OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 December 1990 *

Mr President,
Members of the Court,

1. Apart from the submission alleging the incompatibility of Article 2(10)(c) of Council Regulation (EEC) No 2176/84 (hereinafter referred to as 'the basic regulation') [1] with the 1979 GATT Anti-Dumping Code, [2] none of the submissions made by Matsushita Electric Industrial Co. Ltd (hereinafter referred to as 'MEI') and Matsushita Electric Trading Co. Ltd (hereinafter referred to as 'MET') in support of their application for the annulment of Council Regulation (EEC) No 535/87 [3] (hereinafter referred to as 'the definitive regulation' or 'the contested regulation') is really new.

2. In Cases C-171/87 *(Canon)* and C-174/87 *(Ricoh)*, I have already dealt with the submissions alleging infringement of Article 2(3) and (7) (concerning determination of the normal value) and Article 2(9) and (10)(c) of the basic regulation (concerning comparison of the normal value with the export price). In the present Opinion I therefore refer, in part, to my Opinions in those two other cases and, for the rest, confine myself to expressing my views on Matsushita's specific arguments in which it draws attention to the particular features which distinguish it from other Japanese exporters concerned either by the contested regulation or by the regulation concerning electronic typewriters (hereinafter referred to as 'ETW'), the application for the annulment of which was dismissed by the judgments of the Court of 5 October 1988. [4] Moreover, the submission alleging infringement of Article 190 of the EEC Treaty (lack of an adequate statement of reasons) is closely linked with the submission as to miscalculation of the normal value, in so far as the Council is accused of not having sufficiently explained the manner in which it applied Article 2(3) and (7) of the basic regulation in the present case.

3. As regards the submissions concerning injury, the Community interest and calculation of the anti-dumping duty, they were the subject of joint observations submitted by the applicants in Cases C-174/87 *(Ricoh)*, C-176/87 *(Konishiroku)*, C-177/87 *(Sanyo)* and C-179/87 *(Sharp)*, whose merits I discussed in my Opinion in Case C-174/87 *(Ricoh)*. I shall not therefore refer to them again in the present Opinion.

* Original language: French.

1 — 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).

2 — Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade approved by Council Decision of 10 December 1979 concerning the conclusion of Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 90).

3 — Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12).

4 — Case 250/85 Brother v Council [1988] ECR 5683; Joined Cases 277 and 300/85 Canon v Council [1988] ECR 5731; Case 301/85 Sharp Corporation v Council [1988] ECR 5813; Joined Cases 260/85 and 106/86 TEC v Council [1988] ECR 5855; Joined Cases 273/85 and 107/86 Silver Seiko v Council [1988] ECR 5927.

A — Determination of the normal value

4. Matsushita makes three criticisms the manner in which the Council determined the normal value. For a details of the arguments submitted I refer you to the Report for the Hearing.

1. *Infringement of Article 2(3) and (7) of the basic regulation, in so far as the prices charged to the first independent purchasers were used in order to determine the normal value*

5. In support of its first submission Matsushita argues that the basic regulation does not allow the prices charged to the first independent purchasers to be used for determination of the normal value. In its view, Article 2(3) and (7) of the basic regulation form a complete system for determination of the normal value where there is an association between a manufacturer and its customers and require the Community institutions to determine the normal value on the basis of the price paid to the manufacturer or of the costs incurred by the latter. The Council thus infringed those provisions by refusing to apply Article 2(7) to the sales by MEI to its related sales companies and, in so far as it treated those sales as not being in the ordinary course of trade, by not determining the normal value in accordance with Article 2(3)(b).

6. However, I have already pointed out in my Opinions in Cases C-171/87 *Canon*, and C-174/87 *Ricoh*, that it is apparent from the judgments in the ETW cases cited earlier that:

(i) in order to establish the normal value, Article 2(3)(a) must be used *primarily*, Article 2(3)(b) being merely *subsidiary*; [5]

(ii) where the prices paid by the first independent purchaser of the product may be regarded as the prices actually paid for the product in the exporting country or country of origin in the ordinary course of trade, they must be used pursuant to Article 2(3)(a) in preference to any other factor; [6]

(iii) that is the case where there is a division of production and sale activities within a group which, although made up of legally distinct companies, is a 'single economic entity'. [7]

7. It follows from the foregoing that to the extent to which the conditions are fulfilled for the prices paid by the first independent purchaser to be regarded as charged 'in the ordinary course of trade' and thus to be considered as the normal value for the purposes of Article 2(3)(a), the question of the applicability, and therefore of the conse-

5 — See the judgment in Joined Cases 277 and 300/85 Canon v Council [1988] ECR 5731, paragraph 11, at 5799.

