fact that the implementation of a provision contained in a regulation necessitates implementing measures adopted by the national authorities does not prevent such provision from being of direct concern to the natural or legal persons to whom it applies where such implementation is purely automatic. This is even more the case where implementation is effected in pursuance not of intermediate national rules but of Community rules alone.

3. It follows from Article 14 of Regulation No 459/68 of the Council that the acceptance by the Commission of an undertaking from the exporter or exporters to revise their prices entails the termination of the anti-dumping procedure. It is accordingly unlawful for an anti-dumping procedure to be terminated on the one hand by such an acceptance and on the other hand by a decision adopted by the Council under Article 17 of the same regulation involving the definitive collection of the amount which, in pursuance of Article 15 of the regulation, has been determined by the Commission by way of provisional anti-dumping duty and security for which has been provided by the exporter or exporters concerned.

   The argument as to the effectiveness of this combination for the purpose of monitoring the observance of the undertaking and being able to penalize any infringement of it cannot be accepted since the provisions of the regulation and in particular those of Article 14 (2) (d) provide that in such a case the Commission must recommence the examination of the facts in accordance with Article 10.

4. The Council, having adopted a general regulation with a view to implementing one of the objectives of Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies.

5. It follows from the wording of Article 17 of Regulation No 459/68 that a decision to collect the amounts secured by way of provisional duty may be adopted only at the same time as the imposition of a definitive anti-dumping duty.

   It follows in particular that the Commission may propose a decision to collect the amounts secured only if it proposes "Community action", in other words, the introduction of a definitive anti-dumping duty.

In Case 120/77

KOYO SEIKO CO. LTD., Osaka (Japan),

DEUTSCHE KOYO WÄLZLAGER VERKAUFSGESELLSCHAFT MBH, Hamburg (Federal Republic of Germany),

KOYO (UK) LTD., Normanton (United Kingdom), and

KOYO FRANCE, Argenteuil (France),

represented by J. P. Karsenty, Advocate at the Paris Bar, with an address for service in Luxembourg at the Chambers of Nico Schaeffer, 38 Rue du Curé,

applicants,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Hans-Jürgens Lambers, Director at the Legal Department of the Council, acting as Agent, assisted by Paul-François Ryziger, Advocate at the Conseil d'État and the Cour de Cassation, with an address for service in Luxembourg at the office of J. N. Van den Houten, European Investment Bank, 2 Place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by J. Groux, acting as Agent, assisted by Bernard Martin, Advocate at the Paris Bar, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendants,

and

FEDERATION OF EUROPEAN BEARING MANUFACTURERS' ASSOCIATIONS (FEBMA), Frankfurt, represented by Dietrich Ehle, Advocate at the Cologne Bar, assisted by Roger l'Eleu, Advocate at the Paris Bar, with an address for service in Luxembourg at the office of Jeanne Housse, Huissier, 21 Rue Aldringen,

intervener,

APPLICATION for the annulment of Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan (Official Journal 1977, L 196, p. l),

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

(a) The framework of the legislation

Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), amended by Regulation (EEC) No 2011/73 of the Council of 24 July 1973 (Official Journal 1973, L 206, p.3) lays down the detailed rules and the procedure for the arrangement of anti-dumping measures. These measures come entirely within the jurisdiction of the EEC by virtue of the transfer of powers carried out by the Member States under Article 113 of the Treaty. The EEC system is in conformity with the General Agreement on Tariffs and Trade Anti-dumping code (United Nations Treaty Series, Volume 651, No 840 p. 321 *et seq.* and Official Journal 1968, L 305, p. 12).

In accordance with the provisions of the General Agreement on Tariffs and Trade, Article 2 of the regulation specifies that an anti-dumping duty may be applied to a dumped product whose introduction into Community commerce causes, or threatens to cause, material injury to an established Community industry or materially retards the setting-up of such an industry. Article 3 defines the concept of dumping, providing that the "price of the product when exported to the Community is less than the comparable price ... in the exporting country of origin" and explains this definition. Article 4 limits the concept of injury.

The normal procedure begins with the lodging of a complaint by a natural or legal person or an association submitted either to a Member State or to the Commission (Articles 6 and 7). A Member State may also alert the Commission (Article 8). If the complaint seems to be serious the Commission, in co-operation with the Member States, commences an examination of the matter which covers both dumping and injury (Article 10 (1)). The other provisions of Article 10 and those of Article 11 regulate that examination. Article 10 (4) provides that: "The Commission shall provide opportunities for the complainant and the importers and exporters known to be concerned ... to see all information that is relevant to the defence of their interests and not confidential within the meaning of Article 11 and that is used by the Commission in the anti-dumping investigation".

Articles 12 and 13 provide for an advisory committee to be set up consisting of representatives of each Member State with a representative of the Commission as Chairman. Consultations cover in particular the existence and margin of dumping, the existence and extent of injury and the measures appropriate to remedy the effects of dumping.

