OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 March 1988

My Lords,

The legal framework and the procedure

The legal framework and an outline of the procedure in this case are given in my Opinion in Joined Cases 260/85 and 106/86 (*Tokyo Electric Company* v *Council* (*TEC*) [1988] ECR 5855, at p. 5884).

Brother Industries Ltd is a Japanese producer of typewriters (mechanical, electric and electronic) which it sells under its own name on world markets. It started producing electronic typewriters in 1980.

The Provisional Duty Regulation imposed a provisional anti-dumping duty of 43.7% on electronic typewriters made in Japan by Brother Industries Ltd.

By an application lodged on 25 February 1985, Brother Industries Ltd along with seven of its EEC subsidiaries brought an action against the Commission for the annulment of the Provisional Duty Regulation and damages (Case 56/85).

The Definitive Duty Regulation of 19 June 1985 imposed a definitive duty of 21% and provided for the amounts secured by way of provisional duty to be collected at the same rate (21%).

By an application lodged on 12 August 1985 the same applicants (hereinafter referred to collectively as 'Brother' unless the context otherwise makes clear) brought an action against the Council and the Commission (Case 250/85) claiming that the Court should declare the Definitive Duty Regulation void in so far as it applied to Brother, award damages in a sum to be determined at the date of the judgment, and order the Commission and the Council jointly to pay the costs. The arguments advanced in that case are similar to, though more detailed than, those advanced in Case 56/85.

By an application lodged on 29 August 1985 Brother sought the suspension of the Definitive Duty Regulation (Case 250/85 R). The application was dismissed by an Order of the President of the Court of 18 October 1985, which reserved the costs of the interim proceedings ([1985] ECR 3459).

By its Reply in Case 250/85, lodged on 26 March 1986, Brother withdrew its damages claims both in that case and in Case 56/85. By a letter dated 8 April 1986, Brother also specified that the annulment claim in Case 250/85 was not directed against the

Commission. These steps amounted to a total withdrawal of Case 250/85 as far as brought against the Commission. Therefore, by an Order of 16 May 1986, the Court removed Case 250/85 from the register of the Court in so far as brought against the Commission and ordered Brother to pay the Commission's costs as defendant, including those relating to the proceedings for interim measures.

By another Order, also dated 16 May 1986, the Court allowed the Commission to intervene in support of the Council in Case 250/85 and reserved the costs (i. e. of the intervention). Cetma has also intervened in support of the Council in Case 250/85.

Case 56/85

Pursuant to Articles 11 and 12 of the Basic Regulation, the terms of its own Article 3 and the terms of Council Regulation No 1015/85 extending the period of its validity (Official Journal 1985, L 108, p. 18), the Provisional Duty Regulation ceased to have any effect except to the extent to which it was readopted by the Definitive Duty Regulation, as for example where Recital 32 of the Definitive Duty Regulation confirmed Recitals 30 to 33 of the Provisional Duty Regulation. Thus, amounts secured by way of provisional duty had to be collected at the rate of 21% under Article 2 of the Definitive Duty Regulation, not at the rate of 43.7% provisionally set, and any difference fell to be refunded pursuant to Article 11 (7) of the Basic Regulation. Any parts of the Provisional Duty Regulation thus incorporated in the Definitive Duty Regulation in my opinion fall to be challenged in an action brought against the latter, and Brother has done so in Case 250/85. Any parts of the Provisional Duty Regulation not so confirmed have lapsed and there is no longer anything left to annul.

Brother has argued that, in spite of its expiry, the Provisional Duty Regulation created a legal situation still capable of separate judicial review. The only relevant effect relied on by Brother, in fact, results from the Definitive Duty Regulation. Brother argues that the approach used in the Provisional Duty Regulation led to unjustified differences in the rates of provisional duty applied, so that when the provisional duty was finally collected TEC only had to pay duty at 6.9% as against Brother's 21%. However, the rate for the definitive collection is provided for in Article 2 of the Definitive Duty Regulation. That is the operative provision and the one against which any action must be brought. It may novate the Provisional Duty Regulation in part, but it is wrong to assert that the effect complained of is created by the Provisional Duty Regulation.

