REPORT FOR THE HEARING
in Case C-178/87 *

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I — The applicant's business

The applicant, Minolta Camera Co. Ltd (hereinafter referred to as 'Minolta') is a Japanese company producing cameras and business equipment, including plain paper photocopiers (PPCs).

In Japan, Minolta sells its PPCs entirely through its wholly owned subsidiary Minolta Business Equipment Trading Ltd. (hereinafter referred to as 'MJS'). MJS has

* Language of the case: English.

branches throughout Japan and sells to both dealers and end-users.

In the Community, Minolta sells exclusively to Minolta Camera Handelsgesellschaft m. b. h. (hereinafter referred to as 'Minolta Germany') which is its distributor in Germany and performs a broadly similar function to that of MJS in Japan, in so far as it sells both to independent customers and to the national distributors in the other Member States. The distributors in the United Kingdom, France and Belgium are wholly owned subsidiaries of Minolta.

II — Facts and procedure

A — *The facts*

In July 1985, the Committee of European Copier Manufacturers (CECOM) lodged a complaint with the Commission that imports of certain PPCs from Japan were being dumped and were causing injury to the Community industry.

The anti-dumping procedure initiated by the Commission on the basis of Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1) led to the imposition by Commission Regulation No 2640/86 of 21 August 1986 (Official Journal 1986 L 239, p. 5) of a provisional anti-dumping duty of 15.8% on the PPCs exported by Minolta.

After the adoption of the abovementioned regulation, in which the Commission evaluated Minolta's alleged dumping margin as 29.3%, on 10 October 1986 Minolta made an extensive and fully reasoned submission confirming the points made in its submission of 10 July 1986, explaining the illegality of the Commission's methodology in determining the dumping margin. No reply was made to that submission.

On 10 November 1986 the Commission disclosed how it intended finally to determine Minolta's dumping margin. The margin was increased from 29.3% to 35%. In the its submission of 21 November 1986, to which the Commission did not reply, Minolta claimed that the method used by the Commission to determine the reasonable profit included in the determination of the normal value of the PPCs manufactured by Minolta was illegal.

On 23 February 1987 the Council, on a proposal from the Commission, adopted Regulation No 535/87 imposing a definitive anti-dumping duty of 20% on Minolta's exports (hereinafter referred to as 'the contested regulation'). According to the regulation, Minolta was dumping at 35%.

B — *Written procedure and conclusions of the parties*

Minolta's application was received at the Court Registry on 10 June 1987.

By orders of 3 February 1988 the Court granted leave to the Commission and CECOM to intervene in support of the defendant's conclusions.

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 95(1) of the Rules of Procedure, to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry. The Council was asked to give a written reply to a question and did so within the time-limit set.

The *applicant* claims that the Court should:

(i) declare Regulation No 535/87 void in so far as it affects the applicant on each and every one of the following grounds:

— infringement of each of Articles 2(2), 2(3), 2(9), 2(19) and 2(13) of Council Regulation No 2176/84;

— infringement of Article VI(1) and (2) of GATT and Articles 1 and 2 of the 1979 anti-dumping Code;

— infringement of the principles of proportionality, legitimate expectations, equality and *audi alteram partem*;

— abuse of power;

— lack of reasoning.

(ii) further or alternatively declare the said regulation void in so far as it purports to impose a definitive anti-dumping duty of 20% on plain paper photocopiers originating in Japan and manufactured or exported by the applicant.

(iii) further, or in the further alternative, declare the said regulation void in so far as it purports to order that the amounts secured by way of provisional duties in respect of plain paper photocopiers manufactured by the applicant and exported to the Community should be definitively collected.

(iv) in any event, order the Council to pay the costs.

(v) order such relief as may be lawful or equitable in all the circumstances.

The *Council* claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

CECOM, intervening, claims that the Court should:

(i) dismiss the application;

(ii) order Minolta to pay the costs, including those of CECOM as intervener.

III — Submissions and arguments of the parties

III.1 — Admissibility

Minolta claims that, according to established case-law of the Court, the action is admissible under the second paragraph of Article 173 of the EEC Treaty.

The *Council* raises no objections as to the admissibility of the application, except as regards Minolta's claim that the operative part of the judgment should include the annulment of the contested regulation on the basis of specific points of law, which in its view should be declared inadmissible.

III.2 — The substance

A — Determination of the normal value

Minolta contests the construction of the normal value in so far as the Council included therein (a) selling, general and other administrative expenses ('SGA expenses') of its sales subsidiaries; (b) a profit of 14.6%; (c) the value of certain discounts granted by the Japanese subsidiaries to their customers.

As regards the *inclusion of the SGA expenses* of its Japanese subsidiaries, Minolta claims that it results in a constructed normal value corresponding to a stage beyond the ex-works level, whereas the export price was constructed on the basis of Article 2(8) of Regulation No 2176/84 starting from the selling prices of the direct and indirect subsidiaries in the Community, from which were deducted all the expenses of those subsidiaries in respect of the sales in question. It follows that the export price was calculated at the ex-works level but the normal value was calculated virtually at the retail level.

Minolta claims that the institutions' argument that it was necessary to add to the production costs a reasonable amount for selling, administrative and other general expenses, and profits, in order to enable the normal value to be determined as if there had been sales on the domestic market, is not in conformity with the purpose of determining normal value. The normal value must be determined by adding to the production cost the costs and profit necessary to calculate normal value at the ex-works level (or whatever other level of trade is relevant) and to enable a 'fair comparison' to be made with the export price.