If it becomes apparent from consultation, unanimously, that protective measures

are unnecessary the proceedings stand terminated. Otherwise the Commission submits to the Council forthwith a report "on the results of the consultation" together with a proposal that the proceedings be terminated. If the Council "acting by a qualified majority, approves the proposal ... the proceeding shall stand terminated. It shall likewise stand terminated if within one month the Council has taken no decision or made no request by a qualified majority to the Commission asking it to resume its examination of the matter" (Article 14 (1)).

Article 14 (2) (a) provides as follows:

"The provisions of the foregoing paragraph shall also apply where, during examination of the matter, the exporters give a voluntary undertaking to revise their prices so that the margin of dumping is eliminated or to cease to export the product in question to the Community, provided that the Commission, after hearing the opinions expressed within the Committee, considers this acceptable".

Regulation No 2011/73 of the Council (Official Journal 1973, L 206, p. 3) adds to this the following provisions:

"(d) Where the Commission finds that the undertaking of exporters is being evaded or no longer observed or has been withdrawn and that, as a result, protective measures might be necessary, it shall forthwith so inform the Member States and shall recommence the examination of the facts in accordance with Article 10."

The representatives of the exporting country and the directly interested parties are informed of the termination of the proceeding which must, with certain exceptions, be published in the Official Journal.

Under Article 15 of Regulation (EEC) No 459/68, the Commission may take "provisional action" consisting in fixing a (percentage of) anti-dumping duty in respect of which payment is not claimed but importers must provide security to that amount, "collection of which shall be determined by the subsequent decision of the Council under Article 17".

Article 17 concerns the lot of the provisional duty and provides as follows:

"1. Where the facts as finally established show that there is dumping and injury, and the interests of the Community call for Community intervention, the Commission shall, after hearing the opinions expressed within the Committee, submit a proposal to the Council. Such proposal shall also cover the matters set out in paragraph 2.

2. (a) The Council shall act by a qualified majority. Where Article 15 (1) has been applied, the Council shall decide, subject to the provisions of Article 15 (2), what proportion of the amounts secured by way of provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there is material injury (and not merely threat of material injury or of material retardation of the establishment of a Community industry) or that such injury would have been caused if provisional action had not been taken".

Anti-dumping duties are imposed by regulation (Article 19 (1)). Article 20 (1)

of Regulation No 459/68 provides, in accordance with Article 8 (b) of the General Agreement on Tariffs and Trade Anti-dumping Code, that the products referred to are described indicating the name of the supplier. Article 20 (2) provides that the only exception to this rule is where it is impracticable to name all the suppliers.

Importers who wish to show that products, although subject to anti-dumping duties, were not dumped, have the means of administrative appeal (Article 19 (4)).

(b) Facts

By document of 15 October 1976, the Committee of the European Bearing Manufacturers' Associations, an association at that time without legal personality whose members were the three German, British and French trade organizations submitted a complaint to the Commission concerning dumping by Japanese roller bearing manufacturers.

After consultation with the Member States, the Commission decided on 9 November 1976 to carry out an official anti-dumping investigation. It informed the Japanese mission of this and sent questionnaires to all the known importers and exporters and published the required notice in the Official Journal of 13 November 1976, C 268, p.2.

When the replies to the questionnaires had been received, the European and Japanese manufacturers met on 18 and 19 January 1977 so that each side could put its views and arguments to the other.

The Commission imposed a provisional anti-dumping duty of 20% on ball bearings and tapered roller bearings and parts thereof originating in Japan by Regulation (EEC) No 261/77 of 4 February 1977 (Official Journal 1977, L 34, p. 60), which was extended by Council Regulation (EEC) No 944/77 (Official Journal 1977, L 112, p. 1). However the percentage was fixed at 10% for the products manufactured and exported by Nachi Fujikoshi Corporation and Koyo Seiko Company Limited.

In the meantime the Commission carried out an investigation at the European (French, British and German) subsidiaries of the Japanese companies during the months from February to April 1977. Because those subsidiaries were associated with the producer companies, it based its calculations of the export prices on the "price at which the imported product is first resold to an independent buyer" (Article 3 (3)). Because of the great variety of categories of products on the market it adopted for each undertaking a sample of representative products and determined the average price. Finally, the prices determined were reduced by fixed percentages so as to reconstruct the export price to be adopted for the purposes of comparison with domestic prices.

From 18 to 28 April 1977 an investigation was held in Japan at the four major producers by a group of experts from the Commission with the collaboration of a chartered accountant, an expert from the United Kingdom and an expert from the Federal Republic of Germany.

From the end of May until the end of June 1977 meetings were held between the Commission and the Japanese roller bearings producers on the possibility of an undertaking as to prices. After four weeks of discussion the four major Japanese producers signed on 20 June 1977 undertakings that they would increase prices.

On 26 July 1977 the Council adopted definitive measures by issuing Regulation (EEC) No 1778/77 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan.

