5. Under the procedure for calculating anti-dumping duties, the Community institutions are entitled to determine the injury suffered by Community manufacturers on the basis of a comparison between the prices of imported products, on the one hand, and the prices of similar Community products not at their real level but at the level which they would have reached if there had been no dumping, on the other, where at the time of comparison the prices of the Community products have already been subject over a long period to downward pressure leading to their decline precisely on account of the dumping.

6. The imposition of anti-dumping duties cannot be challenged on the grounds that those duties leave intact the problems created for Community manufacturers by competition from products imported from non-member countries without being dumped or that they lead to the protection of inefficient producers since the fact that a Community producer is facing difficulties attributable in part to causes other than the dumping is not a reason for depriving that producer of all protection against the injury caused by the dumping.

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I — Facts and procedure

The age of electronic typewriters began in 1978 when the first model of an electronic typewriter manufactured by Olivetti was launched on the market. Until then, the market had been dominated by typewriters of the traditional variety, that is to say mechanical and later electromechanical typewriters.

The spectacular breakthrough achieved by the new product completely overturned the structure of the market in typewriters. Within a very short time sales of mechanical and electromechanical typewriters plunged to the lowest level ever recorded, whilst sales of electronic typewriters soared.

In 1982 European manufacturers of electronic typewriters (Olivetti, Olympia and Triumph-Adler) began to feel the ever-growing pressure exerted by Japanese competition which, in their view, was undercutting prices. According to the European manufacturers, Japanese companies were exporting ever-increasing quantities of electronic typewriters at dumping prices in order to take over the European market in that product and to drive out European undertakings.

In order to contend with what they call the Japanese 'dumping conspiracy', European manufacturers formed an association known as the 'Committee of European Typewriter Manufacturers' (hereinafter referred to as 'Cetma') which, on 15 February 1984, submitted a complaint to the Commission requesting the latter to initiate an anti-dumping proceeding against Japanese exporters.

The proceeding initiated by the Commission on the basis of 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 (Official Journal 1984, L 201, p. 1) culminated in the adoption by the Commission of Regulation (EEC) No 3643/84 of 20 December 1984 (Official Journal 1984, L 335, p. 43). That regulation imposed a provisional anti-dumping duty on imports of electronic typewriters manufactured by a number of companies including Brother Industries Ltd, Canon Inc., Sharp Corporation, Silver Seiko Ltd, Tokyo Electric Company Ltd (TEC), Tokyo Juki Industrial Company Ltd and Towa Sankiden Corporation, and terminated the proceeding with regard to Nakajima All Co. Ltd on the ground that the dumping margin established for that company was negligible.

On 19 June 1985 the Council adopted Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1), which imposed a definitive anti-dumping duty on all the undertakings that were already subject to provisional anti-dumping duty. That measure was contested by all the parties concerned.

By Regulation (EEC) No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2), the Council declared Regulation No 1698/85 inapplicable to Tokyo Juki as from the date of its entry into force.

On 12 August 1985 Brother Industries Ltd (hereinafter referred to as 'Brother'), on which Regulation No 1698/85 had imposed a definitive anti-dumping duty of 21%, brought an action against the Council, in which it sought the annulment of that regulation in so far as it concerned Brother, and the award of damages against the Council

and the Commission for manifestly infringing the provisions of the basic anti-dumping regulation, Regulation No 2176/84, and the general principles of Community law.

By an application for the adoption of interim measures lodged at the Court Registry on 29 August 1985, Brother sought an order suspending the application to it of Regulation No 1698/85 until the Court had given judgment on the main application. The interlocutory application was dismissed by order of the President of the Court of 18 October 1985.

On 19 August 1985 the Commission of the European Communities raised an objection of inadmissibility against the application in so far as it was directed against the Commission, and requested the Court, in the event of its objection being upheld, for leave to intervene in the proceedings in support of the Council's conclusions. By decision of 23 October 1985, the Court reserved its decision on the objection for the final judgment.

By letter of 8 April 1986 Brother informed the Court that it was waiving its claim for damages against the Council and the Commission for the injury which it had suffered.

By order of 16 May 1986, the Court removed the application from the Register, in so far as it was directed against the Commission, and granted the latter leave to intervene in the proceedings in support of the Council's conclusions.

By order of 15 January 1986 the Court granted Cetma leave to intervene in the proceedings in support of the defendant's conclusions.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry. However, it requested the parties to provide it with certain information and to answer a number of questions. The parties complied with that request within the prescribed period.

II — Conclusions of the parties

Brother claims that the Court should:

(i) declare the application for annulment lodged against the Council admissible and well founded;

(ii) declare Council Regulation No 1698/85 of 19 June 1985 void in so far as it applies to the applicant;

(iii) order the Council to pay the costs, including the costs of the application for the adoption of interim measures;

(iv) order the Commission to pay the costs, including those of the intervention in the interlocutory proceedings, except for the costs relating to its defence against the claim for damages;

(v) order Cetma, which intervened in the proceedings, to bear its own costs, including the costs of the application for the adoption of interim measures, and to contribute towards the applicant's costs.

The *Council* contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs, including the costs of the application for the adoption of interim measures;

(iii) in any event, order the applicant to pay the costs of the claim for damages which it has waived.

The *Commission of the European Communities* and *Cetma* support the Council's conclusions and contend that the applicant should also be ordered to pay the costs incurred by them in their capacity as interveners.

III — Submissions and arguments of the parties [1]

A — *Submissions alleging a breach of the provisions of Regulation No 2176/84*

Calculation of the normal value

1. Infringement of Article 2 (3) (a) of Regulation No 2176/84 inasmuch as the Community institutions compared prices on markets with totally different patterns of supply and demand, which therefore precluded a fair comparison

Brother points out that, for cultural reasons concerning essentially differences in language and alphabet, typewriters are little used in Japan. In 1983, for instance, only 20 000 electronic typewriters were sold there, whilst 870 000 electronic typewriters were marketed in the Community.

According to Article 2 (3) (a) of Regulation No 2176/84, the *normal value* means 'the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin . . . '. Although that regulation does not define the concept of 'comparable price', the sixth recital in its preamble states that the comparison must be 'fair' and Article 2 (9) refers to a 'fair comparison'. It follows that only prices which permit a fair comparison to be made are comparable. In this case, the structure of the Japanese market in electronic typewriters has the effect of pushing prices upwards, which makes it impossible to compare that market with the Community market.

That conclusion is confirmed by Article 2 (4) of the GATT Anti-Dumping Code, which provides for the use of factors other than the normal value where, owing to the particular state of the market, domestic sales do not permit a fair comparison to be made. To adopt a different position would be tantamount to extending to the Community the inflationary effects of abnormal market situations in the country of origin, such as the imposition of minimum prices, the existence of monopolies and cartels, or, as in this case, a fundamentally different

1 — As Brother inserted in its reply certain observations which it drew up jointly with the applicants in Joined Cases 260/85 and 106/86, Joined Cases 273/85 and 107/86, Joined Cases 277 and 300/85, and Case 301/85, it is appropriate to summarize those observations under a separate heading which also includes the Council's response to those observations. All those arguments will be set out in Section III (B) of this report.

structure of supply and demand owing to indisputable cultural differences.

The Council points out that the Japanese market in electronic typewriters is a competitive market on which the prices charged are generally offered to all actual and potential customers. Moreover, it is the prices actually paid in the ordinary course of trade, and not the markets, that should be comparable. No market is ever identical or comparable to another market in every respect. If differences between markets could affect price comparability, it would lead to astonishing results, particularly in cases where domestic prices are high owing to the fact that the market is protected.

Cetma points out that alphanumeric typewriters are normally sold on the Japanese market and European and United States manufacturers have a share of that market, albeit a very limited one.

2. Infringement of Article 2 (3) (a) inasmuch as the domestic prices that were used relate to insufficient quantities

According to Brother, the normal value of all, or at any rate the majority, of the exported models should have been established on the basis of the production costs since the quantity of those models sold on the domestic market was less than 5% of exports to the Community, a percentage which the Commission itself had regarded as the minimum threshold below which prices may be influenced by special commercial considerations.