According to Minolta, in order to construct the normal value in accordance with Article

2(3)(b)(ii), it is necessary to take account of a reasonable amount for SGA expenses. However, that amount must be calculated so that the constructed normal value corresponds to the ex-factory level.

Minolta claims that the method adopted by the institutions resulted in the finding of a dumping margin completely divorced from reality. After adjustments are made for freight costs, the average price in the EEC of the six models chosen by the Commission is 30.45% higher than the average price of those models in Japan or 33.45% if all the models are taken into account (as is shown by Tables I and II of the confidential book of tables produced to the Court, in which the price and cost data have been verified by the Commission). Even if the average price in the Community is compared with the average price which Minolta should obtain in Japan to recover all its costs (production and SGA) and achieve a profit of 14.6%, the Community prices are still much higher than the Japanese prices, as Table III shows. It is clear from that table that the average price of the six models chosen by the Commission is 11.74% higher in the Community than in Japan, even if the Japanese prices are adjusted to remove any loss and provide for a profit of 14.6%. The picture is the same when a further adjustment is made for freight costs to the EEC: in this case the EEC prices are 4.08% higher.

Minolta also claims that since the comparison between the normal value and the export price is invalid, Article VI of GATT and Articles 1 and 2 of the 1979 Anti-Dumping Code have been infringed, and it can invoke that infringement as a ground on which the contested regulation should be annulled. Article 173 of the EEC Treaty does not require, in the case of actions brought by the Member States, the Council or the Commission, that the infringed rule of law relating to the application of the Treaty should be one with direct effect. Since natural and legal persons have the same rights by virtue of the second paragraph of that article, Minolta must not be subjected to that requirement either.

Minolta maintains that even if the conditions for direct effect were thought relevant, those conditions would, in the case of Article VI of GATT and Articles 1 and 2 of the Anti-Dumping Code, be satisfied: the operation of the GATT and of the Anti-Dumping Code in the Community is not dependent on further action being taken by the Community or national authorities and the abovementioned provisions are clear and precise.

In the event of the Court's considering that the GATT and the 1979 Anti-Dumping Code cannot affect the validity of the contested regulation, then Regulation No 2176/84 must be interpreted in accordance with GATT and the Code.

In that connection Minolta draws attention in particular to the obligation to make a fair comparison contained in the 1979 Anti-Dumping Code, which means comparing prices at the same level of trade, comparing prices negotiated on dates as close to each other as possible and making due allowances for all differences affecting price comparability. As regards the level of trade,

the 1979 Anti-Dumping Code suggests adopting the ex-factory level, which refers, according to Minolta, to the stage at which the manufacturer makes the goods available for collection at his factory. According to the International Rules for the Interpretation of Trade Terms ('Incoterms'), 'ex-works' means that the seller's only responsibility is to make the goods available at his premises and that he is not responsible for loading the goods on the vehicle provided by the buyer; the buyer bears the full cost and risk involved in bringing the goods from there to the desired destination. It is therefore clear that the term ex-works or ex-factory indicates the costs which are included in the price paid by the buyer to the seller. The expressions 'same level of trade' and 'ex-factory level' refer to prices. The Council therefore chose the wrong test to decide whether the prices it had constructed were at the same level of trade when it looked at the customers paying them.

By failing to observe the fundamental requirement of a fair comparison laid down by the GATT, the 1979 Anti-Dumping Code and Regulation No 2176/84, the Council abused powers conferred on it by that regulation: the Council determined a dumping margin of 35% despite the acknowledged fact that Minolta's prices in the Community are significantly higher than its prices in Japan. The Council infringed the legitimate expectations of traders trading with and within the Community who expect that rules agreed at international level will be applied fairly by the Community authorities and in accordance with GATT and the 1979 Anti-Dumping Code. Moreover, Minolta considers that, by finding that it was dumping at 35% and imposing a duty of 20% on it when a fair comparison showed that Minolta was not dumping, the Council imposed a burden on it which is out of proportion to the objective of Regulation No 2176/84, and therefore infringed the principle of proportionality. Minolta also maintains that the Council infringed the principle of equality in so far as a manufacturer in the same position as Minolta but selling to independent customers would have been found to be dumping to a negligible extent.

According to Minolta, by acting in that way the Council infringed Article 2(9) and Article 2(3)(b)(ii) of Regulation No 2176/84, which require the comparison between the export price and the normal value to be a fair comparison and, in particular, that it should be established at the same level of trade.

Minolta considers that *the profit included by the Council in the normal value* is too high since it did not take into consideration:

(a) the average profit on all relevant PPC models sold on the Japanese market;

(b) the turnover of the unprofitable models sold on the domestic market; and

(c) did not calculate the profit at the ex-factory level.

(a) According to Minolta, if the Council's finding was that a profit was normally realised on PPCs, it cannot exclude those machines which happen to have been sold at a loss during the period or take the profit on the remaining sales as the normal profit and apply it to all Minolta's models. If on the other hand the Council considers that a profit is not normally realized on PPCs, it is required to determine the profit on any reasonable basis, using available information.

In both cases the profit must be reasonable and take account of:

(i) the actual return realized on PPC machines on the domestic market,

(ii) fluctuations in the profitability of PPCs through time, and

(iii) the need to produce a range of PPCs to meet customers' requirements.

(i) Where certain PPCs were sold at a loss and others at a considerable profit, only a profit determined taking account not only of sales at a profit but also those at a loss will give a correct idea of the actual profits achieved on PPCs in Japan. Minolta gives two examples to show that the Council's approach, which disregards sales at a loss, is incorrect.

