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

Mr President,
Members of the Court,

1. Case 172/87 raises fewer — and less complex — problems than the other seven actions for annulment that Japanese manufacturers of plain paper photocopiers (hereinafter referred to as 'PPC') have brought against 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 [1] (hereinafter referred to as 'the definitive regulation' or 'the contested regulation'). First, the applicant, Mita, bases its action on only two submissions, one relating to determination of the normal value and the other to determination of the export price. Secondly, the Court has already had occasion to give its views on similar if not identical submissions in its two judgments delivered on 14 March 1990 in Joined Cases C-133/87 and C-150/87 *Nashua* v *Commission and Council* [1990] ECR I-719 and in Case 156/87 *Gestetner* v *Council* [1990] ECR I-781.

2. Moreover, Mita intervened in support of Gestetner in Case C-156/87 and, in the part of its observations devoted to the substance, confined itself to referring to the submissions that it had lodged or was to lodge in the present case. Gestetner in turn has intervened in the present case in support of Mita and, in its observations, relies largely on those which it submitted in Case C-156/87, which it treats as incorporated in those lodged in the present case, merely adding a number of additional remarks.

3. The two companies' mutual interest in intervening in support of each other arises from the fact that one of them, Gestetner, buys photocopiers from Mita in Japan and then sells them in the Community and in numerous non-member countries. Gestetner thus falls into the category of Original Equipment Manufacturers (hereinafter referred to as 'OEMs') [2] whose photocopiers, having been produced by a Japanese exporter, are subject to the anti-dumping duty imposed on all the latter's machines. In Mita's case, that duty, at the rate of 12.6%, is equal to the dumping margin found in respect of that company. As the Court observed in paragraph 21 of its judgment in *Gestetner*, that is a weighted margin which takes account not only of sales of PPCs marketed under Mita's own brand-name but also of all Mita's sales channels, and in particular its sales to OEM customers, including Gestetner. It is precisely the special features of sales to OEMs that form the basis of Mita's first submission and part of its second submission in this case.

* Original language: French.

1 — OJ 1987 L 54, p. 12.

2 — In their decision, the institutions call firms such as Gestetner Original Equipment Manufacturers and I shall follow that practice, though it should be pointed out that they are in fact companies which buy equipment from original manufacturers and sell it under their own brand-names.

1. *The submission alleging incorrect construction of the normal value of the PPCs sold to OEMs*

4. In its first submission, the applicant claims essentially that in order to determine the normal value for the purpose of making a comparison with Mita's export sales to OEMs, the institutions only partly took into account the fundamental differences between Mita's export sales to OEMs and Mita's sales on the domestic market. In its view, the institutions correctly took account of the lower level of profit which manufacturers achieve on sales to OEMs but wrongly failed also to take account of the lower costs which they incur in respect of such sales.

5. However, as the Court confirmed in paragraph 33 of its judgment in *Nashua,* cited earlier,

'it is apparent from the documents before the Court that the institutions took into consideration the difference between the costs and profits associated with sales to OEMs and the equivalent figures for other sales'.

The Court explained that

'indeed, it was for that purpose, and because the institutions found it impossible to gauge that difference accurately, that in constructing the normal value they set the profit margin at 5% instead of its average rate, estimated at 14.6%, and applied that margin to sales under the manufacturers' own brand-names'.

The adjustment thus made to the profit margin is therefore deemed to cover differences not only of profits but also of costs.

6. The question remains whether the level of the adjustment made by the institutions was sufficient to take account of all those differences. In that regard, it must be noted in the first place that the Court confirmed in its judgment of 5 October 1988, *TEC* v *Council,* at paragraph 33 (Joined Cases 260/85 and 106/86, [1988] ECR 5855), that

'Article 2(3)(b)(ii) [of the basic regulation [3]], according to which a "reasonable amount" for SGA expenses [that is, selling, general and administrative expenses] must be included in the constructed normal value, allows the Community institutions a margin of discretion in evaluating that amount'.

That applies also to evaluation of the amount of the 'reasonable margin of profit' referred to in the same provision. For its submission to be well founded, Mita would have to prove therefore that in exercising that discretion the Council committed a manifest error or misused its power or that the Council manifestly exceeded the limits of its margin of discretion.

3 — 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).

7. It must be pointed out that, although during the course of the investigation (see Annex 3 to its application), Mita did in fact produce a set of figures which, in its view, showed that

'the costs involved in the sale of OEM products are substantially lower than those involved in the sale of Mita branded products in the domestic market' (see paragraph 40 of the application),

those figures, as the Council did not fail to point out, besides being

'based on its [Mita's] arbitrary allocation of costs elements between OEM and own-brand sales' (see paragraph 10 of the defence),

related only to sales on the Community market and not to those on the Japanese market. It is true that Mita could not give data for OEM sales of PPCs on that market since there were no sales of that kind on that market. It is also true that the normal value for OEM sales was constructed precisely for that reason and that in general Article 2(3)(b) of Regulation No 2176/84 is applicable precisely

'when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin'.