The applicant considers, in the first place, that, according to Article VI of the GATT, dumping takes place only where there is a causal connection between domestic sales and export sales. If domestic sales do not permit the financing of exports on a marginal cost basis, one of the conditions for the existence of dumping is lacking. However, that cannot be verified by arbitrarily fixing a 'threshold of negligible sales'.

Similarly, the applicant considers that such verification cannot be carried out on a model-by-model basis.

Finally, if a threshold were to be fixed, it would have to correspond to the Community institutions' previous practice and take account of the established practice of the Community's major trading partners, as provided for in the third recital in the preamble to Regulation No 2176/84. That is not so as regards the threshold fixed in this case, which is therefore contrary both to the obligation to conform to the practice of the Community's trading partners and to the general principle of legal certainty.

In response, the Council states that the 5% threshold of exports to the Community, adopted in Regulation No 3643/84, is reasonable and that no practice involving higher thresholds was consistently followed prior to the adoption of that regulation. In addition, there is no requirement in Regulation No 2176/84, or for that matter in the GATT Anti-Dumping Code, that the dumping must have been financed by sales on the domestic market; those two measures merely state that dumping exists where the 'export price' is below the 'normal value'. If the applicant's assertions were true, it would no longer be possible to use the production costs for the construction of the normal value or to impose anti-dumping duties in

respect of products from non-market-economy countries.

A model-by-model comparison is expressly provided for by paragraphs 2 and 3 (a) of Article 2, which state that the comparison must be made with the 'like product'.

With regard to the threshold below which sales are considered negligible, the Council sees no reason to imitate in any particular respect the anti-dumping system of a non-member country. Moreover, the system envisaged by Brother, that of the United States, is in many ways totally different from the system of the Community.

Finally, with regard to the alleged breach of the principle of legal certainty, the Council points out that Community law on dumping rightly confers a discretion upon it in cases which are not expressly provided for, which precludes any obligation to indicate in advance the threshold which is to be applied.

3. Infringement of Article 2 (3) (b) inasmuch as the normal value of the majority of the exported models was calculated at the level of the resale price of the related distributor in Japan

Brother contends that, according to Article 2 (3) (b), the Commission, if it considered that the prices charged by Brother to its related distributor in Japan, Brother Sales Ltd (hereinafter referred to as 'BSL'), were not prices established in the ordinary course of trade, should have determined the normal value by reference to the prices to third countries or the production costs. Regulation No 2176/84 makes no provision for the possibility of constructing the normal value of a product 'at the ex-factory level' on the basis of a price charged for it subsequently, and still less for the possibility of using that price as the normal value.

In the regulation imposing a definitive anti-dumping duty, the Council endorsed the Commission's view that the distribution companies form an integral part of the structure of the corporate group, in which those companies carry out essentially the functions of a branch office or sales department. Therefore, although they may be separate legal entities, they constitute — according to the Community institutions — a single economic entity, which precludes the existence of any normal commercial transaction between the manufacturer and a related distributor.

Brother disagrees with that argument. It points out that it is self-evident that its own interests are distinct from those of its subsidiary, in which its holding is only 15.76%. Apart from that, Regulation No 2176/84 draws no distinction according to how closely the vendors and purchasers are related. Finally, if the legislature had wished to allow for the possibility of using prices charged at subsequent stages as a basis of calculation, it would no doubt have laid down detailed rules for constructing the normal value, so as to ensure that a fair comparison — which is fundamental to the whole system — could be made.

The Council points out that Brother and BSL in fact form an economic entity within which BSL carries out the functions of a sales department, even though it is constituted as a legally distinct company. It was therefore correct not to treat transfers within the entity as transactions in the ordinary course of trade. In those circum-

stances, it follows from the order of priority as between paragraph 3 (a) and paragraph 3 (b) that the actual value based on the price actually charged on the market of the exporting country takes precedence. Accordingly, the Community institutions are obliged to ascertain, in the first place, whether there have been any transactions in the ordinary course of trade in the exporting country. In this case, BSL's sales to independent buyers are transactions in the ordinary course of trade.

Cetma also considers that Brother and BSL must be regarded as a single unit in economic terms.

If Brother's opinion were accepted, the applicant would be allowed to transfer most of the costs and expenses to an 'autonomous' local distribution company, and thereby arbitrarily adjust the normal value to the level of the export price.

In view of the possibilities of undertakings which practise dumping of structuring their costs and expenses, and of the extremely complicated calculation of the normal value in Japan, the Community institutions must be left a broad discretion if the system of protection against dumping is to continue to function in practice.

4. Infringement of Article 2 (3) (b) (ii) inasmuch as the constructed value of certain models was calculated at the level of the resale price of the related Japanese distributor

Brother considers that Regulation No 2176/84 does not permit the addition of the exclusive distributor's selling expenses. Moreover, it considers that the construction of the normal value must be treated as meaning the construction of the value of the exported product, with the result that the addition of the Japanese distributor's expenses is unjustified. It cites, in that regard, the approach taken by the Commission in the regulation imposing a provisional anti-dumping duty on imports of certain cotton yarns originating in Turkey (Official Journal 1981, L 347, p. 19) and the practice followed in the United States.

In its reply, Brother also contends that:

(i) the constructed value was calculated in a somewhat ambiguous manner;

(ii) the constructed value should not reflect the value of the product on the domestic market but should be a parameter for determining whether export prices are fair; consequently, dumping exists only in cases where export prices are abnormally low and do not include all the production costs and a normal profit.

The Council points out that this submission is analogous to the previous submission. It states that the constructed value was envisaged by the legislature as representing the value of the product on the domestic market and that it should therefore be parallel, as regards its different components, to the price of the product on the domestic market. The grounds relied upon by Brother to establish the contrary are not convincing. In the case of the regulation concerning cotton yarns originating in Turkey, which was referred to by the applicant, it was necessary to use the expenses relating to

exports solely because no reliable information was available concerning selling expenses on the domestic market.

In response to the first argument raised in the reply, the Council states that, in calculating the constructed value, the Community institutions correctly applied methods that were consistent with the reasoning behind them.

With regard to the second argument, the Council points out that, according to Article 2 (3) (b) (ii) of Regulation No 2176/84, the constructed value is to be established by reference to the cost of production and a reasonable profit margin in the country of origin. The constructed value is therefore defined by reference to the costs of, and the profits yielded by, the product on the domestic market and not by reference to the export price.

Cetma points out that the arguments put forward in connection with the previous submissions are equally applicable to this submission and to all those that follow, up to the 11th submission.

5. Infringement of Article 2 (3) (b) (ii) inasmuch as the profit calculated was abnormal

Brother points out that, in determining the normal profit to be used for the calculation of the constructed value, the Community institutions calculated the total amount of the general expenses incurred by BSL in selling electronic typewriters in Japan, then deducted a minimum portion of those expenses as expenses directly related to sales in Japan, and divided the balance by the Brother group's global sales figure. By deducting the resultant amount, together with Brother's production costs and general expenses, from BSL's average resale price, they obtained the profit made by BSL on its sales in Japan.

That method of calculation is evidently unreasonable inasmuch as it necessarily understates BSL's general expenses and exaggerates the profit made by BSL in Japan, as if BSL incurred practically no general expenses on its sales. It is contrary to Article 2 (3) of Regulation No 2176/84 inasmuch as the 'normal' profit referred to in that provision is the result of a theoretical construction which bears no relation to reality. It should also be regarded as a misuse of powers, since it deflected from its objective a measure designed to combat the unfair manipulation of exports and turned it into an instrument of protectionism.

If the theory of a single economic entity, endorsed by the Commission and the Council, is accepted, then not only BSL's expenses but also its profit margin should be divided by the global sales volume. There is no justification for using two different denominators.

The Council considers that in a case such as this, where the distribution network forms an integral part of an industrial group, it may be considered logical to allocate the general expenses of that distribution network, on the same basis as the group's other general expenses, to that group's aggregate sales. Accordingly, that method cannot simply be described as unreasonable. As for the reasons for which it was selected, the Council refers to the arguments developed by the Commission.