First example

Profit/loss

Model	Amount sold per company	Co. A	Co. B	Co. C
One	100	2%	2%	30%
Two	100	2%	2%	5%
Three	100	2%	+10%	+60%
Profit which would be added by the Council		35%	10%	60%
Weighted average profit per company		N/A	2%	8.3%
Weighted average profits of all companies		2.8%		

It is apparent from this table that the profit that would be added by the Council, using the contested method, is unreasonable.

Second example: Suppose that Alpha and Beta each make a profit of 10% on the Japanese market on their range of ten models. The profit on Alpha's models varies from 5% on one model to 15% on another model, whilst the profit achieved by Beta varies from minus 10% to plus 30%. According to Minolta, the profits achieved by the two companies are identical and the profit which should be considered as being normally realized is identical. However, according to Minolta, the Council would have come to the conclusion that the profit normally realized by Beta was higher than that for Alpha because the Council would ignore the sales of all Beta's models which showed a loss during the period considered.

(ii) In view of the varying profitability of different models with the passage of time, Minolta considers that in order to determine the profit for a given period (the reference period), account must be taken of the average profit realized on all the models of varying ages sold during that period, which can then be applied to all the models sold by Minolta during the same period. The Council, however, took account of a sub-set of models sold during the reference period and applied the resulting profit to the whole range of Minolta models regardless of their age and profitability.

(iii) Finally, since Japanese producers have to produce a complete range of photocopiers, the normal profit should be that which is realized on the whole range of models, and not solely on those which are sold with an overall profit in a given period.

(b) According to Minolta, the profit determined by the Council is also unreasonable because it did not take account of the turnover of unprofitable models sold on the domestic market. If the Council were to look only at the profit on those models which happen to be profitable, then the profit on those models should be expressed as a percentage of the turnover of both profitable and unprofitable models. Minolta claims that in calculating the dumping margin in the present case the Council, having incorrectly calculated the dumped amount based on the prices of dumped sales only, then expressed this as a percentage of the CIF value of all sales, dumped and undumped.

Minolta gives the following example:

Model	Profit/loss	Turnover
A	10%	100
B	10%	100
C	— 10%	100
		300

(i) It is clear that the average profit here is 3.3%

$$\frac{10 + 10 - 10}{300} = 3.3\%$$

This is the normal profit and no reasonable margin of profit can exceed this.

(ii) The Council's method would show a profit of 10% as it would ignore all sales of model C:

$$\frac{20}{200} = 10\%$$

(iii) If the Council were (wrongly) to ignore the loss on model C simply to take the profit of 20% on models A and B, this profit should be expressed as a percentage of the total turnover:

$$\frac{20}{300} = 6.7\%.$$

(c) Finally, Minolta claims that the Council did not calculate the profit at the ex-factory level. In the first place, since, according to the figures produced by Rank Xerox, a profit of 16% for an integrated supplier on a given market is equivalent to a 5% profit for a manufacturer alone on that market, Minolta considers that if a profit of 14.6% was a reasonable calculation of the profit normally realized by integrated suppliers of PPCs on the Japanese market, the Council should have taken a profit of just under 5% as the profit normally realized at ex-factory level. Moreover, the rate of 5% was, according to Minolta, used by the Commission at the disclosure meeting of 30 November 1986 and is the same as the profit which the Council determined would be realistic for Minolta's sales in the Community. It would be slightly higher than the 4% profit determined by the Council to be the profit earned by the complainants on the more profitable Community market. Secondly, the Council should not have added that profit margin to the sum of Minolta's manufacturing costs and all the SGA expenses of both of the manufacturing company and the Japanese subsidiaries, which exceeds the ex-factory value.

With respect to the *trade-in discounts*, Minolta claims that the Council increased the SGA expenses included in the constructed normal value by an amount corresponding to the value of certain discounts granted by Minolta's subsidiaries to their customers. According to Minolta, the Council has no evidence whatsoever to justify such an addition and accordingly the SGA expenses included in the constructed normal value used as the basis of the applicant's normal value exceeded the 'reasonable margin' permitted by Article 2(3)(b)(ii) of Regulation No 2176/84. In fact, the discounts in question were similar to others granted by Minolta's Japanese subsidiaries and neither MJS nor any company in Minolta's group ever received trade-in models. Finally, the discounts in question were costs directly related to the sales under consideration and should not therefore be included in the construction of normal value.

In that connection, Minolta claims that in February 1986 in Japan the Commission verified Minolta's data on cost of production, SGA expenses, prices and all discounts relating to the reference period. It was only after making verification visits to other exporters that the Commission decided to increase the SGA expenses included in the constructed normal value by the amount of the discounts granted by MJS (shown under codes 32 and 34 of Minolta's computerized accounting system) which it considered to be trade-in discounts similar to those they had found to be used by other exporters.

Minolta maintains that the Commission had no copies of the documents which its officials had seen while carrying out the abovementioned verification and which they claimed to show that dealers requested Minolta to pay them money so that they could trade in a machine. Nor was it in a position to specify those documents or the examples of trade-ins or discounts seen by its officials. Moreover, the notes taken by Minolta's lawyers at the verification meeting

show that the Code 32 discount is an ordinary discount and that the Commission official did not express any doubts as to the nature of Minolta's discounts. On the other hand, the Commission official refused to disclose to Minolta a copy of the notes taken at the verification meeting, and according to Minolta no such notes were prepared. Finally, MJS asked independent accountants to examine its accounts for a number of years and the certificate prepared by them shows that MJS has never received any traded-in machines (Annex IV to the application).