6 — See the same judgment, paragraph 12.

7 — See, in the context of determination of the normal value, paragraph 16 of the judgment in Case 250/85 Brother v Council [1988] ECR 5683, at 5723, and paragraph 13 of the judgment in Joined Cases 273/85 and 107/86 Silver Seiko v Council [1988] ECR 5927, at 5975.

quences of the possible application, of Article 2(7) need not be considered.

8. It also follows that no argument in support of the view that only the prices paid to the *manufacturer* or the costs incurred by it may be used in determining the normal value can be derived either from the fact that Article 2(3)(b)(ii) provides that the constructed value is to be determined by adding *cost of production* and a reasonable margin of profit and that that *cost of production* includes a reasonable amount for selling, administrative and other general expenses, or, from the fact that the provisions of the basic regulation concerning determination of the normal value, by contrast with those concerning determination of the export price (see Article 2(8)(b], do not expressly provide for recourse to the level of (re)sale to the first independent purchaser. Moreover, it is expressly stated in paragraph 29 of the judgment in *TEC* v *Council,* above, that even if Article 2(3)(b)(ii) is applied, not only the costs incurred by the manufacturer (or its internal sales department) but also those incurred by a sales company which, although legally distinct, is financially controlled by it, must be included in the normal value.

9. The question therefore remains to be considered whether the factors to which Matsushita drew attention in its reply, which was lodged after judgment was delivered in the ETW cases, to show that MEI and its 59 related sales companies do not form a 'single economic entity' within the meaning of those decisions are sufficient to compel the conclusion that those judgments are not applicable to the present case. Matsushita claims, first, that MEI is not merely a manufacturer of plain paper photocopiers (hereinafter referred to as 'PPCs') but also carries out a number of sales functions and that the transfers between MEI and its 59 related sales companies are genuine sales. It asserts, secondly, that those 59 related sales companies to which MEI thus 'sells' its products discharge functions other than those of an internal sales department and that their selling costs, which are additional to the expenses already incurred by MEI itself, should not therefore have been included in the normal value.

10. Having regard to the circumstances of the present case, I do not however think that those factors are such as to justify Matsushita and its related sales companies not being regarded as constituting a 'single economic entity' within the meaning of the ETW cases. It should be noted in the first place that in each of the judgments of 5 October 1988 in which the Court applied the theory of the 'single economic entity', it considered it sufficient to find that the manufacturer in question [8]

'markets is products in Japan through a distribution company which it controls financially and to which it entrusts tasks that are normally the responsibility of an internal sales department of the manufacturing organization'.

Admittedly, that wording does not perhaps require the theory of the 'single economic

8 — Paragraph 15 in Brother, paragraph 39 in Canon, paragraph 26 in TEC and paragraph 12 in Silver Seiko.

entity' necessarily to extend to a case where the manufacturer itself sells some of its products directly to independent customers, through an internal sales department, and others through one or more distribution companies. On the other hand, however, it cannot be deduced from that wording that the Court wished to limit application of the 'single economic entity' theory to those cases where the manufacturer itself carries out no sales functions and where all the functions relating to sales, which are normally the responsibility of an internal sales department, are carried out exclusively through one or more related sales companies. The theory of the 'single economic entity' is thus applicable where there is a

'division of production and sales activities within a group made up of legally distinct companies'.[9]

In my opinion it does not require a clear separation between production activities on the one hand and sales activities on the other, that is to say it is not necessary for the company which carries out the production activities not to discharge any function relating to sales. It is sufficient if the manufacturing company itself does not sell direct to independent customers.

11. That interpretation seems to me to be in conformity with the aim which that theory pursues, namely to ensure that economic reality prevails over legal forms and fabrications. Specifically, that theory must make it possible to 'ensure that costs which manifestly (or necessarily[10]) form part of the selling price of a product where the sale is made by an internal sales department of the manufacturing organization are not left out of account where the same selling activity is carried out by a company which, despite being financially controlled by the manufacturer, is a legally distinct entity'.[11] For that purpose, it must be applied not only where all the sales functions are discharged by a company which, although legally distinct, is financially controlled by the manufacturer, but also where the manufacturer has entrusted only some of those functions to such a company and carries out the remainder through an internal department.