The Commission points out that, when the constructed value was calculated, Brother, which had an interest in ensuring that such value should be as low as possible, agreed that BSL's selling, administrative and other general expenses should be allocated between sales made in Japan and sales made in the rest of the world. The same method was applied for the calculation of the profit when Regulation No 1698/85 was adopted.

If BSL's general expenses had been allocated in their entirety to BSL's sales in Japan, the result would have been the same, since the production costs would have been much higher.

Even if the method that was used is not necessarily appropriate, it must be pointed out that it yields precisely the same result as the other method.

Calculation of the export price

6. Infringement of Article 2 (8) (b) inasmuch as the cost of credit to customers was deducted twice over when the export price was constructed

In its application, Brother had complained that, when the export price was constructed, the cost of credit to customers had been deducted from both the financial expenses of its Community subsidiaries and the resale price in the Community.

The Commission subsequently informed Brother that the effect of the deduction twice over of credit to customers had been eliminated from the calculations and that the dumping margin had been reduced by 1.5%, without affecting the level of the anti-dumping duty. In that regard, Brother raises the question whether the Commission can correct *ex post facto* factual findings or methods of calculation which affect the dumping margin without requesting the Council to confirm or withdraw the regulation in the light of fresh information which could, in certain circumstances, also have a very significant impact on the calculation of the anti-dumping duty.

The Council recalls that the rectification affects the costs to be deducted from the (constructed) export price, that is to say only one of the two components which are necessary in order to calculate the dumping margin. The extent of the injury was determined by reference not to the constructed export price but to the selling price actually paid on the Community market, which clearly was not altered subsequently by the recalculation of certain cost factors.

In those circumstances, there was no reason to reconsider the level of the anti-dumping duty imposed by the contested regulation.

Comparison between the normal value and the export price

7. Infringement of Article 2 (9) inasmuch as the export prices constructed at the ex-factory level were compared with a normal value determined at the level of the product leaving the exclusive distributor

Brother submits that, according to Article 2 (9), the export price and the normal value

must be compared, for the purposes of a fair comparison, at the same level of trade, preferably the ex-factory level. According to the Community institutions, that is the level at which the product ceases to belong to the manufacturer or an apparently related undertaking and becomes the property of an independent purchaser. According to the applicant, however, that concept must be assessed having regard to the economic realities of the situation.

The effect of the Community institutions' interpretation is that all exports to the Community are treated as dumping if sales have also taken place at a level beyond the ex-factory level. That interpretation places undertakings which have not sold any products on the Japanese market at an advantage. It could be accepted, but only if it were applied to both the normal value and the export price.

It is impossible to arrive at the same level of trade by making the adjustments provided for in Article 2 (10). In fact, adjustments can be made only to prices that have already been reduced to the same level of trade. Article 2 (10) (c) of Regulation No 2176/84 provides for allowances to be made for differences in the level of trade only 'in so far as no account has been taken of them otherwise'. However, none of the other allowances listed relates to a reduction of prices to the same level of trade. Accordingly, it is only where, for one reason or another, it has proved impossible to fix prices in advance at the same level of trade that this may be done by the ancillary method of an adjustment.

The Council explains the system for calculating the normal value, whether or not a constructed value, and the export price at the 'ex-factory' level. The institutions relied on the same concept of 'ex-factory' in both cases. It recalls that, in connection with those calculations, the Community institutions had to take account of the fact that the sales unit in Japan forms an integral part of the structure of the Brother group. It was therefore impossible to adopt criteria which varied according to the system of distribution established by an undertaking.

8. Infringement of Article 2 (10) (c) on account of the refusal to make allowances in order to offset the differences affecting price comparability

This submission is put forward by Brother in the alternative to the submission that precedes it. Brother considers that, in the absence of a comparison at the same level of trade, allowances should be made for general selling expenses in Japan and for the related Japanese distributor's profit, in addition to allowances for expenses directly connected with sales.

With regard to the general expenses, Brother considers that, for the purposes of a fair comparison, the related Japanese distributor's expenses should be deducted from the resale price in Japan symmetrically with the deduction of the Community subsidiaries' expenses from the export price.

In response to the Council's argument that overheads and general expenses may qualify only for allowances concerning differences in conditions and terms of sale, but that such allowances must be limited to those

differences which bear a direct relationship to the sales under consideration, Brother states in the first place that in its reasoning the Council seems to be confusing the concept of reducing prices to the same level of trade with the concept of allowances. Allowances have nothing to do with a reduction to the same level of trade and are made only in order to adjust prices which have already been reduced to the same level of trade on the basis of physical differences or other factors.

Next, Brother submits that there is nothing in Regulation No 2176/84 to suggest that the list of permitted allowances in Article 2 (10) is exhaustive, with the result that there is no reason for the Community institutions not to make an allowance for general expenses.

Finally, Brother points out that the reasoning of the Community institutions is contradictory. In the first place, they acknowledge the existence of allowances for differences in the level of trade but contend at the same time that the related distributor's overheads and general expenses — which reflect the actual cost of the difference in the level of sales — may be considered only in connection with the conditions and terms of sale. Secondly, whilst arguing that the overheads and general expenses may be considered only in connection with the conditions and terms of sale, the Community institutions give a restrictive definition of those terms and conditions ('obligations inherent in a contract of sale which may be incorporated in the contract itself or in the general conditions of sale laid down by the vendor'), which does not bear any relation, even a distant one, to overheads and general expenses.

The argument concerning the differences in the composition of the categories of customers concerned, relied upon by the Council in support of its refusal to make the allowances sought by the applicant, is also unfounded. It is clear that BSL's customers (wholesalers and retailers) are not the same as those of Brother (Community subsidiaries).

With regard to the allowance for the profit made by the related distributor in Japan, Brother considers that the requirement of a fair comparison calls for symmetrical deductions with the result that, if a normal profit has been deducted from the resale prices of the Community subsidiaries, it should also be deducted from the resale prices of BSL.

The Council points out that account was taken of the differences affecting price comparability when evidence was furnished of the existence of a direct relationship between those differences and the sales under consideration. On the other hand, allowances for the overheads and general expenses incurred by the domestic sales companies were refused on the following grounds:

(i) the applicant and its sales departments in fact constitute a single economic entity;

(ii) according to Regulation No 2176/84, allowances generally will not be made for differences in overheads and general expenses;

(iii) there is no difference, as regards their composition, between the categories of customers of Brother and BSL, which rules out the possibility of making the allowances sought by the applicant on account of an alleged difference in the level of trade.

According to the Council, Brother is confusing the method of calculating the export price with the rules applicable to a comparison between that price and the normal value. It is only in connection with that comparison that allowances may be claimed. With regard to the allowances concerning differences in the conditions and terms of sale, it is essential to establish that the costs are directly and functionally related to the sales under consideration, that is to say the costs were incurred because of a specific sale. In the case of overheads and general expenses there is no such relationship.

With regard to the allowance claimed in respect of the profit of Brother's related distributor in Japan, the Council emphasizes that, once again, the applicant is confusing the calculation of the export price with the comparison between that price and the normal value.

9. Infringement of Article 2 (10) (c) on account of the refusal to deduct from the resale prices of the exclusive distributor, BSL, a proportion of the general expenses at least equal to the proportion of general expenses incurred by Brother's subsidiaries in the Community

Even if its interpretation of the concept of 'general expenses' were not to be adopted, Brother maintains that the restriction on allowances for general expenses imposed by Article 2 (10) (c) is not an absolute one. The underlying concept of the anti-dumping legislation requires the comparison to be made on a fair basis, and it is unfair to compare a price which includes all the selling expenses on a domestic market with an export price from which all the general expenses have been deducted.

If that interpretation were also rejected, it should still be noted that Regulation No 2176/84 refers to 'differences in overheads and general expenses' for which no allowances are made. This means that an allowance must be made which is at least equal to the selling expenses incurred in the Community. Such an interpretation is amply supported by the practice and the case-law of the United States.