The institutions cannot, however, be compelled by virtue of that fact to use, when constructing the normal value, pursuant to Article 2(3)(b)(ii), data relating to a market other than 'the domestic market of the exporting country or country of origin'. It is apparent from the very wording of Article 2(3)(b)(ii) that

'the production cost shall be computed on the basis of all costs in the ordinary course of trade, both fixed and variable, *in the country of origin*, of materials and manufacture . . . '.

Furthermore, in its judgments in the electronic typewriter cases of 5 October 1988, and in particular in paragraph 18 of the judgment in Case 250/85 *Brother* v *Council* [1988] ECR 5683, the Court pointed out that

'according to the scheme of Regulation No 2176/84, the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or in the exporting country'

and it concluded that

'consequently, it is the expenses relating to sales on the domestic market which must be taken into account'.

It added, in paragraph 19:

'it must also be emphasized that, although in the case of models sold in sufficient quantities on the domestic market it has been possible to calculate the real price, whereas in the case of models that are exclusively exported the normal value had to be constructed, the failure to take into consideration for the latter the same costs as those included in the real price of the models sold on the domestic market would lead to an unjustified difference in the treatment of manufacturers exporting electronic typewriters according to whether they are sold exclusively abroad or in their own country as well'.

Even if the situation referred to there is not exactly the same as that in the present case, in which no OEM sales of PPCs have taken place on the domestic market (see in particular recitals 8 and 11 of the contested regulation), the Court's observation nevertheless indicates the need to take into account, in constructing the normal value of a given model, the costs relating to the domestic market, even if that model is not sold there but is exported.

8. Mita's reference to a recent judgment of the United States Court of International Trade to the effect that it is unreasonable for an authority to require the production of information which it knows to be non-existent likewise cannot have any impact on the present case. In the first place it has been held that

'the attitude of one of its trading partners ... does not suffice to oblige the Community to follow the same course ... [nor can it] determine how the Community legislation is to be interpreted'. [4]

Moreover, the institutions did not require Mita to produce non-existent information but simply refused to take account of information which they did not consider relevant.

9. In my opinion no counter-argument can be derived from the fact that Article 2(3)(b)(ii) refers, at the end, to 'available information', since that part of the provision relates to the element to be added to the costs in respect of profit. As far as profit is concerned, it is also worthwhile asking whether the absence of any OEM sales on the Japanese market is not in fact a clear indication that manufacturers are not interested in selling to OEMs on that market and thereby sacrificing a part of the profits which they can achieve by selling under their own brand-names. On the Community market, by contrast, they may have an interest in giving up a part of their profits in order to gain access to the pre-existing network of OEMs. The possibility cannot therefore be ruled out that if there had in fact been OEM sales on the Japanese domestic market, they would have been at a profit very close to that achieved by Mita on sales under its own brand-name.

10. Having regard to the foregoing considerations, it cannot therefore be concluded that Mita has proved that by adding a margin of 5% to Mita's production costs (including SGA expenses), the Council included in the constructed

4 — See Joined Cases 133 and 150/87 Nashua v Commission and Council, supra, paragraph 30, and Joined Cases 277/85 and 300/85 Canon v Council [1988] ECR 5731, paragraph 15.

normal value for the (hypothetical) sales to OEMs an amount for SGA expenses and profit which is not 'reasonable' within the meaning of Article 2(3)(b)(ii) of the basic regulation.

11. In those circumstances, I consider that there is no need to verify whether the Council's contention, which appears in paragraph 9 of its rejoinder and is supported by a reference to the dot-matrix printer market, that

'the real profit margin for OEM sales in Japan generally tends to be considerably higher than 5%'

is correct. Furthermore, it does not seem to me that Mita has any grounds for complaining since even if it were found to be correct and if, therefore, the adjustment made by the institutions covered only the differences in costs, that could not weaken its position. In fact, the differences in costs to which Mita refers in paragraphs 47 and 49 of the confidential version of its reply are alone substantially greater than the adjustment made, so that, even if they should have been taken into account, they would still be more than sufficient to show that the level of the contested adjustment was insufficient.