Minolta also maintains that the Commission did not take account of the evidence and detailed observations which Minolta submitted to it on 10 October 1986 showing that no trade-in transactions were effected by Minolta and explaining the true nature and use of the discounts in question.

According to Minolta, all the Code 32 and 34 discounts are normal discounts. Code 32 discounts never had any connection whatsoever with trade-in transactions, as is apparent from the notes taken at the verification meeting mentioned above and from the explanations which Minolta provided to the Commission on 10 October 1986, which will be produced, on a confidential basis, to the Court and the Council if they so wish. As regards the Code 34 discounts, they were intended to help dealers conclude transactions involving a trade-in with their customers but in fact, as from 1983, the discounts were granted regardless of whether a trade-in had actually taken place.

In order to demonstrate that the Code 32 and 34 discounts are different from the trade-in discounts to which the Council refers in recital 13 to the contested regulation, Minolta also claims, on the one hand, that MJS's customers who receive such discounts are generally members of the 'Minolta Society', which is a club conferring various benefits on its members and open to large MJS dealers and, on the other, that the discounts are given automatically to all the club members on a flat-rate basis. If those discounts were related to the occurrence of a trade-in transaction, the amount would vary from transaction to transaction, which is not the case.

According to Minolta, the only purpose of granting a discount is to enable MJS to make additional sales to its dealers by helping them to sell in circumstances in which they might lose a potential customer. With regard to the alleged benefit referred to by the Council, Minolta states that it is clear that that benefit would be enjoyed by it regardless of whether it operated a trade-in system or offered discounts. There is no causal link between Minolta's discounts and the alleged advantages of the absence of a second-hand market for PPCs in Japan.

The Council should not have added the cost equivalent to the value of those discounts to the SGA expenses since, on the Council's own approach, those costs bear a direct relationship to the sales under consideration pursuant to Article 2(10)(c) of Regulation No 2176/84.

The *Council* states in the first place, *with regard to the inclusion of the SGA expenses,* that it constructed the normal value in the

manner provided under Article 2(3)(b)(2) of Regulation No 2176/84 (recital 8 et seq. of the contested regulation) since all sales of PPCs by Minolta in Japan were made at a loss. In that normal value, the Council included the SGA expenses relating to the operations of Minolta sales subsidiaries on the domestic market because those subsidiaries performed the functions of a sales department of Minolta. Being subject to common control, sales subsidiaries should not be treated separately from Minolta itself.

Thus, all costs normally incurred by the Minolta group in making sales on the domestic market are within the 'reasonable amount for selling, administrative and other general expenses' as provided by Article 2(3)(b)(ii) and must therefore be included in the constructed normal value. Since all the SGA expenses of the export department are included in the export price it would not have been appropriate to include in the construction of the normal value only some of the SGA expenses relating to sales on the domestic market.

With respect to Minolta's argument that as a result of the inclusion of the abovementioned expenses the normal value was constructed at a level of trade other than the ex-factory level, the Council states that Minolta has confused certain aspects of the determination of normal value and the comparison between that value and the export price. According to the Council, the level of trade is determined by the category of purchasers to which a company sells, not by the type of cost elements included in normal value. In particular, the definition of level of trade given by Minolta is inappropriate and the Incoterms to which it refers do not provide any assistance for determining the level of trade for the purpose of an anti-dumping calculation. According to the Council, the level of trade is determined by considering to which category of purchasers the price charged corresponds. Ex-factory level relates to the sale to the first independent purchaser in the distribution chain. Finally, no evidence was presented that if Minolta itself had sold to independent buyers the circumstances would have been so different that the prices charged by Minolta would have been different from the prices charged by the sales companies to the same customer. The constructed normal value is determined in lieu of a sales price and thus it will normally be at the same level of trade as the normal value for which it is intended to be substituted.

In addition, Minolta's argument concerning the 'fair comparison' referred to in Article 2(9) of Regulation No 2176/84 cannot be relied on to determine the 'reasonable amount' of SGA expenses to be included in constructing the normal value, but must be examined at the stage of the comparison between normal value and the export price.

As regards the alleged infringement of GATT provisions and the 1979 Anti-Dumping Code, the Council contends that there is no conflict between the contested regulation and those provisions. According to the Council, Regulation No 2176/84 defines in rather a precise way how the 'purpose of fair comparison' should be achieved by providing for allowances, particularly in Article 2(9) and (10). Moreover, the Code left the contracting

parties a considerable margin of discretion as to the way to implement it in national legislation and the Code does not give any guidance as to what the term 'fair' comparison means.

The Council also states that Minolta cannot rely directly on the provisions of GATT or of the Code, even if the contested regulation were in contradiction with those international agreements, and it refers in that regard to previous decisions of the Court to the effect that the provisions of the General Agreement, and in particular Article VI, are not directly applicable and do not confer rights on individuals (judgments in Joined Cases 21 to 24/72 *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219; Case 9/73 *Carl Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135; Case 266/81 *SIOT* [1983] ECR 731; Joined Cases 267 to 269/81 *Amministrazione delle Finanze dello Stato* v *Società Petrolifera Italiana and Others* [1983] ECR 801; and Joined Cases 290 and 291/81 *Singer SpA and Geigy Spa* [1983] ECR 847). The Council submits that the same principle applies to the Anti-Dumping Code.

The Council also states that in its judgment in Case 240/84 (*NTN Toyo Bearing* v *Council* [1987] ECR 1809), the applicants to a considerable extent based their application on an alleged conflict between the contested anti-dumping regulation and the rules of GATT and the Court merely interpreted the basic regulation which preceded Regulation No 2176/84, thus clearly indicating that it was unnecessary to refer to Article VI of the General Agreement or the Code.