The Council emphasizes that this submission was already embodied in the previous submission, since Article 2 (10) (c) precludes in principle allowances for differences in overheads and general expenses. As for the applicant's references to anti-dumping legislation in the United States, the Council points out that such legislation is not applicable in this case and that, in addition, two sets of legislation pursuing the same purpose may very well be inspired by different legal conceptions and interpretations.

10. Breach of the principles of equal treatment and non-discrimination

Brother considers that, under the method used by the Community institutions, the existence and the level of the dumping margin depend to a large extent on the manufacturer's sales structure on both the domestic market and the Community market. It leads to the determination of a higher margin, both in the case of an exporter operating in the Community through its subsidiaries and in the case of an exporter selling in its own country through its subsidiaries. A difference in treatment on account of the sales structure is manifestly contrary to the principles of equal treatment and non-discrimination.

In response to that submission, the Council challenges Brother's grounds for stating that dumping would not have been found to exist had it not been for the method of calculation applied by the Community institutions. It points out that the existence of any profit margin on exports does not necessarily exclude the existence of dumping. The Council also challenges Brother's contention that, in the case of an exporter which is not active on its domestic market, the dumping margin may not exceed the proportion of that exporter's production losses. In fact, as the dumping margin is equal to the difference between the export price and the normal value, however the latter is calculated, there is no basis for the view that the dumping margin must be limited to the proportion of the exporter's production losses.

In the event that this submission is held to be admissible, inasmuch as it also concerns the implementation of Regulation No 2176/84 by Regulation No 1698/85, it should be pointed out that it was not apparent from the decisions taken by the Community institutions that the broad discretion which must be conferred upon them in this area had been misused.

In particular, the institutions considered that the not altogether novel approach of taking into account the expenses of the related distribution network was necessary in order to avoid discrimination against undertakings with a different sales structure; the institutions acted properly in the exercise of their discretion and there was no breach of the principle of legal certainty.

11. Breach of the principle of legal certainty

Brother argues that since the basic regulation does not lay down detailed practical rules for calculating the dumping margin, Regulation No 1698/85 made a large number of fundamental decisions which had never been taken previously. It is therefore utterly impossible for the exporters to charge prices for exports to the Community which they can be reasonably sure are not dumping prices.

According to Cetma the detailed provisions of Article 2 of Regulation No 2176/84 afford sufficient safeguards for the principle of legal certainty. In establishing the facts and in assessing various criteria, the Community institutions should have a broad discretion in order to prevent exporters from evading anti-dumping measures.

The Council emphasizes that this submission seems to be directed primarily against the actual principles set out in the basic regulation and should therefore be considered inadmissible inasmuch as no objection of illegality has been raised against that regulation.

As the essential purpose of Regulation No 2176/84 is the rapid and effective removal of injury caused by dumping, the adoption of defensive measures to combat the injury inflicted should in no circumstances be delayed or rendered impossible by a strict interpretation and application of Article 2.

Determination of injury

12. The method used to determine the existence of injury was unreasonable; infringement of the rights of the defence

Brother denies, in principle, the lawfulness of calculating the injury by fixing target prices, that is to say by constructing prices which the Community manufacturers would supposedly have been able to charge if there had been no dumping. It considers that the use of target prices should not be permitted if the prices of the imported products are fair, as they quite clearly are in this case. If it were unclear whether the export prices were fair, the construction of a target price for Community products might prove useful, provided that it was done correctly. It is sufficient to point out, however, that target prices were also constructed for certain less efficient European manufacturers which should be protected, if necessary, by measures of commercial policy or by aid schemes, whilst it is doubtful whether such means were actually employed. Moreover, it is legitimate to raise the question whether the Community institutions took account of the fact that the Japanese exporters' prices are sometimes justifiably lower than the prices of Community manufacturers, such as Olivetti, which use, for sales to 'large accounts', a large network of specialized dealers, a factor which must have an impact on their selling expenses.

Brother adds that the comparison between selling prices and target prices is in fact a comparison between prices and costs, which cannot yield reasonable results. The allowances to be made for the purposes of the comparison clearly differ widely, according to whether they take account of the production costs and the effects of trade, or of the costs alone. For instance, an electronic typewriter with a larger-capacity memory has a much higher market value than an electronic typewriter with a smaller memory, even though the production costs are more or less the same in both cases.

Finally, Brother points out that it has no knowledge whatever of the manner in which the 'target' prices were calculated. The method of constructing target prices forms part of the 'essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties', according to Article 7 (4) (b) of Regulation No 2176/84, and should therefore have been communicated to the companies concerned in terms less vague than a mere reference to the addition of costs, selling expenses and a 10% profit. Hence, by communicating that information alone, the Community institutions infringed the rights of the defence.

The Council submits, in the first place, that the Community institutions established the existence of injury after considering not only the prices of Japanese imports but also several other factors, none of which has been contested by the applicant. With regard to the choice of the method for examining 'the prices of dumped . . . imports', that is a matter within the discretion of the Community institutions and reflects, in this case, the proper exercise of that discretion. The prices charged by the Community manufacturers began to fall as soon as the dumped imports appeared on the market. Accordingly, a comparison between those prices and those of the imported products would have been inadequate.

According to the Council, the fact that the exporter covers its costs and may make a profit does not preclude the existence of dumping if the price at which that exporter sells its product is lower than the normal value. Nor is the fact that the prices of Community manufacturers were not undercut significant if those prices were depressed.

As for sales to 'large accounts', the higher costs were taken into account when the costs were calculated as a proportion of turnover. Hence costs at different levels were used for sales to 'large accounts' (higher prices), on the one hand, and to ordinary customers (lower prices), on the other.

With regard to the efficiency of European manufacturers, the Council considers that even the less efficient manufacturers are entitled to protection against dumping since dumped imports cause injury to them over and above the adverse effects of any structural difficulties they may be experiencing.

The Council denies that the Commission compared prices and costs. Target prices are merely prices constructed on the basis of costs, to which selling expenses, general expenses and a reasonable profit margin have been added.

In response to Brother's contention that it had no knowledge whatever of the manner in which the target prices were calculated, the Council states that the method of calculating target prices had been communicated to the applicant. Factual information on the actual prices of Community manufacturers was not relevant, since target prices are constructed on the basis of the costs of production. Moreover, it was impossible to communicate the real costs and prices to the applicant for reasons of confidentiality.

The Commission emphasizes that the findings concerning the prices of imported products are the element involved in the determination of injury which makes it easiest to assess the level at which an anti-dumping duty is to be imposed. If the injury is the result of the undercutting of prices and the dumping margin is equal to or higher than the level of undercutting, it might be sufficient to impose a duty equal to the level of undercutting. The problem is a little more complicated where the existence of dumping has depressed prices. In those circumstances it is too difficult and too risky to take into consideration the level of prices before the dumping started. Accordingly, the only possibility for the Community institutions is to construct the price on the basis of the production costs and to impose a duty enabling the Community manufacturers to charge prices which give them a reasonable profit.

In order to calculate the production costs, the Commission took as a basis the average costs of production of all the Community manufacturers, so as to ensure that the less efficient manufacturers are afforded a degree of protection which is less than that which they need and encourages them to become more efficient. As for the profit margin, it is clear that the level thereof cannot be fixed in such a way as to provide compensation for the injury suffered in the past and that it must be reasonable having regard to all the circumstances with which the Community industry has to contend.

The level of the profit margin was fixed with great prudence by the Commission and was even considered to be inadequate by the Community industry.

In the light of those considerations, the Commission considers that Brother's criticisms of the use of target prices are unfounded.

Cetma submits that the fixing of target prices makes it easier to calculate a fall in prices caused by dumping in the case of technical equipment which is available in a wide range of models, where there are different competitors and traders and where undercutting is practised by charging different prices on the different Community markets.

Cetma recalls that, in connection with the assessment of the target price, it had argued that a profit margin of 18 to 20% on turnover, before tax, could be adopted as an adequate profit margin. Bearing in mind that the lowest profit margin applied by the Japanese undertakings on their own market is 32.39% on turnover, the 10% margin which the Community institutions considered sufficient for the Community industry results in a significant decrease in customs duties in relation to the dumping margins. However, Cetma refrained from submitting a complaint because, in view of the circumstances, the fixing of that margin could not be regarded as a manifest error of assessment.