12. It is also apparent from the foregoing that there is no justification for the complaint that the method used by the Council in constructing the normal value of PPCs sold to OEMs is discriminatory. That complaint, in so far as it is based on the consideration that the adjustment actually allowed is not the same for all the exporters but is equivalent to the difference between the real profit margin achieved by the exporter concerned on domestic sales under its own brand-name and the flat-rate uniform profit margin of 5% used for construction in respect of all domestic sales to OEM buyers, overlooks, on the one hand, the fact that the adjustment is also deemed to cover the differences in costs and that it is wholly possible, if not probable, that the exporters, which receive high profits, bear lower costs and, on the other, that in the exercise of the discretion which the institutions enjoy, in the absence of any actual information, in evaluating the costs and profits to be included in the constructed normal value, they could reasonably adopt for that purpose one and the same profit level. I would add that it is apparent both from the previous decisions of the Court [5] and from Article 2(3)(b)(ii) of the basic regulation, in its present version, that is to say as it appears in Regulation (EEC) No 2423 of 11 July 1988,[6] which has replaced Regulation No 2176/84, that the calculation of the costs and profits for a given manufacturer or exporter may also be carried out by reference to the costs incurred and the profits earned by other manufacturers or exporters on the domestic market of the country of origin or the exporting country. In that hypothesis too, situations such as that to which Mita objects are likely to arise, since exporters whose costs and profits are normally very high receive a greater benefit than those whose costs and profits are lower from the taking into consideration, for the construction of the normal value, of the costs and profits of other exporters. However, that has not

5 — See for example paragraph 18 of the judgment in Joined Cases 273/85 and 107/86 Silver Seiko v Council [1988] ECR 5927, from which it is apparent that the institutions did not overstep their discretion in using, for the construction of normal value in the case of an exporter which did not sell on the domestic market, the profit margin determined for another exporter. In the present case, the margin used was the lowest of those determined for undertakings which sold sufficient quantities on the domestic market.

6 — OJ 1988 L 209, p. 1.

prevented the Court or the Community legislature from considering such a method of calculation to be reasonable.

13. Finally, for the sake of completeness, I would point out that in its written observations (paragraph 30 et seq.) Gestetner, the intervener, claims that, if it were assumed that the normal value for OEM sales had been determined correctly, an adjustment would have had to be made under Article 2(9) and (10) of the basic regulation in order to ensure a 'proper comparison' between that value and the export price. However, the same argument has already been rejected by the Court in paragraphs 36 to 40 of the judgment in *Gestetner* cited earlier.

2. *The allegedly incorrect determination of the export price of the PPCs sold to independent importers*

14. This second submission has two limbs, depending on whether the sales concerned are to OEMs or to other independent importers. In both cases the role of Mita Europe, a wholly owned subsidiary of Mita, with its registered office in Amsterdam, is at the centre of the dispute. In its judgment in *Gestetner*, *supra*, the Court stated that

'plain paper photocopiers produced by Mita are sold through Mita Europe, which handles customers' orders, sends them the invoices and receives the relevant payments'

and that

'the price paid by purchasers to Mita Europe is not the same as the price invoiced to Mita Japan by Mita Europe' (paragraph 27).

15. With respect to sales to OEM importers, Mita claims essentially that the Council correctly determined the export price in accordance with Article 2(8)(a) of the basic regulation but improperly deducted from it a theoretical 'agent's commission' of 5% to take account of Mita Europe's role, since the provision in question provides no legal basis for such a deduction. In *Gestetner*, *supra*, the Court pointed out that the Council did not determine the export price for sales to Gestetner on the basis of Article 2(8)(a) but that because of Mita Europe's involvement in the sales to Gestetner it had

'decided to construct the export price on the basis of the price invoiced by Mita Europe to Gestetner by making the allowances for which Regulation No 2176/84 provides, that is to say by deducting from that price a reasonable margin for overheads and profit, estimated at 5%'.

In fact, the Council did the same for all export sales to OEMs.

16. With respect to sales to independent importers other than OEMs, Mita recognizes that the Council applied Article 2(8)(b) of the basic regulation but claims

that the prices paid by those importers to Mita Europe are the normal market prices and should have been used as the export price under Article 2(8)(a), without an 11% adjustment therefore being deducted in respect of the costs (6%) and the profits (5%) inherent in Mita Europe's role. The arguments put forward by Mita in support of the applicability of Article 2(8)(a) are the same as those on which it based its view regarding the application of Article 2(8)(a) to export sales to OEMs and, therefore, the illegality of the deductions made.

17. As regards the export sales to OEMs, the Court held in *Gestetner* that the Council was right to apply Article 2(8)(b) of the basic regulation and therefore

'to construct the export price on the basis of the price paid by the first independent purchaser, adjusting that price to reflect the costs and the profits inherent in the role played by Mita Europe' (paragraph 34).

The Court had previously dismissed most of the arguments relied on in this case too by Mita. Thus, in particular it held that it is apparent from Article 2(8)(b) of the basic regulation that

'the export price must be constructed when, *for whatever reason*, the price actually paid or payable for the product sold for export to the Community is unreliable' (paragraph 30)

and that that was so in that case where

'neither the price paid by Mita Europe to Mita Japan nor the price paid by Gestetner to Mita Europe could serve as a point of reference, on account of the association between the exporting manufacturer [Mita Japan] and its subsidiary [Mita Europe] and the sales activities pursued by that subsidiary' (paragraph 31).