As regards the alleged *unreasonableness of the profit margin included in the constructed normal value*, the Council states in the first place that in constructing the normal value of Minolta's models the institutions used the average profit — in excess of costs of production, including a reasonable amount of SGA — for models sold by all the other exporters selling in Japan. In determining a reasonable profit account was taken of sales though loss-making channels where, overall, the model in question was sold profitably and therefore of many individual sales at a loss during the reference period. Recital 10 to the contested regulation describes the methodology employed in calculating that profit margin, which amounted to 14.6%.

According to the Council, it is apparent from Article 2(4) of Regulation No 2176/84 that, contrary to Minolta's contention, it is permissible to disregard sales made at a loss and there is no need to base normal value on any kind of average of sales made at prices above and below cost. Indeed, although Article 2(4) applies only when profits are not being made, all the alternatives listed in that provision for determining normal value are based on sales, values or prices which include or are likely to include profit.

Where the alternative used is the construction of a normal value, the profit margin to be used can be based on the profit made by other companies in the country and the industry in question. In such a case, the Council considers that the words of Article 2(3)(b)(ii) and the comparison with the situation under Article 2(4) clearly indicate that it is the sales made at a price above production cost that must be taken into consideration and not all the sales of the other companies.

Commenting on the examples given by Minolta, the Council considers that the first is unacceptable since all exporters, except Minolta, sold most models profitably in Japan. As regards the second example, the Council contends that the conclusion that the normal profit margin for Beta — an exporter which sells part of its products at a loss — is higher because the loss-making sales were excluded is in conformity with Article 2(4) of Regulation No 2176/84. In the case of the Beta sale in the example, the normal value could be determined 'on the basis of the remaining (that is to say profitable) sales on the domestic market', as Article 2(4) provides.

The parallel to the Council's findings drawn by Minolta with regard to injury is also unacceptable. The Council states that the methodology employed for calculating the price increase needed to enable Community producers to make a reasonable profit in the Community bears no relation to the calculation of a profit margin in constructing normal value. Loss-making sales are a clear indicator of injury and therefore cannot be disregarded in the calculation relating to injury. However, with regard to the calculation of normal value they may be excluded, as is provided by Article 2(4) of Regulation No 2176/84, since otherwise sales not made in the ordinary course of trade would be included.

Similarly, the comparison with the calculation of dumping margins suggested by Minolta is a false one. The method of calculating a dumping margin and the calculation of a profit normally realized on profitable domestic sales for the purpose of the normal value calculation are entirely separate issues.

The Council puts forward several arguments to counter Minolta's contention that, in view of the fluctuations of the profitability of a model over time, the Council should have taken into consideration the average profit on all relevant models of varying ages sold during the reference period. It states in the first place that Article 2(4) of Regulation No 2176/84 provides the basis for excluding sales at a loss if they are made over an extended period of time and that it considered that the reference period met that criterion. Secondly, no evidence whatsoever was submitted to support the general assertion relating to the variation of profitability of a product over its lifetime, and that the prices of models often vary from customer to customer — some are loss-making, some are profitable regardless of the stage of its 'model life'. The Council also states that, according to Minolta's theory, there would always be some highly profitable models on the market, some less profitable models and some models sold at a loss; that would not justify determining profits over a longer period of time than the reference period, a course which would be incompatible with Regulation No 2176/84.

The Council also considers that Minolta's argument based on the need for the manufacturers of PPCs to produce a full range of

models has no bearing on the determination of the reasonable profit margin to be included in the constructed normal value. Minolta explains why certain sales are made at a loss, but that is irrelevant for the purpose of applying Article 2(4) of Regulation No 2176/84; it is the fact that there are sales at a loss that justifies their exclusion in determining normal value.

In reply to the argument that the profit was not calculated at the ex-factory level, the Council states that the level of trade aspect is irrelevant. It explains, in the first place, that the amount to be included as profit under Article 2(3)(b)(ii) is made up of the manufacturer's profit on production and the profit on sales of goods by the manufacturer's sales department. In Minolta's case, the latter would include profit realized by the sales subsidiaries which performed functions of a sales department, and that does not change the level of trade at which the sale is made since those subsidiaries sell to customers of the same type as those to which the manufacturer's sales department would sell. Secondly, with respect to the figures given by Rank Xerox, the Council observes that they are expressed as a percentage of the independent distributors' list price and that if those figures were to be used for determining the reasonable rate of profit to be applied they would have to be expressed as a percentage of the manufacturer's revenue. Thus, the 5% profit on the list price is equal to 15.6% of the total manufacturer's cost and a return on the manufacturer's revenue of 13.5%.

The Council states that the figure of 4% for the profit earned by the complainants on sales in the Community is a matter entirely separate from that of determining the profit normally realized on sales of PPCs on the Japanese market and that the figure quoted is depressed by the dumped imports.

With respect to *trade-in payments*, the Council first of all disputes the statement of facts presented by Minolta. At the verification meeting, the Commission's officials were in no doubt that the Code 32 and 34 discounts were payments relating to trade-in transactions, the evidence in that regard being clear, in particular Minolta's own administrative forms. It is also clear from the minutes drawn up by Minolta on 5 February 1986 (Annex IV B to the application) that the payments in question are trade-in payments.