12. In the second place, I would observe that in the present case, according to the applicants themselves (see in particular paragraph 21 of the application), the main task of MEI's internal sales department in the area of office equipment (belonging to the Office Equipment Division, hereinafter referred to as the 'OED') is 'to assist related sales companies in their sales activities, especially when sales are made to large customers, such as banks, schools or other similar institutions', the reason for this being that 'most of them do not have personnel specialized in the sale of PPCs'. It thus steps in to fulfil a task which the related sales companies are not able to carry out themselves entirely and, whilst it carries out sales functions, it does so for the customers of the related sales companies, not for the latter companies themselves.

13. Moreover, when the OED 'salesmen organize exhibitions, fairs, sales competitions amongst related sales companies and dealers', they carry out tasks which are

9 — Paragraph 16 of the Brother judgment, paragraph 40 of the Canon judgment, paragraph 28 of the TEC judgment and paragraph 13 of the Silver Seiko judgment.

10 — See paragraph 29 of the TEC judgment.

11 — See paragraph 14 of the Silver Seiko judgment.

intended to promote sales of Matsushita products — sales not to the related sales companies but to the customers of the related sales companies.

14. Similarly, the fact that they 'visit dealers and actual or potential customers with related sales companies' salesmen and ... take purchase orders from related sales companies' shows that in fact they do not sell to the related sales companies but that, at most, they cooperate with them in sales to independent dealers.

15. Finally, although 'advertising for PPCs in Japan is mainly carried out by OED', the object is certainly not to promote 'sales' by MEI to its related sales companies but rather sales by the latter to independent customers.

16. In those circumstances, it cannot be considered that the sales functions carried out by MEI relate to transfers to its 59 related sales companies or that those transfers constitute actual sales within the meaning of the anti-dumping regulations, that is to say sales 'in the ordinary course of trade'. Moreover, since the functions in question relate to sales to the first independent purchasers on the domestic market, the purpose of including in the normal value all the costs which are manifestly included in the selling price on the domestic market requires the costs incurred in the exercise of those functions to be incorporated in the normal value. Moreover, Matsushita does not challenge such inclusion but, as we have seen, taking the view that the functions discharged by the related sales companies are different from those of an internal sales department, it claims that the normal value should include only MEI's costs, and not, therefore, those incurred by the related sales companies.

17. It must be observed, in the third place, that it already follows from the finding that the functions carried out by MEI are merely supplementary to those discharged by its related sales companies, and from the fact — which has not been challenged — that no sale to independent customers has been made by MEI itself, that the sales functions exercised by the related sales companies are essential to the sales of Matsushita PPCs on the domestic market. Moreover, in its application (see in particular paragraph 24), Matsushita states expressly that 'each related sales company is responsible for the sale of PPCs to dealers located in its territory' and that 'their activities involve not only the supply of PPCs to dealers, but also the transport of PPCs to the dealer's premises or to end-users, the advertising and promotion of PPCs, the servicing and, where possible, the repairing of PPCs sold to end-users'. What are involved here are, without any doubt, activities which, in the absence of related sales companies, would be carried out by an internal sales department and the costs relating thereto must therefore be included in the normal value.

18. It is true that the normal value thus arrived at, as Matsushita states,[12] includes 'two sets of costs ... those of the applicant MEI itself and those of the related sales companies', but, contrary to Matsushita's

12 — See paragraph 7(iii) of the reply.

view, since those costs relate to distinct tasks, which all relate to sales on the domestic market, the inclusion of only one set of costs would not have been sufficient to ensure the incorporation in the normal value of all the costs which manifestly form part of the selling price where the selling activities are carried out exclusively either by an internal sales department of the manufacturer or by a company which, although legally distinct from the manufacturer, is financially controlled by it.

19. I conclude from the foregoing that, since all the sales to independent purchasers on the domestic market are made by MEI's related sales companies, the fact that MEI has not entrusted all the sales functions relating thereto to those sales companies but carries out some of them itself (in particular support activities) does not mean that MEI and its sales companies cannot be regarded as constituting a 'single economic entity' for the purposes of determining the normal value.