Article 1 of Regulation (EEC) No 1778/77 imposes a definitive anti-dumping duty of 15%, whose application is however suspended. Article 2 orders the Commission, in collaboration with the Member States, to monitor the undertakings given by the major Japanese producers to revise their prices, and provides that if the Commission finds that these undertakings are being evaded, are not being observed or have been withdrawn, it shall forthwith, after consulting the Member States within the Advisory Committee provided for in Article 12 of Regulation (EEC) No 459/68, convened within a period of five days, terminate the suspension of the application of the definitive duty.

In application of Article 17 (2) (a) of Regulation (EEC) No 459/68, Article 3 of Regulation No 1778/77 provides as follows:

"The amounts secured by a way of provisional duty under the provisions of Regulation (EEC) No 261/77 extended by Regulation (EEC) No 944/77, in respect of products manufactured and exported by the following producers, shall be definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation: Koyo Seiko Company Limited; Nachi Fujikoshi Corporation; NTN Toyo Bearing Company Limited; Nippon Seiko K.K."

Regulation (EEC) No 1778/77 was published in the Official Journal on 3 August 1977 (L 196, p. 1).

On the same date the Commission accepted the undertakings given by the Japanese producers on 20 June 1977.

(c) The subject-matter of the dispute

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

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

(d) Procedure

The application, dated 5 October 1977, was entered in the Court Register on 10 October 1977. On the same day, the applicants requested the Court to adopt interim measures.

Following its application, which was entered on the Court Register on 17 October 1977, the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as "FEBMA") was allowed, by order of the Court of 30 November 1977, to intervene in support of the submissions of the Council, the defendant.

The Council, by document lodged on 29 December 1977, and the Commission, by document lodged on 4 January 1978, applied to the Court pursuant to Article 91 of the Rules of Procedure for a decision as to the admissibility of the application before examining the substance of the case. The intervener lodged its observations on the objection of inadmissibility on 15 February 1978, and the applicants lodged their observations on 3 March 1978.

Having heard the report of the Judge-Rapporteur and the views of the

Advocate General, the Court decided by order of 12 April 1978 to reserve its decision on the objection of inadmissibility for the final judgment.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, the Court requested the parties to answer certain questions in writing.

II — Conclusions of the parties

The applicants claim that the Court should:

— Annul Council Regulation (EEC) No 1778/77 of 26 July 1977;

— Order the defendants to pay all the costs, including those of the intervener.

The Council contends that the Court should:

— Declare the application inadmissible;

— Dismiss the application with all the legal consequences;

— Order the applicants to pay all the costs.

The Commission contends that the Court should:

— Declare the application inadmissible;

— Failing this, declare it unfounded;

— Order the applicants to pay the costs.

The intervener contends that the Court should:

— Dismiss the application as inadmissible;

— In the alternative, as unfounded;

— Order the applicants to pay all the costs including those of the intervention.

III — Submissions and arguments of the parties

Admissibility

In its seperate document and in its defence, the *Council* states that the contested measure is not of direct or individual concern to the applicants.

The contested regulation is adopted on the basis of an objectively determined situation, in other words the existence of dumping on the Community market and of injury to the European industry. The regulation is a general measure applying to all importers of the goods upon whom an anti-dumping duty has been imposed. The importers are referred to in the abstract and not by reason of a personal attribute which distinguishes them from other undertakings engaged in the same activity.

The category of importers of ball bearings in the Community is moreover much less limited than one might believe and, according to the Council, amounts to 267 importers.

The fact that the applicants were among the undertakings which were the subject-matter of the Commission's intervention cannot show that the contested measure is of direct concern to them. The fact that the Commission notified them of that measure as a mere act of courtesy cannot qualify them under the second paragraph of Article 173.

The *Commission* and the *intervener* make observations of the same nature, emphasizing above all that the contested measure is of a general nature and does not apply to limited and named addressees.

The applicants reply that the contested regulation belongs to a category of measures which may form the subject-matter of an application because they are of direct and individual concern to certain persons.

The applicants explain fully that only the basic regulation, Regulation No 459/68, is a legislative measure and the contested measure constitutes merely a specific application thereof. Regulation No 1778/78 is of direct and individual concern to them.

The first applicant is expressly named in Article 3 of the contested regulation. The fact that its European subsidiaries, the three other applicants, are more directly concerned than the parent company disregards the actual facts of the financial and commercial structure of the group.

In the rejoinder, the *Council* maintains that the contested regulation is indeed a measure which was laid down by regulation and applied by virtue of an objective factual situation, the finding of the existence of dumping and in relation to its objective, the re-establishment of competition.

The applicants are not individually concerned since the fact that the companies of the Koyo Seiko group were involved in the investigation is not such as to distinguish them individually within the second paragraph of Article 173. The contested regulation did not refer to the conduct of the applicants but, on the contrary, to an objective situation, in other words dumping, regardless of the persons who were responsible for the dumping.

The arguments of the *Commission* and the *intervener* are to the same effect.