Brother has also sought to rely on the termination of the proceeding in respect of

Nakajima by Article 1 (2) of the Provisional Duty Regulation. However, that step has been reversed and replaced by a series of other measures, which are set out in my Opinion in *TEC*. It is, in my view, wrong to assert that the legal situation regarding Nakajima has been created by the Provisional Duty Regulation.

If any independent effect could be attributed to the Provisional Duty Regulation after 19 June 1985 then clearly a court ruling would have point. Equally, if Brother could show some loss or injury resulting from the Provisional Duty Regulation alone (e. g. interest lost on amounts secured by way of provisional duty which were subsequently reimbursed) then a ruling to that effect might be possible, though it seems to me that it would be difficult to establish any damage reparable under Article 215 of the EEC Treaty and, in any event, Brother has withdrawn its damages claim in Case 56/85.

Accordingly, in my view, Case 56/85 ceased to have any purpose after 19 June 1985 and should be dismissed; Brother should pay the Commission's costs. The issues canvassed in that case fall to be decided under Case 250/85.

Case 250/85

Brother makes 16 submissions in support of its claim in Case 250/85, grouped under five headings: I — Normal value, II — Export price, III — Comparison, IV — Injury and V — Interests of the Community.

I — Normal value

Under the heading of normal value, Brother argues as follows:

1. Article 2 (3) of the Basic Regulation was infringed because the Community authorities compared prices on markets where supply and demand were completely different, so that no fair comparison of prices was possible. That argument falls to be rejected for the reasons given in my Opinion in *TEC*. Small sales or non-existent sales on the domestic market cannot be used as a reason to evade the effect of the Basic Regulation. Effective protection against dumping is particularly necessary where, as here, the product concerned is manufactured mainly for export.

2. Established practice was changed and Article 2 (3) (a) of the Basic Regulation was infringed, because where domestic prices were used as the basis for normal value they related to quantities so small that they could not 'permit' (i. e. subsidize) exports at dumping prices. In my opinion it is not a requirement under present rules that domestic sales should finance the dumped exports. The definition of dumping in Article VI of the GATT, Article 2 (1) of the Code and in Article 2 (2) of the Basic Regulation all plainly exclude any requirement of such a link. As to the alleged change of practice, I consider that Brother has failed to establish the existence of any consistent practice prior to the adoption of the 5% threshold in the present case. Moreover, I consider the adoption of that threshold as lawful for the reasons given in my Opinions in *TEC* and in Joined Cases 277 and 300/85 (*Canon* v *Council* [1988] ECR 5731, at p. 5768).

3. Article 2 (3) (b) of the Basic Regulation was infringed because the normal value of most of the models exported by the applicant was calculated on the basis of the resale price charged by its associated distributor in Japan. The electronic typewriters of Brother Industries Ltd are distributed on the Japanese market through a sales company, Brother Sales Ltd. Brother Industries Ltd holds only about 15% of the share capital of Brother Sales Ltd (although the Court has not been informed about other ways in which control might be exercised over the sales company, such as voting rights, shared directors or staff, indirect shareholdings, contractual links or simple economic pressure). Nevertheless, in my opinion, it is plainly an associated company within the meaning of Article 2 (7) of the Basic Regulation, so that the Community institutions were entitled to disregard sales from Brother Industries Ltd to Brother Sales Ltd and to base the normal value for those models sold in sufficient quantities on the Japanese market on the price charged on the first arm's-length sale, i. e. the sales of Brother Sales Ltd. For those models I consider that normal value was lawfully based on the actual domestic sale price of Brother Sales Ltd, and this argument fails.

4. Article 2 (3) (b) (ii) of the Basic Regulation was infringed because the constructed value of certain models exported by Brother Industries Ltd was calculated on the basis of the resale price charged by its associated Japanese distributor. This argument is analogous to the previous one, except that it applies to those models which Brother did not sell — or did not sell in sufficient quantities — on the Japanese market and for which therefore normal value was constructed. For the reasons given in my Opinion in *TEC* I consider that it is correct to assert, as does Recital 15 to the Definitive Duty Regulation, that construction of normal value under Article 2 (3) (b) (ii) of the Basic Regulation is designed to lead to a normal value as if sales on the domestic market had taken place. Since the normal value based on actual domestic price was, in my view, correctly based on the sale prices of Brother Sales Ltd, an analogous approach was in my opinion correct where normal value was constructed, and the present argument falls to be dismissed.