20. For the sake of completeness, I would add that the statement in paragraph 23 of the application that 'during the period of investigation, the equity interest held by MEI and other companies of the Matsushita Group in these 59 (related sales) companies varied from 12.5% to 100%' is not by itself sufficient to show that they were not under the financial control of MEI. First, among the 59 sales companies in question there were only a few in which MEI did not hold at least 50% of the equity. Secondly, the degree of financial control is not measured only by capital holdings. In that regard, it might be observed, for example, that MEI's Industrial Sales Division is responsible for marketing policy for industrial products and accordingly determines, in particular, in cooperation with the OED, PPC pricing policy, including the principles governing the grant of discounts (see paragraph 19 of the application). It also seems to me to be significant that Matsushita has not based any argument on the fact that it held less than half the capital in some of its sales companies. Indeed, it refers to that fact only incidentally in a footnote in its reply, where it claims that the internal transfers within the group are in fact real sales, even though they are between related parties (see paragraph 8 of the reply).

2. Infringement of Article 2(3)(a) of the basic regulation on the ground that the main-unit trade-in discount was included in 'the ... price actually paid or payable' used for the normal value

21. I have already shown, in my Opinion in Case C-171/87, *Canon*, that every trade-in discount must in principle be included in the normal value as determined in accordance with Article 2(3)(a) of the basic regulation, since, reflecting as it does the value which the traded-in machine represents for the person receiving it, it specifically constitutes a part of the price 'actually' paid or payable by the purchaser of the new product. That remains the case even if that value corresponds not to the resale value of the used products but, as in the present case, to the advantages accruing to the manufacturer from their withdrawal from the market, which the Council described at the end of recital 13 of the contested regulation. Matsushita's argument that those advantages are not direct and quantifiable

does not seem to me to be relevant in this context since the institutions did not have to make an evaluation of the specific profit which each of the various manufacturers obtains from the withdrawal of its used PPCs from the market but simply added to the net prices paid or payable by their customers the real amount of the reduction granted by way of trade-in discount.

22. The specific arguments which Matsushita has put forward in support of its claim that the trade-in discounts granted by the sales companies to their independent customers are ordinary discounts in all cases and should not have been included in the normal value likewise cannot be upheld.

23. In the first place, the purpose of granting the discount without proof of any trade-in having to be produced and without Matsushita's checking whether a trade-in has taken place is precisely to enable dealers selling Matsushita PPCs to effect trade-ins and to withdraw the traded-in PPCs from the market. Having regard to the other discounts granted by Matsushita, namely the main-unit discount, the cash discount and the discount to meet competition (see chapter I. B of the Report for the Hearing) and to the sometimes hesitant or indeed contradictory statements made by Matsushita at the various stages of the proceedings (see paragraphs 55 to 77 of the Council's defence), it is also difficult to understand why Matsushita grants discounts which it calls 'main-unit trade-in discounts' if they are not intended — besides promoting the sale of new PPCs — to encourage the trading in of used PPCs. Finally, according to Matsushita itself, there are trade-ins in 90% of cases.

24. Furthermore, none of the facts which, according to Matsushita, show that the trade-in discount does not correspond to a value transferred by dealers to the related sales companies is relevant in that regard. The fact that independent dealers did not (always) return to the related sales companies the second-hand traded-in PPCs and did not forward to them (any) income arising from their being scrapped or re-sold is no basis for saying that Matsushita did not obtain any advantages of the kind indicated by the Council from their removal from the market. On the contrary, the fact that Matsushita only rarely recovered the traded-in machines or did not itself benefit from (any) income deriving from their being scrapped or re-sold gives the impression that, by granting the trade-in discount, it sought specifically to benefit from those advantages which are not linked with the recovery or re-sale value of the traded-in machines. Moreover, in Matsushita's case in particular, the Council has certainly not overlooked the fact that in certain cases the grant of the discount was not legally (by virtue of an agreement or arrangement) conditional upon withdrawal of the old PPCs from the market. It is in fact Matsushita which is referred to in the penultimate paragraph of recital 13 of the contested regulation where it is stated that one exporter

'argued that, in its case, dealers were not required to prove that the machines were removed from the market before qualifying for the trade-in payment'.

The Council's reply, in the last paragraph of the same recital, was that

'the fact that there is virtually no second-hand market for PPCs in Japan shows that almost without exception the dealers remove the machines from the market and that consequently this exporter obtained intentionally or otherwise the same benefit as all other PPC producers in Japan'

and that

'no convincing evidence was supplied by the exporter concerned to suggest the contrary'.