The substance of the case

In their applications, the applicants consider that the preliminary investigation of the case cannot justify the imposition of identical anti-dumping duties on all the Japanese companies and on all ball bearings and tapered roller bearings.

As an example of the breaches of Regulation No 459/68, the application states that neither dumping nor injury nor, finally, the causal connexion between those two has been established. Nor has it been established how "the price at which the imported product is first resold to an independent buyer" was found, a most important question in view of the differences in the conditions of sale, the differences in taxation and the differences in practices on the markets. Next, the applicants did not have access to the information referred to in Article 10 (4) of Regulation No 459/68.

The procedure was not terminated after the undertakings had been given.

Article 19 of the basic regulation has been infringed since the Commission notified the applicants' representative that the dumping had been fixed (by methods which are, moreover, contested) as amounting to 12.24% as far as they were concerned.

Finally, it was impossible to declare that the provisional duty should be definitively collected.

The *Council* replies that Article 14 of the basic regulation has not been infringed since the Commission was under no duty to accept an undertaking given by the manufacturers concerned. There is no reason why the Commission should not, for the future, adopt measures intended to enable a rapid response to be made in cases in which the undertakings given are evaded or not observed. This was so in the present case because of the extent of the dumping found to exist, both as regards the size of the margin and the volume of exports. The Commission, using its discretion, considered that the solution proposed by the exporters was simply unacceptable and refused to terminate the procedure, abandoning the securities lodged by way of provisional anti-dumping duty. On the contrary, it proposed to the Council that it should, within certain limits, order the definitive collection of the amounts secured by way of provisional duty. On the other hand, it proposed that the Council should, as

regards the future, take into account the undertaking, whilst suspending the definitive anti-dumping duty which it proposed that it should impose and which the contested regulation in fact imposed.

As regards the alleged infringement of the rights of the defence, the Council observes that the imposition of an anti-dumping duty in no way constitutes a conviction and that there can therefore be no question of the establishment of a right of defence as understood in judical matters nor even of the establishment of a right defence in the sense in which it exists in the procedures laid down in Articles 85 and 86 of the Treaty. Article 10 of the basic regulation refers only to the defence of interests.

Moreover, the Council states that the undertakings concerned were notified of the matters complained of in accordance with Article 10. The Commission is not bound to inform those concerned of the manner in which it conducts its investigation. Only at the stage of the statement of the reasons upon which the decision is based do the persons concerned find all necessary information on the manner in which the Community authorities, and in particular the Council of Ministers, have become convinced of the existence of dumping.

As for the complaint that the statement of the reasons upon which the regulation is based is insufficient, it is necessary first of all to observe that the contested regulation is a Council regulation. In those circumstances, it was not for the Commission to give any details when the definitive regulation was drawn up; it is not the author of that regulation. This reply is sufficient by itself to dismiss the argument based on an absence of reasons. However, it follows from case-law that the statement of the reasons on which a regulation is based may be succinct. Since the Council recalled the findings made on the occasion of the preliminary examination of the matter which had shown the existence of dumping and injury, its regulation amply fulfilled that requirement. The existence of both dumping and of injury were established sufficiently in law by the Commission's findings. If the applicants can establish that no dumping exists, Article 19 (4) of Regulation No 459/68 enables them to bring evidence. However the applicants do not seriously contest that the facts found by the Commission are accurate as a whole.

As regards the allegation that the duty imposed is not equal to the percentage of dumping found by the Commission, this allegation does not take into account the very structure of the anti-dumping duty and, moreover, Article 19 (4) of the basic regulation would offer and appropriate remedy if the applicants' allegation proved to be correct.

The *Commission* states that the nature and objective of the anti-dumping duty require the general application thereof to products of several producers intended for various countries in the Community. For that reason too the Commission was able to limit its investigation to certain types of ball bearings. This method was explained to the applicants and was never contested by them during the investigation. The reason for which an anti-dumping duty must be imposed by reference to findings relating to a previous period, in the present case the first half of 1976, lies once more in the structure of the anti-dumping duty.

The Commission states the method by which it reached the findings of the

existence of dumping and injury and that of a causal connexion between the two.

As regards dumping, the applicants were perfectly acquainted with the information on which it relied, with the exception of the confidential information given by third parties. As regards the complaint that Article 14 of the basic regulation was not applied, it is stated that the Japanese industrialists gave undertakings only on 20 June 1977 so that the Commission was unable to study that document until the period when the examination of the matter had already ended. Thus the provisions concerning termination are no longer applicable. The Commission never indicated to those concerned that it considered that the proposed solution was adequate. Moreover, since the undertakings involved a two-stage price increase, one of 10% before 30 June 1977, the other of 10% before 31 December 1977, it was logical for the Council to introduce a duty applicable until the end of 1977. Finally, the Commission states the fundamental criteria which, in its opinion, should be applied in the examination of the legality of anti-dumping measures. In this context, it mentions the complexity of the economic phenomena and the difficulties of an investigation. The provisions of the basic regulation must be appraised in the light of those circumstances. In particular, it is impossible to reduce the margin of discretion which it leaves to the Community authorities.