It added that that continues to be true despite the fact that

'the activities of Mita Europe are pursued *prior to* importation and, on the basis that Mita Europe resells plain paper photocopiers to Gestetner, that resale takes place *before* importation' (paragraph 32),

even though the final part of Article 2(8)(b) mentions only the adjustments necessary to take account of the costs incurred *between* importation and resale. The Court stated that

'the allowances referred to are those inherent in the construction of an export price in the commonest cases of an association or a compensatory arrangement between the exporter and the importer or a third party'

and that

'that does not mean that Article 2(8)(b) precludes the making of the necessary allowances when the export price must be constructed for other reasons' (paragraph 33).

18. The Court's reasoning does not of course apply only to Mita's sales to Gestetner — it applies to the other sales on an OEM basis in which Mita Europe was involved in the same way. Nor is there any reason not to apply it also to Mita's sales to other independent importers in which Mita Europe was involved. In all those cases in fact, Mita Europe,

'although not officially importing the product assumes, nevertheless, the functions typical of an importing subsidiary' (see the third paragraph of recital 15 of the contested regulation),

and therefore bears expenses which reduce the amount actually received by the exporter and thus must be deducted from the price paid by the first independent purchaser when the latter is used as a basis for construction of the export price. I would even say that that reasoning is applicable *a fortiori* to those cases since, although Gestetner takes delivery of Mita products in Japan itself and makes its own arrangements for their export to Japan, that is not true of the other OEM customers to which the products are delivered FOB Japan and particularly not of the other independent importers whose products actually pass physically through Mita Europe's customs warehouse in the Netherlands.

19. It therefore only remains for me to express my views briefly on a number of arguments which were not raised in the *Gestetner* case. In the first place, on the basis of the fact that Mita Europe, although not the official importer of Mita products, nevertheless fulfils the functions of such an importer, the institutions, contrary to the applicant's assertion, relied on the economic reality rather than taking a purely formal approach.

20. As regards the argument that, by thus applying Article 2(8)(b) of the basic regulation to export sales to independent importers, whether or not OEMs, the institutions deducted profits twice, it has no real basis. Only one adjustment for profit was made and it related to the price paid *by* the independent importers to Mita Europe and not to the price paid *to* the independent importers by their customers. The fact that the export price does not include the profit made by the independent importers on sales to their customers in the Community market is merely the consequence of the fact that it corresponds to the price paid or payable for the product sold by way of export to the Community and not the price paid or payable on the Community market.

21. Finally, Mita's reference to Commission Decision 2247/87/ECSC of 28 July 1987 imposing an anti-dumping duty on certain sheets and plates of iron or steel originating in Mexico [7] does not seem to me to be

7 — OJ 1987 L 207, p. 21. In its Decision No 3499/87/ECSC of 19 November 1987 imposing a definitive anti-dumping duty (OJ 1987 L 330, p. 42) the Commission confirmed, in the absence of any new evidence, its interim conclusions concerning in particular the dumping and the injury.

relevant. It is true that the Commission acknowledges in that decision that

'where a subsidiary of a producer established *in the same country* performs functions identical to those of a fully-integrated export sales department, it would be normal to regard it as part of the same economic entity' (see recital 10).

In the present case, however, the subsidiary in question, Mita Europe, does not fulfil functions identical to those of an export sales department but those typical of an importing subsidiary. Furthermore, it is not correct either to assert that the Commission recognized in that decision that in such circumstances the export price should be determined on the basis of Article 2(8)(a) of the basic regulation, even if the subsidiary is established in a non-member country, or, *a fortiori*, to deduce that that should also be the case if it is established in the Community. It is clear from the further considerations put forward by the Commission that it did indeed consider whether that should be the case not only when the subsidiary is established 'in the same country' as the manufacturer but also when it is situated in a third country, that is to say one other than the one in which the manufacturer is established, but that it did not take a position on the matter. In the third sentence of recital 10, in fact, it pointed out that

'the question of whether in this case the subsidiary is or is not treated as a fully integrated export sales department is at any rate without decisive influence on the rate of duty to be applied'.

That is the reason which prompted the Commission to adopt, for the export price, the prices actually paid or payable to the subsidiary in question. It seems to me to be significant that when it reproduced that recital, in paragraph 39 of its reply, Mita failed to cite that passage.

22. Finally, as Mita has not contested the level of the adjustment made to take account of Mita Europe's role in its sales to independent importers, and since neither the documents before the Court nor the oral arguments presented to it have shown the adjustment to have been excessive, it follows from all the foregoing that the second submission likewise cannot be upheld.

Conclusion

23. Mita's application must therefore be dismissed and Mita must be ordered to pay the costs, including those of the parties intervening in support of the Council. Gestetner must bear its own costs.