Thus, in the almost total absence of a second-hand PPC market in Japan, Matsushita enjoyed the same advantages as the other manufacturers which did not lodge objections (see the second paragraph of recital 13) or whose trade-in

'payments were described in every case as being for traded-in machines and were conditional almost without exception on the machines being removed from the market' (see the fourth paragraph of the same recital).

Since Matsushita itself acknowledges that in Japan 'the second-hand PPC market has now practically disappeared' (see paragraph 31 of the application), I consider that the Council was entitled to take the view that the withdrawal of used PPCs from the market was the usual practice and that in those circumstances it was of no importance that the trade-in discount was not formally made conditional upon withdrawal or proof of withdrawal from the market.

25. As regards, finally, the Council's determination of the value of the main-unit trade-in discount, I am of the opinion that the Council cannot be accused of committing a manifest error of appraisal by including in its calculation of the value of the trade-in discount the 'main-unit discount' granted by all Matsushita's sales companies other than its subsidiary Osaka N. O. A. In fact, it was only in respect of the latter company that the applicant provided any evidence to distinguish that discount from the 'trade-in discount'. Since the sales of Osaka N. O. A. represented only about 22.5% of the total sales made during the period of the investigation, the Council cannot be criticized for applying the figures for Osaka to the 58 other related sales companies, for which Matsushita had provided only a single figure covering both discounts.

3. *Infringement of Article 2(3)(b)(ii) of the basic regulation, in that a manifestly excessive amount of SGA*[13] *expenses was included in the constructed normal value for sales to OEMs*[14]

26. It will be remembered that the Council took account of the differences of costs and profits between manufacturers' own-brand sales and sales to OEMs by adopting for the latter a flat-rate profit of 5% instead of the — higher — profit margin achieved by manufacturers on sales under their own brand-name.

13 — An abbreviation for the selling, administrative and other general expenses referred to in Article 2(3)(b)(ii) of the basic regulation.

14 — This abbreviation stands for Original Equipment Manufacturers. It is used, paradoxically, for suppliers of PPCs which sell under their own brand-name products manufactured by others.

27. Matsushita considers that the Council committed a manifest error of appraisal in determining the amount of SGA expenses which would have been incurred if it had sold PPCs on an OEM basis in Japan. By incorporating those expenses in the constructed normal value for the purposes of comparison with export sales to OEMs in the Community, it is said to have infringed Article 2(3)(b)(ii) of the basic regulation, which provides that the amount of SGA expenses must be 'reasonable'.

28. Matsushita claims in particular that the following items were wrongly included in the constructed normal value:

(1) the SGA expenses of the related sales companies, since if sales to OEMs had taken place on the Japanese market they would have been made directly by the manufacturer, MEI;

(2) the expenses of, *inter alia*, advertising and promotion which it incurred for sales under its own brand-name and which, in the case of OEMs, would be borne by the OEMs themselves;

(3) the main-unit trade-in discounts, even though it is obvious that a manufacturer would never grant a discount to an OEM purchaser with a view to enabling him to undertake trade-ins.

29. In that context, however, it is necessary to take account in general terms of the fact that, in the absence of any OEM sales on the Japanese market, the institutions made an evaluation intended to cover all cost and profit differences, whatever the nature thereof. It cannot therefore be claimed with any certainty that a given category of expenses, included in the normal value for sales under the manufacturer's own brand-name, was also included in the constructed normal value for sales to OEMs. In any event, the possibility that they were all included in their entirety must be ruled out.

30. In the second place, I believe that the institutions were fully entitled not to take into consideration the two agreements which Matsushita produced in order to prove that although, in its case, there had been OEM sales in Japan, they were made directly by MEI. Matsushita did not in fact reveal either the identity of the OEM purchasers concerned or the nature of the products in question, so that the institutions were unable to verify whether the agreements were representative. Moreover, even if the sales had been made directly by MEI and not, as in the case of the sales under Matsushita's brand-name, by its related sales companies, they would have required sales efforts additional to those normally allowed by MEI and would therefore have involved SGA expenses additional to and higher than those already incurred by MEI for its sales under the Matsushita brand-name: those expenses would also have to have been included in the normal value.

31. As regards the evidence concerning the costs of, *inter alia*, advertising and promotion, to which Matsushita referred, it all relates to sales to OEMs in the Community. And as I have already stated in my Opinion in Case C-172/87, *Mita*, in constructing the normal value the institutions are not obliged to adopt data relating to any market other than the

'domestic market of the exporting country or country of origin' expressly mentioned in Article 2(3)(b) of the basic regulation.