The observations of the *intervener* support the arguments of the defendants.

In their reply, the *applicants* begin by denying that they are guilty of dumping; they protest against the accusation that they supplied inadequate and incorrect information and allege that the nature of the procedure, which requires that each party should be able to put its case to the other, was not respected.

The applicants never hindered the Commission's investigation. If the information supplied was "fragmentary and incorrect" it was for the investigators to ask for additional information.

The defendants wrongly refer to the objectives of the anti-dumping policy in order to show that the investigation provided for by Regulation No 459/68 is not such that it requires that each party should be able to put its case to the other. Perusal of Articles 8 to 14 of that regulation shows the contrary. They never had any opportunity at all to discuss the Commission's criteria or to know the facts on which the Commission intended to base its findings.

The doubts expressed by the applicants are confirmed by the fact that when they brought proceedings for the return of the anti-dumping duty under Article 19 (4) of Regulation No 459/68, the Commission considered that it was necessary to conduct fresh investigations as if the steps already taken had not supplied it with sufficient information. It appears that the Commission considered that it was sufficiently informed to decide to introduce an anti-dumping duty but not to grant a claim for repayment which is justified.

As regards the statement of reasons on which the contested measure is based, the applicants rely upon Article 4 (b) and Article 17 (2) (b) for the purpose of maintaining that the basic regulation requires a more complete statement of reasons.

It is for the Community authorities to establish the existence of dumping and injury and the defendants cannot escape the duty to provide evidence thereof. Thus the argument based on Article 19

(4) of Regulation No 459/68 is irrelevant. The applicants ask whether the Commission has in fact examined all the factors which are such as to influence Community production of ball bearings, as required by Article 4 (3) of the basic regulation, whether it has studied the special characteristics of Japanese commerical methods and whether it took into account the structure of Japanese industry and the efforts made resulting in a reduction in the cost price of its products. According to the applicants, the replies must be in the negative.

The use of the method indicated by Article 3 (3) of Regulation No 459/68 is also responsible for serious lacunae in the conduct of the investigation.

As regards the undertaking, the applicants state that it was the result of long negotiations with the Commission, which implies that the latter had accepted the bases of it. Moreover, the contested regulation seems to accept the undertaking because it suspends the collection of the definitive duty. It is therefore not permissible that the procedure was not terminated.

Finally, the applicants continue to consider that the contested regulation could not impose an anti-dumping duty of 15% on them so long as the Commission's investigation had established only a rate of 12.24% as far as they were concerned.

In its rejoinder, the *Council* once more rejects the argument that the alleged nature of the procedure requiring that each party should be able to put its case to the other and therefore the alleged right of the defence has been infringed in the present case. The applicants are confused.

In the procedure in question those concerned are informed of all the reasons given by the Community authorities only at a later stage, in other words at the stage at which the decision is adopted.

The argument based on a fresh investigation by virtue of the applicants' complaint under Article 19 (4) of the basic regulation also proves confusion.

As regards the insufficient statement of reasons, the Council maintains in all respects the arguments put forward at the stage of the defence, stating them in more detail on several points. It has proved to be impossible to check the information supplied by those concerned because the invoicing system used by the Japanese industry was incomplete and fragmentary. The Commission's services discovered that a retroactive increase of 8% had been applied with effect from January 1976, whereas the industry had claimed to have charged an increase only in July 1976.

Moreover, it was an established fact that the Koyo company sold a loss on the Japanese market, in the same way moreover as other producers. It is clear that a sale at a loss cannot be considered as a normal transaction, whereas during the period under consideration the other sectors of the Japanese industry were making normal profits. The Council supplies in addition details of the method of calculation applied for the purposes of establishing the export prices, observing that all those details were known to the applicants. The fact that they do not dispute the conclusions of the regulation but merely make general statements is revealing.

As regards the arguments based on an alleged infringement of Article 14 (2) (a) and Article 19 (3), the reply is restricted to repetitions and the Council can refer in substance to its defence.

The *intervener* considers that only in their reply the applicants for the first

time claimed that there was no dumping, injury or causal link between the two. It refers to the Court to decide whether those new submissions are admissible. The applicants are trying to shift the burden of proof by introducing confusion between the duty to give a statement of reasons upon which the regulation is based and the burden of proof.

It is easy for the applicants to bring evidence of the absence of dumping as that evidence is in no way "negative" evidence. It cannot therefore merely contest in the abstract the existence of dumping.

The applicants are trying to prove that the Community authorities were unable to establish the existence of a dumping situation whereas they themselves know this better than anybody but do not wish to reveal it in the procedure and submit it to the decision of the Court.

As regards injury, the Community authorities have also examined all the other factors which might have had an unfavourable influence on the European industry. This examination led to the conclusion that Japanese dumping was exerting a serious influence.

The observations in the *Commission's* rejoinder essentially support the arguments of the Council.

IV — Oral procedure

The parties presented oral argument at the hearing on 10 and 11 January 1979.