13. Discrimination between exporters inasmuch as the allowances made between different models were unreasonable

Brother recalls that at a meeting held on 29 March 1985 each of the Japanese manufacturers and Community manufacturers concerned had submitted its own figures regarding the comparability of its models with those of its rivals. Striking differences were revealed between the various assessments. However, instead of verifying those differences or submitting them to an expert, the Commission merely calculated the arithmetical average.

However broad the Community institutions' discretion in the assessment of complex situations may be, the methods used should comply with the general principles of law and be such as to achieve the objective pursued. There is no doubt that to make allowances by taking the arithmetical average of the evaluations made by those concerned, with no verification of their basis and where complete ambiguity exists as to what was sought (market value or difference in costs) is more of an arbitrary action than an objective and systematic attempt to ascertain the true figures.

The Council emphasizes that electronic typewriters do not lend themselves to a direct comparison between Community models and imported models, and that an assessment must therefore be made of the differences between them. Hence it was necessary in those circumstances to apply a method that was as objective as possible and, at the same time, workable. There were sound reasons why the Commission did not avail itself of the services of an expert, namely that any evaluation would inevitably be influenced by a subjective appraisal of the anticipated reactions of potential customers. Although the choice of

a figure midway between the subjective evaluations of the manufacturers concerned was not the ideal method, the Commission was entitled to regard it as a method which was as objective as possible and generally yielded reasonable results.

Cetma considers that it is hardly appropriate to compare and to contrast only different models in an arbitrary fashion. A comprehensive evaluation can be made only on the basis of weighted averages.

14. Taking account, in the calculation of the extent to which prices were being undercut, of 'target prices' relating to models sold by the complainants but originating in non-member countries

In response to that submission, the Council acknowledges, in its defence, that some of Brother's models were compared with some of Olivetti's models that were manufactured at the time in Singapore. The Commission has rectified the calculation of the injury by eliminating those improper comparisons but that rectification has not led to any change in the anti-dumping duty applicable to Brother (see Regulation No 113/86, of 20 January 1986, Official Journal 1986, L 17, p. 2).

15. Incorrect appraisal of the interests of the Community

Brother maintains that on the whole its prices correspond, on average, to the prices charged for comparable models by non-Community manufacturers, for instance IBM or Nakajima, neither of which was subjected to duty.

Consequently, the anti-dumping duty imposed on Brother has the effect of driving the applicant off the market, without conferring any advantages on the Community industry which cannot raise its prices owing to the massive scale of operations of other manufacturers from non-member countries charging the same prices as Brother.

The interests of the Community were also disregarded inasmuch as the duty imposed on Brother, as a result of which it has to include in its resale price a profit of approximately 40%, would, on the assumption that such a profit can be made on the market, have an inflationary effect that is highly detrimental to the Community's economy.

The Council acknowledges that the essential purpose of anti-dumping duties is indeed to protect the Community industry; however, it points out that if, by chance, the imposition of those duties also conferred an indirect benefit on undertakings from non-member countries, that would not constitute an infringement of the anti-dumping legislation.

With regard to the profit margin, the Council considers that if an exporter makes a substantial profit on the domestic market — as is the case here — it must also make a substantial profit on the export market if it wishes to avoid the risk of dumping.

Cetma points out that the fact that undertakings from other non-member countries were selling electronic typewriters in the common market has nothing to do with an interpretation of 'the interests of the Community' within the meaning of Article 12 of Regulation No 2176/84. Moreover, Brother has neither alleged nor demonstrated that those undertakings exported and imported electronic typewriters at dumping prices in such a way as to cause injury to European manufacturers.

B — *Arguments put forward in the observations common to the applicants in Case 250/85, Joined Cases 260/85 and 106/86, Joined Cases 273/85 and 107/86, Joined Cases 277 and 300/85, and Case 301/85, and in response to those observations*

1. Observations common to the applicants

The applicants in the aforesaid cases, including Brother, have advanced in their replies a number of arguments common to all of them which highlight what they consider to be one of the most fundamental defects in the findings of the existence of dumping made by the Commission in this case, namely the fact that the export price and the normal value were not put on a comparable basis. According to the applicants, the high dumping margins attributed to them by the Community institutions are to a large extent the result of the unfair comparison between the export price and the normal value made by the Commission and are inconsistent with both Regulation No 2176/84 and the GATT Anti-Dumping Code on which that regulation is based.

The joint observations are divided into two parts; the first part describes the procedure followed by the Commission, and merely taken over by the Council, to calculate the dumping margin, whilst the second part seeks to show that the comparison made by the Commission is inconsistent with Regulation No 2176/84 and the GATT Anti-Dumping Code.

In their general description of the manner in which a finding of the existence of dumping is made, the applicants emphasize, in particular, the difference between the approach taken by the Community institutions, according to which the calculation of the normal value and of the export price are two separate exercises to which different methodologies should apply, and their own point of view, namely that the purpose of those two calculations is to arrive at two figures, comparison of which must be fair according to Regulation No 2176/84.

Next, the applicants observe that the Commission followed a radically different approach according to whether it was calculating the export price or the normal value. In the first case, it took care to ensure that the export price did not include any expenses incurred in the Community and, in the case of imports made through related sales companies, it deducted all the costs incurred by those companies plus a profit margin. In the latter case, a substantial part of the expenses and an element for the profit related to distribution in Japan were included in the normal value.

In other words, the Commission did not exclude from the normal value any such distribution costs incurred in Japan which were of a kind corresponding to distribution costs incurred in Europe that were not included in the export price with which the normal value was generally compared.

That methodology necessarily yields a high apparent dumping margin even though the exporter sells his products, at the same level of trade, at a higher price in the Community than in Japan and makes the same profit on his export sales as on his domestic sales.

The applicants submit that in adopting that methodology the Community institutions infringed the fundamental requirement that the export price and normal value should be put on a comparable basis, contrary to the provisions of Article 2 of Regulation No 2176/84, which are based on those of Article VI of GATT and of the GATT 1979 Anti-Dumping Code to which the second recital in the preamble to that regulation expressly refers. That requirement is fundamental because it is obvious that a finding that the export price is less than the normal value is justified only if it is based on a fair comparison between the two.

Contrary to what is contended by the Community institutions, the unfair comparison between export prices and domestic market prices made in this case is neither required nor permitted by Article 2 (10) of Regulation No 2176/84.

That provision lays down that 'due allowance shall be made in each case, on its merits, for differences affecting price comparability' and indicates the 'guidelines' which are to be applied for the purpose of determining the necessary allowances.

It would appear from the wording of the provisions of Regulation No 2176/84, of GATT and of the GATT 1979 Anti-Dumping Code that the aforesaid provision is intended to ensure a fair comparison between the export price and the normal value.

To begin with, the Community institutions misinterpreted the expression 'conditions and terms of sale' in Article 2 (10) (c). The reference in that provision to 'commissions or salaries paid to salesmen' shows that the expression 'conditions and terms of sale' cannot be as limited in scope as the Council maintains and cannot refer only to the obligations which may be laid down in the contract of sale or in the general conditions of sale but must also cover the factual conditions of, and surrounding, the sale in question.

Hence the restrictions contained in the aforesaid provision were, according to the applicants, misinterpreted by the Community institutions.

The limitation of allowances to differences which bear a direct relationship to the sales under consideration and the exclusion of any allowances for differences in overheads and general expenses are designed to relieve the Commission, in general terms, of the burden of allocating between domestic trade and exports the general costs of a single organization that is concerned with both domestic and export trade. However, neither of those restrictions applies to a case such as this, where the dispute centres on the failure to allocate to domestic trade the 'indirect costs' of organizations, specifically the Japanese sales companies, that were concerned exclusively with domestic trade.