32. Finally, if the main-unit trade-in discount was not granted in the case of sales to OEMs, the price of new PPCs would be correspondingly higher so that the question of including an amount in respect thereof in the normal value, by way of SGA expenses, would not even arise.

33. I conclude from all the foregoing that Matsushita has not succeeded in showing that, by acting as it did, the Council included in the constructed normal value for sales to OEMs an amount of SGA expenses which was not 'reasonable'.

34. The submission as to unlawful determination of the normal value must therefore be dismissed in its entirety.

B — The comparison

35. In the alternative, in case it should be found that the Council was entitled to treat MEI and its related sales companies as constituting a 'single economic entity' for the purpose of determining the normal value, Matsushita claims that it did not, on the other hand, make the comparison between the export price and the normal value at the same level of trade and that it thus infringed Article 2(9) or, alternatively, Article 2(10)(c) of the basic regulation. According to Matsushita, even after certain adjustments were made in accordance with Article 2(10)(c) to take account of certain cost differences relating directly to export sales or sales on the domestic market, there is still a difference in the level of trade deriving from the fact that the export price includes the costs borne by Matsushita in placing the PPCs at the disposal of the importers at its premises near Tokyo, whereas the normal value includes not only the expenses borne by Matsushita for sales to the related sales companies but also those borne by the latter in placing the PPCs at the disposal of the dealers at their premises. The export price thus corresponds to the ex-factory stage whereas the normal value corresponds to the regional-distributor level, In short, Matsushita considers that the normal value should include only the costs borne by MEI and not those incurred by its related sales companies: whilst the latter could have been included in the normal value under Article 2(3)(a), they should have been deducted from it under Article 2(9) or Article 2(10)(c).

36. I can dispose of that argument very briefly. As Matsushita itself began to apprehend in its reply, which was lodged some three months after judgment was delivered in the ETW cases,

'if the Council was right to treat the related sales companies as performing the functions of a mere internal sales department, then no difference in level of trade arises between the ex-factory export price and the ex-related-sale-company normal value'.

37. As I in fact pointed out in my Opinions in Cases C-171/87 *Canon*, and C-174/87 *Ricoh*, it is apparent from those judgments that where there is a division of production and selling activities within a group made up of companies which, although legally distinct, are financially linked,

'it is precisely by taking account of the first sale to an independent purchaser that the normal value at the "ex-factory" level can be correctly established'.[15]

The normal value thus also corresponds, contrary to Matsushita's assertion, to the ex-factory level.

38. It is also apparent from paragraph 30 of the judgment in *Silver Seiko* v *Council*, above, that the institutions are not obliged to make any allowance in respect of alleged differences of level of trade as long as the export price and the normal value both correspond to the ex-factory level.

39. That being so, it is unnecessary to express any view concerning Matsushita's interpretation of Article 2(9) and (10)(c) of the basic regulation or of the relationship between those two paragraphs. The argument that Article 2(9) required the Council to make allowances to take account of differences in level of trade even if those differences did not satisfy the conditions laid down in Article 2(10) presupposes that such differences in level of trade did exist. The same applies to the argument — put forward in the alternative — that, having failed to proceed in that way, the Council should, to take account of differences in level of trade, have made adjustments on the basis of Article 2(10)(c), even if those differences bore no direct relationship with the sales under consideration.

15 — See in particular the judgment in Canon v Council, above, paragraph 41 at [1988] ECR 5805.

C — The incompatibility of Article 2(10)(c) of the basic regulation with the GATT 1979 Anti-Dumping Code

40. The foregoing also applies to the allegation that Article 2(10)(c) of the basic regulation is illegal. Matsushita claims that

'if Article 2(10)(c) of the Anti-Dumping Regulation entitles the Council to refuse to make allowances even though normal value and export price are not on a comparable basis as regards level of trade, then Article 2(10)(c) is illegal as being contrary to the Community's obligations under the 1979 Anti-Dumping Code, and cannot be applied to the applicant' (see the title of the applicant's fifth submission).

Consequently, the definitive regulation, in so far as it is based on that provision, should be declared void.