The Advocate General delivered his opinion at the hearing on 14 February 1979.

Decision

1 By application of 5 October 1977, received at the Court Registry on 10 October 1977, the applicants, Koyo Seiko Company Limited (hereinafter referred to as "Koyo"), Deutsche Koyo Wälzlager Verkaufsgesellschaft mbH, Koyo (UK) Limited and Koyo France (hereinafter referred to as "the subsidiaries") brought before the Court of Justice under Article 173 of the Treaty an action against the Council and the Commission for the annulment of Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan (Official Journal 1977, L 196, p. 1).

2 By application of 17 October 1977 the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as "FEBMA") asked to be allowed to intervene in support of the submissions of the Council, the defendant; this intervention was allowed by order of the Court of 16 November 1977.

3 As early as the beginning of 1977, the Commission, under Article 10 of Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), commenced examination of the matter so as to check whether protective measures against dumping by Japanese ball bearing and tapered roller bearing producers were necessary.

4 Pursuant to Article 10 in conjunction with Article 15 of Regulation No 459/68, the Commission introduced by Regulation (EEC) No 261/77 of 4 February 1977 (Official Journal 1977, L 34, p. 10) a provisional anti-dumping duty of 20%, reduced to 10% in the case of two producers, for ball bearings, tapered roller bearings and parts thereof originating in Japan; this provisional duty was extended by Council Regulation (EEC) No 944/77 of 3 May 1977 (Official Journal 1977, L 112, p. 1) under Article 16 of the basic regulation, Regulation No 459/68.

5 During the procedure initiated by the Commission the four major Japanese producers, including Koyo, gave voluntary undertakings signed on 20 June 1977 under Article 14 (2) of Regulating No 459/68 to revise their prices so that the margin of dumping might be eliminated; these undertakings resulted in an increase of 20% in their export prices.

6 Council Regulation (EEC) No 1778/77 of 26 July 1977 then introduced, under Article 17 of Regulation No 459/68, a definitive anti-dumping duty of 15% on the products in question, suspended the application of that duty, and provided, as regards the products exported by the four major Japanese producers, for the definitive collection of the amounts secured by way of provisional anti-dumping duty laid down in Regulations Nos 261/77 and 944/77.

The admissibility of the application for annulment

7 The defendant institutions have raised an objection of inadmissibility claiming that the contested measure is a regulation and that the applicants are therefore not entitled to request annulment of it under the second paragraph of Article 173 of the Treaty.

8 They claim that in the present case this is not a decision adopted in the guise of a regulation since Regulation No 1778/77 in fact constitutes a general rule which affects all the products in question originating in Japan and which must, according to Article 19 (1) of Regulation No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), be adopted in the form of a regulation.

9 The applicants reply that the contested measure, although drafted in abstract terms, in fact affects only the first applicant and three other Japanese undertakings which produce the products in question (hereinafter referred to as "the major producers"), as well as their subsidiaries in the Community.

10 The preliminary investigation carried out before the adoption of Regulation No 1778/77 was limited to inquiries made first at the premises of the European subsidiaries and then at the premises of the major producers in Japan.

11 The specific nature of the measure is confirmed by the fact that Article 1 (2) thereof suspends the application of the imposed anti-dumping duty on the grounds, stated in the penultimate recitals in the preamble, that the four major producers have given undertakings to revise their future prices.

12 This specific nature is also confirmed by Article 3 of Regulation No 1778/77 which provides for the collection of the amounts secured by way of provisional duty only as regards the products manufactured and exported by the major producers.

13 The contested measure therefore constitutes a decision which affects only the major producers and their subsidiaries and must therefore be considered to be a decision concerning them adopted in the guise of a regulation.

14 Before commencing the examination of the admissibility of the application, it should be stated that Koyo and its subsidiaries are sufficiently closely associated for the Commission to have considered, during its examination of the matter, that it was necessary to apply to them the special provisions concerning export prices laid down in Article 3 (3) of the basic regulation, Regulation No 459/68.

15 In these circumstances there is no need, as regards the question whether the contested measure is of direct and individual concern to the applicants, to make a distinction in relation to them between producers on the one hand and importers on the other.

16 Regulation No 1778/77 contains essentially three provisions:

— Article 1 imposes a definitive anti-dumping duty of 15% on the products in question originating in Japan and suspends the application of that duty without prejudice to Article 2;

— Article 2 regulates the monitoring of the undertakings given by the major Japanese producers and empowers the Commission to terminate the suspension of the application of the duty if it finds that these undertakings are being evaded, not being observed or have been withdrawn;

— Article 3 provides, in respect of the products manufactured by the major producers, for the collection of the amounts secured by way of provisional duty in application of the imposition by previous regulations of a provisional duty.

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

18 It emerges from the two recitals before last in the preamble to Regulation No 1778/77 that Article 1 (2) provides for the suspension of the definitive anti-dumping duty because "the four major Japanese producers have given undertakings to the Commission to revise their future prices".