As regards the accountant's certificate (Annex IV D to the application), the Council observes first that the accountants decided that the payments were ordinary discounts merely because MJS did not confirm whether trade-in transactions were actually made. However, the fact that MJS did not confirm the existence of those transactions does not mean that they did not take place. Secondly, the Council maintains that the fact that the discounts are granted on a fixed-sum basis does not mean that there were no trade-ins or that Minolta did not take the trade-in value into account. Finally, Minolta itself confirms that the old machines are removed from the market (minutes taken by Minolta at the meeting of 6 February 1986, page 14, Annex IV B to the application). However, even if payments were made without its being ascertained whether the machines were removed from the market, the Council states that there is no second-hand market for PPCs in Japan

and that fact remains uncontested by Minolta.

The Council then states that it determined the normal value in accordance with Regulation No 2176/84. The costs of running a trade-in payments scheme form part of the 'reasonable selling, administrative and other general expenses' to be included in constructing normal value, as provided for in Article 2(3)(c) of Regulation No 2176/84. Being overhead expenses such costs could not be allowed as an adjustment. In addition, there was a value received in return for the trade-in payment (recital 13 to the contested regulation).

The Council considers that Minolta obtains a benefit resulting from the used machine being removed from use. Minolta and all the other manufacturers of PPCs selling Japan enjoy the cumulative benefit which results from the certainty that the traded-in machines will no longer be used by anyone, which guarantees that there will be a regular and complete replacement of all the PPCs in use within a specific period (corresponding to the average period for which the first user is willing to retain a new PPC). The trade-in payments therefore have the effect of artificially reducing the working life of PPCs in Japan. The result is that manufacturers collectively increase their sales of new PPCs.

Since in the present case the traded-in machines were almost all scrapped, rendered unserviceable or otherwise removed from the market, the Council took the view that the value that the exporter received for making a trade-in payment or for granting an additional discount for the trade-in did not relate to a resale value, the institutions having found that the value of the transaction corresponded rather to the benefits of removing the traded-in machines from the market and the absence of a second-hand market.

The Commission received no satisfactory evidence (and the burden of proof in that respect clearly falls on the party claiming the allowance) to allow it to conclude that the trade-in payment or discount was wholly or in part an ordinary discount granted in addition to the various other types of discount.

CECOM considers that the normal value may not be reduced by trade-in discounts because they do not change the sales price and have to be systematically taken into consideration in the framework of allowances for differences in conditions and terms of sale which may affect the price comparability, if a direct relationship to the sales under consideration has been claimed and proved.

CECOM states first that the discounts are not granted 'in the ordinary course of trade' within the meaning of Article 2(3)(a) of Regulation No 2176/84 and points out that Canon, whose share of the Japanese copier market is 30%, raised the issue of trade-in discounts only in relation to allowances under Article 2(10)(c) of Regulation No 2176/84.

Secondly, it may be in the interests of Minolta to blur the boundary line between the determination of the normal value and the allowances for which the applicant bears the onus of proof. The Court held in its judgment in Case 240/84, *NTN Toyo Bearing Company Ltd* v *Council*, [1987] ECR 1809, paragraph 13, that Article 2(3)(7) and (8) of Regulation No 2176/84 separately specify several different methods for calculating each of the terms of the comparison (normal value and export price). CECOM considers that it follows from that statement that discounts which may be allowable for an adjustment under Article 2(9) and (10) cannot be used for reduction of the normal value under Article 2(3).

CECOM also states that trade-in payments essentially focus on the removal of used copiers and the creation of new placements, which demonstrates that they have no direct relation to the product concerned which is subject to the anti-dumping investigations and are therefore not allowable under Article 2(9) and (11) of Regulation No 2176/84.

B — *The comparison*

Minolta claims that the Council infringed Article 2(10)(c) of Regulation No 2176/84 by not granting allowances to take account of salesmen's salaries, certain transport expenses and certain other costs incurred by MO (its manufacturing company in Japan) and by MJS, even though they relate directly to the sales under consideration.

— Salaries paid to salesmen

Minolta claims that the Council should have taken account of the salaries of sales leaders, which affect price comparability and bear a direct relationship to sales within the meaning of Article 2(10)(c) of Regulation No 2176/84.

Sales leaders are salesmen who are responsible for organizing the work of a network of salesmen, sell PPCs to customers and therefore have the function of business negotiation; in other words they are responsible for dealing with large dealers. That is apparent from oral evidence given and from copies of reports of sales made by the salesmen provided to the Commission at the verification meeting. According to Minolta, Article 2(10)(c) does not justify a strict interpretation of the term salesmen or the refusal to grant an allowance for certain salesmen on the ground that they are sales leaders. Their primary responsibility was to sell and not, as the Council suggests, to manage.

— Transport costs

Minolta claims in the first place that the Commission disallowed the whole of the Japanese subsidiaries' vehicle costs. In taking account of costs associated with the transport of goods, the Commission made an adjustment under Article 2(10)(c) but reduced the vehicle costs by one third. In so far as the vehicles were not used for the transport of goods they were used prin-

cipally by salesmen to effect sales and that is allowable as 'transport' costs which affect comparability and bear a direct relationship to the sales under consideration, within the meaning of the abovementioned provision. Such costs bear a more direct relationship with sales than the salesmen's salaries which are (in principle) admitted by the Commission to be allowable costs under Article 2(10)(c).

Minolta then challenges the Commission's refusal to take account of salesmen's travel expenses on the ground that they do not bear a direct relationship to sales. All transport costs, and not only those for the transport of goods, which affect price comparability and bear a direct relationship to the sales under consideration are covered by Article 2(10)(c).