D — The injury

E — The Community interest

41. However, in the first place, that objection of illegality can be of no help to Matsushita in the present case since, as we have just seen, the Council compared the normal value and the export price at the same level of trade. Secondly, it is based on a false assumption, namely that the basic regulation authorizes the Council to make the comparison between those two items at different levels of trade. But Article 2(9) expressly provides that

F — Calculation of the anti-dumping duty

'they shall normally be compared at the same level of trade, preferably at the ex-factory level . . .'

43. For the reasons given in my Opinion in Case C-174/87 *Ricoh*, the submissions concerning errors in the determination of the injury, in the evaluation of the Community interest and in the calculation of the anti-dumping duty, which Matsushita made in common with the applicants in Case C-174/87 (*Ricoh*), Case C-176/87 (*Konishiroku*), Case C-177/87 (*Sanyo*) and Case C-179/87 (*Sharp*), must also be dismissed.

and Article 2(10)(c) provides that allowances are to be made to take account of differences of level of trade

'in so far as account has not been taken of them otherwise'.

G — Infringement of Article 190 of the EEC Treaty

42. Accordingly, it is unnecessary to express any view on the direct applicability of the GATT Anti-Dumping Code, namely the question whether it confers on individuals the right to rely on them in legal proceedings.

44. The submissions as to infringement of Article 190 of the EEC Treaty are closely linked with the various complaints made by Matsushita regarding the manner in which the Council determined the normal value, which have been discussed in Chapter A of the present Opinion.

45. Matsushita claims in the first place that the contested regulation does not give a sufficiently clear or precise indication of the reasons which prompted the Council to depart from the mandatory scheme laid down by Article 2(3) and (7) of the basic regulation for determination of the normal value in the case of an association between a manufacturer and its related sales companies. That argument is based on the premise that the Council erroneously applied to Matsushita the 'single economic entity' theory and that it should, in view of the fact that the sales by MEI to its related sales companies do not constitute transactions in the ordinary course of trade, have constructed the normal value in accordance with Article 2(3)(b)(ii) of the basic regulation. Since that premise has proved unfounded, that first submission must be dismissed. Moreover, recital 7 of the provisional regulation, expressly confirmed in recital 6 of the definitive regulation, clearly indicates the reasons for which the institutions used the prices charged to independent purchasers in order to determine the normal value and refused to apply Article 2(7) of the basic regulation.

46. The same applies to Matsushita's second submission that the Council's statement that it did not perhaps 'intentionally' benefit from the advantages resulting from the absence of a second-hand PPC market cannot 'logically' support its decision to include the main-unit trade-in discount in the normal value. We saw earlier that in that connection it is of no importance that the grant of the discount was not legally conditional upon proof of the withdrawal from the market of the traded-in machine, since the absence of a second-hand market proved that withdrawal was the rule and brought Matsushita the same advantages as those which accrued to the other manufacturers. That expressly follows from the last part of recital 13 of the contested regulation.

47. As regards Matsushita's third submission, that the contested regulation does not indicate the reasons of law or of fact for the inclusion of certain costs incurred by it for sales under its own brand-name and the trade-in discount in the constructed normal value for sales to OEMs or the reasons for which the Council considered that sufficient account would be taken of the cost and profit differences between sales to OEMs and sales under its own brand-name by applying to the former a profit margin of only 5%, it must be pointed out in the first place that the adjustment thus made to the profit margin takes account of the cost and profit differences without distinction, and thus also of (possible) differences in advertising or promotion costs, to which Matsushita makes special reference. Secondly, it is clear from recital 11 of the contested regulation that because of the absence of any OEM sales on the Japanese market during the reference period,

'any difference in cost or profit could not be accurately assessed' (first paragraph)

and that in the absence of any guidance regarding such differences,

'it [was] considered appropriate that the same profit level be applied to all [the] constructed values' (third paragraph).

The contested regulation thus gives an adequate statement of reasons both regarding the possible inclusion, after adjustment, of certain expenses in the normal values constructed for certain sales to OEMs and regarding the application of a flat-rate and uniform profit margin to those constructed values. [16]

48. The submissions as to infringement of Article 190 of the EEC Treaty must therefore be dismissed.

Conclusion

49. Since, therefore, none of Matsushita's submissions can be upheld, its application must be dismissed and it must be ordered to pay the costs, including those of the interveners.

16 — The question whether those costs might possibly have been included and whether the adjustments could properly be flat-rate and uniform are matters of substance. The first was examined in Chapter A.3 of the present Opinion and the second in paragraph 12 of my Opinion in Case C-172/87 Mita.