With regard to differences which bear a direct relationship to the sales under consideration, it should be emphasized that selling the products in Japan entails certain costs that are specifically attributable to the distribution of those products in that country.

Similar considerations apply in the case of overheads and general expenses. A differential allocation of common overheads is irrelevant in the present case.

Further, the expression 'differences in the level of trade' in Article 2 (10) (c) of Regulation No 2176/84 has been misinterpreted, inasmuch as all local marketing and distribution costs were excluded from the export price, whilst significant costs of that kind were included in the normal value. Accordingly, the export price and the normal value were not compared at the same level of trade.

The 'guidelines' should not be applied where their application would lead to an unfair comparison and the list set out therein is illustrative, not exhaustive. It is clear that the first two sentences of Article 2 (10), which require due allowance to be made in each case, on its merits, for differences affecting price comparability, are of a general nature, whereas the guidelines referred to in the third sentence can in no way be regarded as exhaustive. Admittedly, those guidelines apply prima facie, but if their application, on the facts of a particular case, would conflict with the basic principle of fair comparison, there is no doubt that it would be impossible to reject a claim solely on the ground that the case does not fall within one of those guidelines.

The Commission was also wrong in including in the constructed normal value an amount for selling expenses in connection with distribution by related sales companies in Japan.

If the Community institutions had not included in the cost of production the expenses incurred by the exporters' Japanese sales companies, the normal value and the export price would have been on a comparable basis and no question of allowances would have arisen.

The applicants' analysis has the advantage that the likelihood of an exporter being found guilty of dumping will not vary according to whether (i) the normal value is based on actual domestic prices or is constructed, or (ii) export prices are based on actual export prices or are constructed. The principle is always the same: so far as practicable, material elements that are not included or reflected in the export price should not be included or reflected in the normal value.

Moreover, the Community institutions erroneously inflated the constructed value with abnormally high profit margins. The profit margins which the Commission established for certain producers, and the loss established in respect of Tokyo Juki, are simply the result of the Commission's failure properly to allocate costs incurred in connection with the distribution of electronic typewriters.

In determining the profit margin for undertakings selling their products on the domestic market, the Commission took no account of the fact that the advertising costs incurred by those undertakings in connection with their sales of electronic typewriters in Japan were much higher than the advertising costs incurred in relation to their overall turnover.

The loss established for Tokyo Juki stems from the fact that the Commission has disregarded verified accounting data for

that company, which showed that Tokyo Juki's domestic sales were profitable. However, the Commission allocated to sales of electronic typewriters an unreasonable amount of Tokyo Juki's distribution expenses for unrelated products or product lines.

The profits used for the determination of the constructed value are thus based on gross errors in the allocation of the relevant costs.

In conclusion, the high dumping margins that have been established are to a large extent the result of an unfair and legally improper comparison rather than any objectively unfair trade practice which exporters may have engaged in.

2. The Council's response

Before replying to the joint observations of the applicants, the Council considers it appropriate to make two preliminary points.

In the first place the Council recalls that for each of the three main elements used for determining whether dumping is being practised (normal value, export price and a comparison between the two), there are precise, distinct and separate rules. It challenges the applicants' assertion that the GATT Anti-Dumping Code requires allowances to be made for *all* differences affecting price comparability. Apart from the fact that the code does not use the word 'all' as the applicants allege and that the provisions of GATT have never been regarded as directly applicable, as the Court has confirmed in its case-law, it is clear from the text of the code itself that the code represents a compromise, the result of which is a text which is deliberately imprecise and which leaves a considerable margin of discretion to the legislature of each contracting party to decide exactly what allowances should be made.

The second preliminary point concerns the hypothetical example given by the applicants to show that the methodology adopted by the Commission necessarily leads to the establishment of a dumping margin. According to the Council, that example has certain fundamental flaws which render it unusable. It is based on the internal transfer prices between the manufacturing company and its subsidiaries in Japan or the Community, which are inherently unreliable and always subject to manipulation. It omits completely both the expenses and profits of the corporate headquarters company. It considers the domestic sales company as a separate entity, whereas it was found to be an integral part of the corporate structure. It fails to deduct Common Customs Tariff duties. It is incorrectly based on the assumption that the sales price to independent purchasers in Japan is always below the price in the Community. Finally, it does not refer to the constructed normal value.

Next, the Council observes that the applicants' *first* argument seeks to show that the requirement of a comparable price or of

a fair comparison between the normal value and the export price is fundamental, and that the words in Article 2 (10) concerning a fair comparison should override the other conflicting words in that provision. That is contrary to two basic principles of interpretation, namely:

(i) two provisions in the same legislation should normally be reconciled if possible;

(ii) in the event of a conflict, *lex specialis* prevails unless the two conflicting provisions can be reconciled in some other way.

The Council observes that the phrase 'conditions and terms of sale' should be interpreted in the light of the rest of Article 2 (10) (c), which shows that that phrase applies only to differences in terms and conditions which are capable of bearing a direct relationship to specific sales. The only costs which may bear a direct relationship to a sale are those which may be mentioned specifically in a contract of sale and which are likely to influence the mind of the buyer. In a normal contract of sale, it would be unusual to find any clause concerning 'overheads and general expenses', but not for there to be a clause concerning, for instance, credit and delivery terms.

The price charged in the exporting country and the export price may have different payment, credit, delivery and guarantee terms attached to them. Those prices should be brought on to a comparable footing by means of the operation described in Article 2 (10). That operation is not designed not to compare costs, but to compare prices, and the cost element is used only when it is necessary to iron out different conditions attached to prevailing prices. However, even if there were no specific reference to overheads and general expenses, it is clear that such expenses would not 'bear a direct relationship' to specific sales. That interpretation is confirmed by the last clause in Article 2 (10) (c) which is worded as follows: 'the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product'; that shows that Article 2 (10) (c) is concerned only with costs to the seller which are likely to affect the price of the product on the open market, or with advantages to the buyer which may vary for different purchases of the same type of goods.

The applicants rely more specifically on the expression 'commissions or salaries paid to salesmen'. According to the Council, commissions are clearly expenses directly related to sales. The legislature has added salaries paid to salesmen simply in order to avoid different treatment depending solely on the legal form of the relationship between the manufacturer and the sales staff. Therefore that derogation, made for a very specific and legitimate reason, does not justify the general conclusions which the applicants seek to derive from it.

According to the Council, the applicants' *second* argument is based on two clauses in Article 2 (10) (c) which they do not contest but which, in their view, are intended only to make it unnecessary to allocate, as between domestic trade and exports, overheads and general expenses of a company's headquarters. The clauses in question read as follows:

'Allowances shall be limited to those differences which bear a direct relationship to the sales under consideration and include, for example, differences in credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and, in so far as no account has been taken of them otherwise, differences in the level of trade;

allowances generally will not be made for differences in overheads and general expenses, including research and development or advertising costs.'

According to the Council, those clauses do not have the meaning attributed to them by the applicants. The Commission has already explained in its intervention the reasons why it is often inappropriate or impossible to attempt to allocate overheads as between domestic sales and export sales.

With regard to the statement that the general expenses of a domestic sales company can never be included, even partly, in the general expenses allowed for in the normal value, the Council makes the following comments on the points raised by the applicants in their joint observations:

(i) there is nothing in the two clauses in question to suggest that the overheads and general expenses of a domestic sales company should be treated differently from those of a domestic sales department of a company which also has an export department;

(ii) the purely formal legal distinctions between parent company and subsidiaries, on which the applicants rely, are inappropriate in anti-dumping law, which should take account of the economic reality and not the legal form;

(iii) the wording of the two clauses quoted by the applicants militates against their arguments. The applicants' opinion that general expenses should always be the subject of an allowance is directly contrary to the phrase stating that allowances generally will not be made for general expenses;

(iv) if the applicants' theory were correct, sales companies could be set up for the purpose of enabling exporters to claim that all or most of the overheads and general expenses incurred on their domestic markets should be deducted from domestic sales prices, which would be contrary to Article 2 (10) (c), Article 2 (3) (a) and Article 2 (3) (b) (ii).