— The expenses incurred by MO and MJS

According to Minolta, the Council should have allowed the costs of warehousing, transport, insurance and credit incurred by MO and the transport, vehicle and credit costs incurred by MJS under Article 2(10)(c) of Regulation No 2176/84, since they bear a direct relationship to the sales under consideration.

Minolta claims that they are real costs incurred by MO and MJS in dealings with independent third parties.

It then claims that if the Council had properly determined normal value at the ex-factory level all the costs could have been allowed as affecting price comparability and bearing a direct relationship to MO's sales. The fact that the Council did not determine the normal value at the ex-factory level cannot convert MO's and MJS's direct costs into indirect costs.

Minolta also states that MO's and MJS's direct costs were incurred in relation to one or other of their sales channels. MO's costs relate to sales to MJS and MJS's costs relate to sales to independent customers or to its subsidiaries.

The costs which the Council disallowed were, according to Minolta, incurred in respect of activities which are an integral part of its distribution system in Japan. By way of example, Minolta claims that it was absurd for the Council to disallow all MO's transport costs but allow MJS's transport costs to independent customers. That means that if MO ships a product to MJS's customer the whole of the transport costs will be disallowed but if MO ships products to MJS which then ships them to the customer the Council would allow the costs.

Finally, Minolta states that if the Council deducts MO's direct costs of selling to its wholly owned subsidiary, Minolta Germany, then it should deduct the equivalent direct costs of MO in selling to MJS

so that the comparison between the export price and the normal value is fair.

As regards the allowances asked for in respect of *salaries paid to sales leaders*, the *Council* states in the first place that in the course of its investigations at Minolta's premises the Commission examined the evidence relating to the salaries paid to the salesmen claimed, reports made by salesmen to their superiors on their weekly activities, organization charts of the Minolta group, in particular MJS, and the job descriptions of employees. In addition, interviews were conducted with certain members of staff. The investigation showed that Minolta was claiming as 'salesmen' the director and manager of the Osaka branch, the section chief and deputy manager of that branch and also the marketing managers and sales leaders of the Minolta Osaka subsidiary.

It thus became necessary to draw a line between the managerial functions of certain personnel and the salesmen's functions. The Commission considered that the salary of sales leaders and marketing managers could not be regarded as being directly related to the sales under consideration since their primary role was to manage and direct a sales force and not to sell directly to buyers.

In the Council's opinion, that approach is consonant with the strict interpretation of Article 2(10)(c) of Regulation No 2176/84 justified by the fact that salesmen's salaries are not normally expenses directly related to the sales under consideration as the salary is paid whether or not the particular sale is made, and that those costs were included in the wording of that article as an exception in order not to discriminate between sales made by persons working on a commission basis and those who are permanently employed.

As regards the *transport costs* relating to the use of salesmen's vans, the Council states that the Commission agreed to allow two thirds of those costs as costs of transporting products and there is nothing to suggest that all of the costs claimed by Minolta should be allowed, since Minolta provided no evidence to show that all of the salesmen's van costs directly related to the sales under consideration. Moreover, the term 'transport' in Article 2(10)(c) refers to transport of goods, not of salesmen.

The Council observes that the same principles also apply to salesmen's travel expenses, two thirds of which were allowed.

With respect to *MO's and MJS's expenses*, the Council contends that they do not directly relate to the sales under consideration but are merely general overhead costs incurred in moving the product between different parts of the same group and cannot therefore be deducted. It states that if a product is transported in Japan from the manufacturer to the warehouse, prior to a sale to an independent

buyer being made, the costs are never deducted either from the export price or from the normal value. On the other hand, if the goods are being transported to an unrelated customer after a sale has been made, the costs incurred are directly related to the sales to that particular customer and will be taken into account. There is no justification for deducting under Article 2(10)(c) of Regulation No 2176/84 the costs referred to by Minolta which are incurred prior to a sale being made and before the goods transported have been allocated to any particular sale.

Finally, in reply to Minolta's argument that the direct costs of selling should have been deducted from both the export price and the normal value, the Council observes that in applying Article 2(9) and (10) of Regulation No 2176/84 the Council only deducts those costs from export prices which are directly related to the sales under consideration. No overheads of Minolta, MO or MJS were deducted. The same principle was applied to the normal value. Thus, the two values were on a comparable basis.

C — *Calculation of the dumping margin*

Minolta claims that the Council should have compared the weighted average export prices with the normal value rather than using the transaction-by-transaction method. In its view that method is illegal since the Council did not make the fair comparison required by Article 2(2), (9) and (13)(b) of Regulation No 2176/84 and by GATT and the 1979 Anti-Dumping Code, it infringed the principle *audi alteram partem* and contravened Article 190 of the EEC Treaty.

As regards application of the transaction-by-transaction method, Minolta claims in the first place that in the present case that method did not enable a fair comparison to be made between the export price and the normal value. The Commission is under a duty in choosing one of the methods provided for in Article 2(13)(b) of Regulation No 2176/84 to ensure that in the circumstances of the particular case the method chosen permits a fair comparison to be made. Minolta therefore considers that since the normal values were calculated for single models, the export prices should, unless special circumstances dictated otherwise, be based on average weighted prices to enable that fair comparison to be made.

According to Minolta it follows from the judgment in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923 (at paragraph 25) that the transaction-by-transaction method may be used when an exporter is engaged 'in certain manoeuvres in which dumping is disguised by charging different prices, some above normal value and some below it'. If the Commission found that Minolta was engaged in certain manoeuvres by which dumping was being disguised, the Commission would be entitled to consider the most appropriate way of calculating a dumping margin and determining a remedy to remove any injury thereby caused. However, in the present case the institutions did not conduct any analysis enabling it to conclude that Minolta had engaged in such manoeuvres and it was therefore unlawful for the Council to depart from the method of weighted average export prices. It is clear from the abovementioned judgment that the exporter is required to have 'done something wrong, or intentional, with the aim of disguising dumping' for the transaction-by-transaction method to be justified.