5. The margin of profit (71.18%) included in the normal value of the three Brother models for which normal value was constructed was excessively high and was wrongly determined, which constitutes an infringement of Article 2 (3) (b) (ii) of the Basic Regulation and a misuse of powers. By dividing the general sales expenses incurred in Japan by Brother Sales Ltd not by the volume of its sales in Japan but by the volume of sales for the whole Brother group worldwide (sales which have nothing to do with Brother Sales Ltd), the Council necessarily underestimated the general expenses of Brother Sales Ltd (to the point of reducing them almost to nil) and, by the same token, overestimated its profit in Japan.

It seems to me that, since Brother Sales Ltd sold only in Japan, it would have been appropriate to divide its SGA expenses by the volume of its sales in Japan: sales outside Japan were made by other companies and it does not appear appropriate to me to bring them into this particular calculation. I think that there was here an error; but Brother has adduced no

proof of any misuse of powers and that allegation must be rejected. However, that error makes no difference to the figure established for the constructed normal value. The profit margin and the SGA expenses result from the same data and are linked; if one goes up, the other goes down. This is stated in Brother's own argument: if the profit has been overestimated, it is because the SGA expenses were underestimated. Accordingly, if the profit margin is decreased to correct the error complained of, the SGA expenses will have to be increased correspondingly, and the final figure for the constructed normal value of the Brother models concerned will be no different. Accordingly, this argument cannot provide any ground for the annulment of the Regulation.

II — Export price

Under the heading of export price, Brother argues as follows:

6. Article 2 (8) (b) of the Basic Regulation is infringed because the Council requires export prices to permit a 'normal' profit to be made twice: one 'normal' profit on the price at which the manufacturer sells to its EEC subsidiary and a second 'normal' profit on the price at which that subsidiary resells to independent buyers in the Community. As explained in my Opinion in *Canon* and in my Opinion in Joined Cases 273/85 and 107/86 (*Silver Seiko* v *Council*, [1988] ECR 5927, at p. 5958) the Community authorities were entitled to disregard the price from the Japanese parent to its European subsidiary in establishing export price, and because that price is a transfer price they are also entitled to disregard the profit figure resulting for the European subsidiary and use instead a 'reasonable profit margin' based on what an independent importer would have obtained in the same situation. In my opinion, the approach followed by the Community institutions was in accordance with Article 2 (8) (b) of the Basic Regulation and this argument fails.

7. In breach of Article 2 (8) (b) of the Basic Regulation the cost of credit granted to the buyer was taken into account twice: once as a finance charge and once by deducting it from the resale price. This point was conceded by the Community institutions, and a correction to the calculations was made in the course of proceedings which reduced the dumping margin by 1.5%. The margin of dumping found for Brother was 33.6%, the injury 21.9%, and the lower of the two — the injury figure — determined the rate of duty (21%). Therefore the correction made in the dumping margin had no effect on the rate of duty, and in my view there subsists no irregularity which could provide grounds for annulling the regulation.

III — Comparison

Under the heading of comparison Brother argues as follows:

8. Article 2 (9) of the Basic Regulation was infringed because export prices on an ex-works basis were compared with normal

value determined on the basis of the resale price of Brother Sales Ltd.

9. In the alternative, Article 2 (10) of the Basic Regulation was infringed by the Community authorities' refusal to make allowances for differences affecting price comparability.

10. In the further alternative, Article 2 (10) (c) of the Basic Regulation was infringed by the Community authorities' refusal to deduct from the resale prices charged by Brother Sales Ltd a percentage in respect of general expenses at least equal to the percentage of general expenses incurred by the Brother subsidiaries in the EEC.

11. The principles of equality and non-discrimination were infringed inasmuch as the stage at which an exporter operates on his home market and on the EEC market has a preponderant effect on the existence and the level of the dumping margin.