19 "Whereas, however, it is necessary that the Commission closely monitor the observance of the undertakings and take immediate action if there is any violation or evasion or if the undertakings are withdrawn", it is provided in Article 2 of the regulation that "the Commission shall, in collaboration with the Member States, closely monitor the observance of the undertakings given by the major Japanese ... producers to revise their prices" and that it "shall forthwith ... terminate the suspension" if it finds "that these undertakings are being evaded, are not being observed or have been withdrawn".

20 It follows from these recitals that, whatever character the imposition of a suspended anti-dumping duty may present in other cases, in the present case the measure in question is intended to ensure the strict observance of the stated undertakings by the creation of an additional penalty.

21 Thus, although drafted in general terms, Article 1 in fact concerns only the situation of the major Japanese producers, including Koyo, who are directly and individually concerned by reason of the undertakings which they have given to revise their prices.

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

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

24 Although the collection of the amounts secured by way of provisional anti-dumping duty is *per se* of direct concern to any importer who has imported the products in question subject to such duty, the special feature of Article 3 which sets it apart is that it does not concern all importers but only those who have imported the products manufactured by the four major Japanese producers named in that article.

25 The allegation of the defendant institutions and the intervener that only implementing measures adopted by the national authorities are of direct concern to the importers and that these importers should therefore, where appropriate, bring the matter before the national courts having jurisdiction disregards the fact that such implementation is purely automatic and, moreover, in pursuance not of intermediate national rules but of Community rules alone.

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

27 As a result the application lodged by Koyo against that article is also admissible.

The substance of the application for annulment

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

29 The defendant institutions and the intervener reply that as the contested regulation was based not only on the basic regulation but also on Article 113 of the Treaty the latter provision, which authorizes the Council to take measures to protect trade in case of dumping, gives the Council the power to adopt an *ad hoc* regulation independently of the provisions of Regulation No 459/68.

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

31 Finally, as the Commission's investigation discovered a margin of dumping of at least 15 % injuring the Community industry and as Koyo acknowledged by implication by its undertaking that there was a margin of dumping of 20 %, it is unsatisfactory to have to recommence the investigation for failure to observe the undertaking and more appropriate in such a case to terminate the suspension of the definitive duty imposed on the basis of well-established facts.

32 Article 14 (1) of the basic regulation, Regulation (EEC) No 459/68, as amended by Regulation (EEC) No 2011/73 of the Council of 24 July 1973 (Official Journal 1973, L 206, p. 3) having provided that "if it becomes apparent ... that protective measures are unnecessary ... the proceeding shall stand terminated", Article 14 (2) provides as follows:

"(a) The provisions of the foregoing paragraph shall also apply where, during examination of the matter, the exporters give a voluntary undertaking to revise their prices so that the margin of dumping is eliminated

or to cease to export the product in question to the Community, provided that the Commission, after hearing the opinions expressed within the Committee, considers this acceptable.

(b) Where the Commission, acting in accordance with the provisions of the foregoing subparagraph, accepts the undertaking referred to therein, the investigation of injury shall nevertheless be completed if the exporters so desire or if, after hearing the opinions expressed within the Committee, the Commission so decides. If the Commission, after hearing the opinions expressed within the Committee, makes a determination of no injury, the undertaking given by the exporters shall automatically lapse unless the exporters state that it is not so to lapse.

(c) The fact that exporters do not offer to give such undertakings, or do not accept an invitation made by the Commission to do so, shall in no way be prejudicial to the consideration of the case. However, the Commission shall be free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

(d) Where the Commission finds that the undertaking of exporters is being evaded or no longer observed or has been withdrawn and that, as a result, protective measures might be necessary, it shall forthwith so inform the Member States and shall recommence the examination of the facts in accordance with Article 10.

(e) The provisions of Article 18 (1) shall apply *mutatis mutandis* to the undertakings given by exporters on the basis of this article. Any modification of such undertakings shall be made in accordance with the procedure laid down in this article."

33 On the other hand, where the procedure of examination of the matter is continued, Article 17 of that regulation provides as follows:

"1. Where the facts as finally established show that there is dumping and injury, and the interests of the Community call for Community intervention, the Commission shall, after hearing the opinions expressed within the Committee, submit a proposal to the Council. Such proposal shall also cover the matters set out in paragraph 2.

2. (a) The Council shall act by a qualified majority. Where Article 15 (1) has been applied, the Council shall decide, subject to the provisions of Article 15 (2), what proportion of the amounts secured by way of provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there is material injury (and not merely threat of material injury or of material retardation of the establishment of a Community industry) or that such injury would have been caused if provisional action had not been taken."

34 In the light of these provisions it is unlawful for one and the same anti-dumping procedure to be terminated on the one hand by the Commission's accepting an undertaking from the exporter or exporters to revise their prices at the same time as, on the other, by the imposition on the part of the Council, at the proposal of the Commission, of a definitive anti-dumping duty.