On the question of the level of trade, the applicants have contended that 'significant local marketing and distribution costs' were included in the normal value and that 'the resulting level of trade was therefore not before any local marketing and distribution' as it was in the case of the export price. The Council observes that the applicants give no reason for the suggestion that the phrase in Article 2 (9) which lays down the principle

of comparison at the same level of trade should override Article 2 (10), which provides that no allowances are normally made for overheads and general expenses. Moreover, the applicants' argument rests on a misunderstanding of the expression 'level of trade'. Where two companies sell to both wholesalers and end-users, they should be regarded, unless each category represents very different proportions of the total sales of the two companies, as selling at the same level of trade.

The Council observes that the general principle of a fair comparison may not be relied upon in order to override the specific terms of Article 2 (10) (c), especially because those terms are the result not of imprecise drafting but of a carefully considered policy for dealing with an inherently difficult problem. Moreover, the applicants do not suggest that these cases are in any way special or unusual. They take the view that their arguments should apply in every case in which the domestic sales were made by a separate company.

The applicants' argument that the Community institutions should have taken into consideration overheads and general expenses not directly related to sales solely on the ground that the Japanese sales were made by separate sales companies cannot be accepted. It is quite clear that, if the same sales had been made by sales departments, the applicants' argument would be contrary to Article 2 (10) (c) and the important findings that the sales companies formed integral parts of the same economic units or enterprises as their parent companies, and that their functions were similar to those of sales departments, have not been challenged by the applicants.

Contrary to the applicants' contention, the difference between the ways in which the export price and the normal value are calculated is the natural and intended result of the express wording of Regulation No 2176/84 and does not inherently have any necessarily protectionist effect.

Next, the Council challenges the applicants' contention that 'in order to reject a claim, either the institutions must be satisfied that allowance of the claim is not necessary to enable a fair comparison to be made or they must point to something in the regulation which specifically permits them to reject the claim even though it is or may be so necessary'.

The applicants' argument to the effect that Article 2 (10) (c) is not applicable to a constructed normal value is incorrect for several reasons. In the first place, a comparison between normal value, however arrived at, and export price always has to be made in any anti-dumping case and in making such a comparison it is always necessary to decide whether allowances need to be made. The applicants' argument is wrong also because it may be necessary to calculate the reasonable amount for selling, administrative and other general expenses on the basis of the real costs of a sales department or sales company selling the

same or a similar product in the exporting country at a price containing allowable and non-allowable cost elements. If Article 2 (10) were not applicable, no allowances at all would be possible, and that clearly runs counter to the applicants' argument.

Finally, the constructed normal value would be unaffected by any change in the relative proportions of costs and profit in Japan since the total of the two elements is included in the constructed normal value. The applicants complain about the use of the lower figure for costs only in the calculation of the profit to be used in constructing the normal value. Even if they were right, their argument would lead to an increase in the costs which would be precisely equivalent to the reduction in the profit based on those costs.

3. The Commission's observations [2]

The Commission observes that, under the rules in force, the normal value includes selling expenses in addition to an element for general expenses, that is to say, expenses which do not bear a direct relationship to sales of the product in question. That rule can be justified by arguments of a general nature, including the fact that any effort to relate general expenses to particular sales is likely to be arbitrary.

2 — In this case, the arguments summarized below were put forward by the Commission in the defence it had submitted before Brother withdrew its application in so far as it was directed against the Commission. Those arguments correspond by and large to the arguments put forward by the Commission in its submissions as intervener in the other cases.

In the special context of dumping investigations, a further point to be made is that all enquiries by the Commission outside the Community depend on the voluntary cooperation of the companies concerned and that if it were necessary to allocate overheads and general expenses within the headquarters of an exporting company in a non-member country that would probably raise great difficulties even if adequate information were made available by the exporter to the anti-dumping authority.

An allocation of overheads in proportion to current sales would require the manufacturer's cooperation and might, moreover, be inappropriate as there is not necessarily a relationship between the proportion of research and development spending or advertising costs and current sales on different markets. No solution has been found so far in the discussions which took place within GATT, both because it was impossible to reach agreement on certain principles and because any rule must, in many situations, inevitably rest on subjective considerations.

Following those preliminary considerations, the Commission considers the treatment of the general expenses of a manufacturing company when the normal value is based on the domestic price. It points out in the first place that, in the case of a manufacturing company which sells on its domestic market only to independent buyers, the normal value is based on the domestic price, with the result that the normal value generally includes overheads and general expenses

since Article 2 (10) (c) provides that no allowance will be made for overheads, research and development costs or advertising costs attributable to domestic sales even if they are higher than those attributable to export sales to the Community. The principle that general expenses are not allocated was adopted on practical grounds in view of the huge difficulties involved in allocating overheads satisfactorily.

The problem which arises in this case is how to deal with the companies which sell on their domestic market only through a related sales company (not necessarily a wholly-owned subsidiary), in view of the fact that, in the Commission's view, transfer prices between a company and its subsidiary cannot be regarded as being 'in the ordinary course of trade'.

There is nothing in Regulation No 2176/84 which suggests that the prices charged by a sales company cannot be used at all as a basis for determining the normal value. If it is decided that a proper comparison is possible, the domestic price in the exporting country should be used in preference to either of the alternatives provided for in Article 2 (3) (b). Regulation No 2176/84 gives priority to that criterion, provided that it permits a proper comparison to be made, regardless of whether that comparison is perfect or easier to make than a comparison based on other criteria.

Once it has been established that domestic prices may be used as a basis for calculating the normal value, the question arises of what deductions should be made from the prices charged by the Japanese sales companies.

According to the Commission, the general expenses of a sales company in the exporting country should be treated as far as possible in the same way as the general expenses of a manufacturing company which has a sales department. The formal difference in the corporate structure should not affect the result, if the sales company is effectively controlled by the manufacturing company and if it is fulfilling essentially the same function as a sales department. The Commission established that the Japanese sales companies formed integral parts of the same economic units as the manufacturing companies and that their functions were similar to those of sales departments. On the basis of those findings the Commission concluded that the general expenses of such companies should also be treated in the same manner as those of a sales department. That does not rule out the possibility that in certain cases a sales company might have functions different from those of a sales department. In those circumstances, for instance, many of the expenses would probably be directly related to sales and consequently they would be allowable. In any event, every situation should be dealt with on its own facts.

The Commission considers that similar considerations apply with regard to the profits of sales companies. It would be intolerable if a manufacturing company which exports its products could effectively reduce the 'normal value' which the Community institutions could arrive at under Regulation No 2176/84 merely by having its sales to independent buyers handled by a sales company rather than a sales department.

Admittedly, if a sales company also sold goods produced by other manufacturing companies or if it handled distribution down to and including the operation of retail outlets, it would be necessary to apportion its profits. In order to do so, however, reliable information would have to be made available by other companies in the same industry showing the profit margins made by distributors from sales to independent buyers on the domestic market.

In conclusion, the Commission considers that when the normal value is based on the prices of domestic sales companies it must include both an element of general expenses and an element of profit, just as it would where it is based on the domestic prices of a manufacturing company's sales department. There is nothing in that approach which necessarily leads to a normal value which is higher for producers distributing their products through related companies than it is for those marketing their products through a sales department.

The Commission then deals with the problem of ascertaining what profit margin is 'reasonable' when the normal value is constructed in accordance with Article 2 (3) (b) (ii).

The Commission considers that when interpreting and applying that provision no rule should be adopted which would be likely to lead to the calculation of normal values different from those which would be arrived at by using domestic prices. The word 'reasonable' does not have a fixed meaning, nor does it refer to a percentage which should always be the same; instead, it is necessary to consider the circumstances of the market. More particularly, it is necessary to take into account any findings which the Community institutions have made in connection with domestic prices.

The desirability of ensuring that the two methods of calculating the normal value lead to parallel results makes it permissible, and even necessary, to use any findings concerning general expenses and profit on the domestic market for the purpose of interpreting and applying the term 'reasonable' when constructing the normal value. It would be not only undesirable but also wrong in principle if the establishment of a dumping margin were to depend on which method of calculating the normal value was chosen.