12. In breach of the principle of legal certainty, the lack of clarity and the variations in the Community authorities' anti-dumping practice make it completely impossible for Brother, even in theory, to adjust the prices of its exports to the EEC so as to avoid dumping.

In my view all of these arguments concerning comparison fall to be rejected for the reasons given in my Opinions in *TEC* and *Canon*.

IV — Injury

Under the heading of injury Brother argues as follows:

13. The method of calculating the injury was unreasonable; the comparison was made between prices and costs; and the rights of the defence were infringed. In my view, for the reasons given in my Opinions in *TEC* and *Canon*, the use of target prices to establish the extent of the injury was lawful. In my view the comparison was plainly made between prices and prices, contrary to Brother's assertion; and as regards the information given to Brother in that connection, I consider that the Community authorities gave Brother all the information requested which they could consistently with the requirements of confidentiality under the Basic Regulation.

14. The determination of injury involved unreasonable calculations of allowances for different models and discrimination between exporters. In my view, for the reasons given in my Opinion in *Canon*, the use of a figure at the mid-point between the evaluations made by the exporters and those made by the Community industry, as described in Recital 34 to the Definitive Duty Regulation, has not been shown to be unlawful. Brother suggests that because Olivetti concluded a cooperation agreement with Toshiba, TEC's parent company, on 14 May 1985, TEC or Olivetti or both might have submitted misleading evaluations; but it says itself that it has no knowledge of whether they actually did so. There is plainly no evidence to support this allegation, which must therefore be dismissed.

15. The assessment of undercutting included target prices for models sold by the Community manufacturers but originating in non-Member countries. The Council has answered, and Brother has accepted, that two of the models said to be manufactured in non-Member countries were in fact manufactured in the Community and that two models manufactured in Japan and sold in the Community on an OEM basis were not used in the injury determination. As regards the remaining models mentioned by Brother, the Council conceded that, although they were sold in the Community by Olivetti, they were actually built in Singapore, and in the course of the present proceedings it corrected that error by Regulaton No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2). That correction did not result in any change in the rate of duty for Brother. The present argument therefore no longer has any substance.

V — Interests of the Community

16. Finally, Brother argues that the assessment of the Community's interests for the purposes of Article 12 of the Basic Regulation was incomplete, because the anti-dumping duty on Japanese producers will benefit the American exporter IBM rather than the Community industry and because, if any sales can be realized at the high prices incorporating the anti-dumping duty, they will have an undesirable inflationary effect on the Community.

In my view, the position of manufacturers in third countries other than Japan cannot in principle affect the outcome of a proceeding to determine whether Japanese manufacturers have been dumping. If it is found that the latter have been dumping and that the Community industry requires protection against that dumping, the fact that a manufacturer in another non-Member country might benefit indirectly from the imposition of an anti-dumping duty does not of itself infringe the Basic Regulation. It may be one of the factors which the Community authorities can take into account in assessing the interests of the Community. The Community authorities obviously enjoy a broad discretion in making that assessment, and in my opinion Brother has failed to show that the discretion was wrongly exercised by reference to exporters in third countries other than Japan. Similarly, the Community authorities had to weigh the disadvantages of higher prices to the Community consumer in the short term against the need to ensure the survival of the Community industry. They did so as stated in Recital 40 to the Definitive Duty Regulation, and in my view Brother has not shown that their discretion was used unlawfully in that respect. This argument, I consider, should be rejected.

Therefore, in my view Case 250/85 falls to be dismissed in its entirety. The Council and Cetma are entitled to their costs of the action including those relating to the proceedings for interim measures, which they have claimed. The Commission has already been awarded its costs as defendant, including those relating to the proceedings for interim measures, by the Order of 16 May 1986. It is now entitled to its costs incurred as intervener in the present case.

Conclusion

Accordingly, in my opinion,

— Case 56/85 should be dismissed, either as having no purpose or for the same reasons *mutatis mutandis* as those which lead to the dismissal of Case 250/85, and Brother ordered to pay the Commission's costs of that action, and

— Case 250/85 should be dismissed and Brother ordered to pay the costs of the Council and of Cetma, including those relating to the proceedings for interim measures, and the costs of the Commission as intervener.