35 It is impossible to accept the argument that in the present case the undertaking was given only after examination of the matter, since the examination of the matter ends only when the Commission submits its proposals to the Council, whilst it is not disputed in the present case that the undertakings were signed on 20 June 1977 before the meeting of the advisory committee provided for in Article 12 (2) of Regulation No 459/68 held on 21 June 1977.

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

37 As has been pointed out above, the same undertakings were referred to by the Council both in the recitals in the preamble to Regulation (EEC) No 1778/77 and in the provisions of that regulation as valid, existing undertakings.

38 The fact that the Commission did not notify its acceptance of the undertaking until 3 August 1977 cannot therefore be considered as an indication that that acceptance was made only "subject to" the suspended imposition of a definitive anti-dumping duty as a penalty.

39 On the contrary, under the above-mentioned Article 14 an undertaking by an exporter to revise his prices leads to termination of the proceedings so that it is impossible to apply Article 17 of Regulation No 459/68.

40 By specifying that termination of the proceedings occurs only if "the Commission, after hearing the opinions expressed within the Committee, considers this acceptable", Article 14 in no way implies that the Commission and, where appropriate, the Council may follow the procedure provided for until the stage reached in Article 17 and accept the undertaking only at the same time as introducing a definitive anti-dumping duty.

41 Such a combination of measures which are by their very nature contradictory would in fact be incompatible with the system laid down in the basic regulation.

42 The argument based on the effectiveness of this combination for the purpose of monitoring the observance of the undertaking and being able to penalize any infringement of it cannot therefore be accepted, since the provisions of Regulation No 459/68 and in particular those of Article 14 (2) (d) provide that in such a case the Commission must recommence the examination of the facts in accordance with Article 10.

43 This provision implies that the Commission may, if it considers that an appropriate situation has arisen, immediately introduce a provisional anti-dumping duty or take other necessary measures, but requires nevertheless that those measures should be adopted having regard to the situation caused by the failure to observe the undertaking.

44 In any case Regulation No 459/68 aims to ensure that the measures to be taken are adopted in compliance with the formalities and guarantees laid down in Article 10.

45 The argument that Regulation No 1778/77 constitutes a measure *sui generis* based directly on Article 113 of the Treaty and not subject to the provisions of Regulation No 459/68 disregards the fact that the whole proceeding in question was carried out within the context of the provisions laid down by that regulation.

46 The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom the law applies.

47 The application is therefore well founded in this respect.

48 As regards the application in so far as it is directed against Article 3 of Regulation No 1778/77, in the circumstances the judgment on Article 3 is the same as that on Articles 1 and 2 of the regulation.

49 If the result of the undertakings signed by the four major Japanese producers was that, under Article 14 of the basic regulation, the proceeding should have stood terminated, it follows that there was no need to apply Article 17 which empowers the Council to order the collection of the amounts secured by way of provisional duty.

50 The wording of Article 17 shows moreover that such a decision can be adopted only at the same time as the imposition of a definitive anti-dumping duty.

51 It follows in particular that the Commission can propose a decision to collect the amounts secured only if it proposes "Community action", in other words, the introduction of a definitive anti-dumping duty.

52 This interpretation is confirmed by Article 16 (2) which provides that the Commission must submit a proposal to the Council for Community action at least one month before expiry of the provisional anti-dumping duty.

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

54 In fact, under Article 19 (3) of the basic regulation, a provisional anti-dumping duty can be imposed only in so far as a margin of dumping and material injury have been found.

55 This would seem to have been the intention of the Council when it provided in Article 3 of the contested regulation that the amounts secured were to be "definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation", in other words the rate of the definitive anti-dumping duty whose application had been suspended.

56 The application is therefore well founded in this respect as well.

57 Since Article 4 of Regulation No 1778/77 regulates only the entry into force of the preceding provisions there is nothing to prevent this regulation's being annulled in its entirety.

58 It follows from the preceding statements and from the arguments put forward by the applicants in the parallel applications in Cases 113/77, 118/77, 119/77 and 121/77 that Regulation No 1778/77 is unlawful and that the application is therefore well founded.

59 It is therefore necessary, in accordance with the applicant's request, to annul the regulation.

60 It should however be observed that the annulment of Regulation No 1778/77 in no way affects the undertakings given by the major Japanese producers by which those producers undertook to revise their prices so that the margin of dumping is eliminated and those undertakings therefore retain their validity and continue to be subject to the provisions of Article 14 (2) in conjunction with Article 10 of Regulation No 459/68.

Costs

61 Koyo has been successful in its application.

62 It is therefore necessary to order the defendants to pay the costs of the proceedings, except for the costs caused by the intervention.

63 The intervener must be ordered to bear its own costs and those incurred by the applicants on account of its intervention.

On those grounds,

THE COURT

hereby:

1. **Annuls Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan;**

2. **Orders the defendants to pay the costs of the proceedings, except for the costs caused by the intervention;**

3. **Orders the intervener to bear its own costs and those incurred by the applicants on account of its intervention.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 29 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President