Minolta then alleges that neither the Commission nor the Council gave it an opportunity to make its point of view known before applying the transaction-by-transaction method, even though it objected to the use of that method in its submissions of 10 October 1986, to which no response was ever received.

Finally, Minolta asserts that the contested regulation (recital 26) did not give sufficient reasons for recourse to the transaction-by-transaction method and that the Council therefore infringed Article 190 of the EEC Treaty.

To emphasize the importance of that point, Minolta refers to the confidential tables annexed to its application.

Tables IV and V illustrate the consequences of calculating normal value at the ex-works level. However, they use the transaction-by-transaction method employed by the Council.

Table VI compares for each model a single normal value and a single export price. The difference is the dumped amount and is expressed as a percentage of the CIF value of the model. The normal value is calculated at the ex-works level and the export price is constructed at the ex-works level as calculated by the Council. The profit included in the normal value is that determined by the Council (14.6%).

The table shows that Minolta's export price exceeds the normal value (a) by 15% on average (15.29%) for six models chosen by the Council; (b) and by 5.32% to 29.28% for five of the six models. For one of the models the normal value exceeds the export price by 6.5% but the dumped amount for that model is only 1.12% of the total CIF value of the six models in question. Minolta observes that that percentage is totally at variance with the Council's finding (35%).

Table VII was prepared on the same basis as Table VI except that the profit included in the normal value is 5%. For the six models chosen by the Council, the export price exceeds the normal value by 23% (23.42%) and in the case of each and every one of the six models by margins ranging from 2.24% to 36.57%.

Minolta concludes that if the calculation of the dumping margin is not corrected so as to compare a single normal value with a single export price for each model, the dumping margin is only 0.39%, as appears from Table V of the Confidential Tables. But if the error is corrected, it becomes apparent that Minolta is not dumping at all, as stated above.

With respect to the alleged unfairness of the transaction-by-transaction method, the *Council* states that Article 2(13)(b) of Regulation No 2176/84 is aimed at determining 'the amount by which the normal value exceeds the export price' and that the question whether those two values can be fairly compared is to be answered in view of Article 2(9) and (10) of Regulation

No 2176/84. The requirement of a fair comparison does not override the application of Article 2(13) of Regulation No 2176/84 and the institutions do not have to establish special circumstances to justify use of the transaction-by-transaction method.

According to the Council, the transaction-by-transaction method is the only one capable of dealing with a situation in which dumping is concealed by charging different prices, some above and some below normal value, and Minolta has not shown that in its case export prices did not vary or that all its export prices were below the normal value.

Contrary to Minolta's assertion, it does not follow from Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923 (paragraph 25), that application of the transaction-by-transaction method presupposes that the exporter has done something wrong or intentional with the aim of disguising dumping. That judgment in fact shows that it is the weighted average method and not action by the exporter which 'would in essence mask sales at dumping prices by those at what are known as "negative' dumping prices, and this would in no way eliminate the injury suffered by the Community industry concerned'. The institutions have to apply the most appropriate method and there is nothing to suggest that the choice of the method used in this case was wrong.

The Council then contends that Minolta was informed at the disclosure of the Commission's preliminary findings that the transaction-by-transaction method had been used to calculate the dumping margin. Moreover, it made its views known in its written submissions of 10 July 1986 and 10 October 1986.

Finally, with regard to the alleged lack of reasoning, the Council observes that the method of calculating the dumping margin was indicated in Commission Regulation No 2640/86 (recital 29) and in the contested regulation (recital 26) and, since it was a standard method used by the Commission and all the parties to the procedure had been fully informed, it was unnecessary to give any further reasons in the contested regulation.

As regards the reference to the confidential tables, the Council observes that the figures in them were computed in a way which totally departed from the concept of Regulation No 2176/84 as interpreted by the institutions, their interpretation having been endorsed by the Court in many respects in the mini-ballbearing judgments. It is untrue that the information in the tables, as used and compared, was verified by the Commission. The Council therefore rejects that information and the conclusions that Minolta draws from its own calculations. In more general terms the Council considers that no account should be taken of Minolta's mathematical calculations since they can be of no use to the Court in determining whether the institutions have made manifest errors or misused their powers.

IV — The Council's reply to the question put to it by the Court

In its reply of 23 May 1990, the Council indicated the factors which led it to conclude that a third of the transport costs did not bear a direct relationship to the sales under consideration.

The Council contends, on the one hand, that those costs related to the vehicles used by salesmen to visit potential customers and, on the other, that since they are regarded as overheads irrespective of whether a sale is made they are not directly related to the sales under consideration.

Since Minolta claimed that the salesmen's vans were used principally to deliver sold machines, it was estimated that two thirds of the total expenses fell into the category of transport costs, whereas the remainder related to salesmen's ordinary travel expenses. This allocation was based on the facts determined during the investigation with regard to other companies where the share of costs which were unrelated to an individual sale regularly amounted to 50%. The fact that the claim contained two types of expense is not contested by Minolta.

The Council points out that the one-third of the cost represents 0.8% of Minolta's turnover, which means that its overall dumping margin is affected by less than 1%.

J. C. Moitinho de Almeida
Judge-Rapporteur