The Commission goes on to consider the applicants' argument to the effect that the Community institutions have contravened the principle of legal certainty by applying Regulation No 2176/84 in a manner which is unforeseeable and which prevents the undertakings concerned from ascertaining what export price needs to be fixed in order to avoid dumping.

The Commission points out, in the first place, that an exporter cannot in any case expect to know 'with confidence' whether dumping will cause injury to Community industry or whether the Community institutions will conclude that it is in the interest of the Community to impose an anti-dumping duty; no objection can be made on grounds of legal certainty. Nor can the exporter rely on that principle with regard to the methods of calculating the

normal value or the export price. The basic anti-dumping regulation confers on the Community institutions a considerable discretion with regard to the application of the rules which it lays down in particular situations which, as is the nature of things, cannot all be foreseen precisely.

Next, the Commission considers the argument that it is contrary to the principle of legal certainty for the constructed normal value to include an element of profit or of the general expenses which is not based on the individual exporter's own activities because that element cannot be predicted or anticipated by the exporter. According to the Commission, that argument amounts to a denial of the right of the Community institutions to use accurate confidential information available to them and, in practice, a denial of their power to determine what is reasonable in the light of the circumstances of the industry concerned and to use anything other than a standard low rate of profit unless, by coincidence, suitable information is published.

The Commission goes on to consider the problem of the reasonable profit margin to be attributed to a related sales company in the Community under Article 2 (8) (b) of Regulation No 2176/84.

The first question which arises is whether any profit margin should be attributed to a sales company in the Community. The answer to that question should be in the affirmative. The profit margin referred to in the aforesaid provision cannot be that of the exporter because it would not be appropriate to deduct it in order to calculate the export price; nor can it be the independent buyer's profit margin, which would not affect the price to that buyer. The next question is how the Community institutions should decide what constitutes a reasonable profit margin. According to the Commission, the term 'reasonable' does not refer to a profit margin which is fixed and unchanging irrespective of the circumstances, but rather to one which is appropriate to the circumstances of the industry and the market.

The purpose of deducting a profit margin is to reduce the price charged by a related sales company to a level at which it is equivalent to the price which would be charged to independent importers. That is the only correct solution.

To that end, therefore, it is necessary to examine the profit margins of independent importers, if there are any. There is no authority for the view that the maximum profit margin to be attributed to the related sales company is the profit margin based on the transfer price to that company. If independent importers make a large profit margin in the Community, there would be no justification for attributing a small margin to a related sales company merely because its manufacturing parent company had chosen to absorb a large proportion of the profit made by the group in the exporting country.

With regard to the arguments put forward by the applicants in connection with the level of trade, the Commission observes that these cases actually raise three issues:

(i) It is first necessary to ascertain whether the prices of the Japanese sales companies were at the same level of trade as those of the related sales companies in the Community.

(ii) If not, what allowances were needed in order to take account of the differences in the level of trade?

(iii) What other allowances were needed for reasons other than differences in the level of trade?

Unfortunately, the activities of companies do not fall into clearly defined levels of trade. Some companies sell both to wholesalers and to end-users. In that case, unless each category of customer accounts for very different proportions of the total sales of two companies, they should be regarded as being at the same level of trade. The fact that the applicants have not seriously argued that specific allowances should be made may mean that the slight differences between the different categories of customers did not justify any significant allowance.

IV — Answers given by the parties to questions put to them by the Court

In its answer of 21 April 1987, Brother stated its views concerning a number of points on which the Court had sought an explanation from it.

In the first place, it stated that its aggregate sales of electronic typewriters in Japan corresponded to 3.31% of its global exports, excluding the Community, but it did not give a breakdown of that figure, model by model. It reiterated that its profit on sales of electronic typewriters was approximately 11% if Brother and BSL are treated, as they have been by the Community institutions, as one and the same entity.

With regard to the percentage of turnover relating to sales of electronic typewriters as against sales of other products, Brother pointed out that sales of electronic typewriters accounted for 17.26% of its turnover during the reference year.

It denied taking part in any agreement or concertation with a view to penetrating the markets by means of predatory practices, as is clear from the fact that it made substantial profits on exports to the Community. Those profits show that the prices charged by Brother are in no way predatory and therefore constitute the best proof that there was no concertation with a view to penetrating the Community market.

According to Brother, the function and powers of the Japanese Ministry of International Trade and Industry are no greater than those conferred on the public authorities of market-economy countries in general. Similarly, the role of the Japan Business Machine Makers Association is limited to that of any trade organization.

When asked to state the reasons that prompted it to set up distribution subsidiaries rather than sell its products directly to independent purchasers, Brother explained that this system made it possible to

achieve the best possible transparency of the group's operations, and thus to ensure better group management. The group also became more efficient as a result.

Finally, on the question why it opposed taking into consideration the global sales figure for electronic typewriters in calculating the profit margin, although it had accepted that method in connection with the calculation of the production costs, Brother states that its objection is less to the overestimation of the profit than to the use of two different denominators.

In response to the question put to it by the Court, the Council indicated the dumping margin, the level of injury established and the rate of duty imposed on the applicant.

In answering the questions put to it, the Commission first states that even if the most correct method of calculating the profit for the purpose of computing of the constructed normal value would have been to deduct from the price charged by the sales subsidiaries in Japan the costs of manufacturing and distributing electronic typewriters in Japan, that approach would none the less have yielded the same results as that which was selected, since higher selling expenses would then have been allocated to domestic transactions.

The Commission also points out that it did not deduct the advertising expenses of the Japanese sales subsidiary in order to obtain the normal value based on the domestic prices because those prices are necessarily fixed by the subsidiaries concerned at a level which enables them to pay those expenses, as the latter form part of the general expenses which must be met in one way or another and which are normally paid out of revenue from domestic sales.

Where the normal value is constructed, a reasonable amount should be included for selling expenses, overheads and other general expenses. That amount should also include advertising expenses, as they are general expenses.

With regard to the question why the Community institutions took the view that the figures published in the applicant's balance sheet are not conclusive, the Commission points out that the balance sheets and profit and loss accounts of an undertaking cover all its activities and do not therefore provide, in the case of a company which produces and markets a wide range of products, sufficient details concerning the costs of production of each product taken individually. In Brother's case, sales of electronic typewriters accounted, for instance, for only 3.6% of its sales in the Community and 17% of its global sales. In addition, any commercial transaction within a group such as Brother is based on internal transfer prices and the balance sheets of an undertaking within the group naturally reflect those prices as opposed to market prices or market costs. It follows that the figures set out in the applicant's balance sheet cannot be relied on for the purposes of calculating the normal value.

With regard to the dumping margin calculated for a product whose selling price in Japan seemed, according to Brother's figures, to correspond to the selling price in the Community, the Commission produced figures which instead revealed a substantial

difference between the export price and the domestic price. The costs which must be borne by a Japanese undertaking in order to sell its products on the Community market (transport, customs duties, general expenses, storage, insurance and so on) are fairly substantial, with the result that, if the domestic price and the selling price charged by a subsidiary in the Community were more or less the same, it would almost certainly indicate the existence of dumping.

The last questions put to the Commission were whether it shared the applicant's view that the selling prices to 'large accounts' (government ministries, hospitals and so on) are necessarily higher than the selling prices to a normal buyer, notwithstanding the reduction in costs which should at first sight be the result of selling large quantities of electronic typewriters to a single buyer, and, if so, for what reasons, and whether it had taken account of the specific characteristics of sales to 'large accounts'.

In its answer the Commission stated that, in its view, sales on a large scale normally entailed lower costs and that selling prices to 'large accounts', or to any other buyer for that matter, in fact depend on all the terms and conditions in the contract.

In the case of Olivetti, which sells to 'large accounts', the additional maximum costs attributable to those sales constitute approximately 3 to 4% of the price charged. The impact on the target price of the additional costs relating to sales to 'large accounts' is therefore much less than 1% and may thus be regarded as negligible.

G. Bosco
Judge-Rapporteur

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

(see Case 56/85, p. 5655, 5671)