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

My Lords,

The legal framework and the procedure

Community rules on anti-dumping are to be found in Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the EEC (Official Journal 1984, L 201, p. 1) ('the Basic Regulation'), which is based on Article VI of the GATT and the second GATT Anti-Dumping Code ('the Code') (Official Journal 1980, L 71, p. 90), which elaborates on Article VI and which resulted from the Tokyo Round in 1979.

Under the Basic Regulation, a product is defined as having been dumped if its export price to the Community is less than the normal value of the like product (Article 2 (2)), and the Community may impose an anti-dumping duty under the following basic conditions. On the one hand, it must establish normal value (Article 2 (3) to (7)), it must establish export price (Article 2 (8)), and it must compare the two (Article 2 (9) and (10)) in order to ascertain the dumping margin (Article 2 (13)). On the other hand, in a separate operation, the Community must determine whether the dumping is causing injury to the Community industry (Article 4). If a positive determination is made on both points, and if the interests of the Community call for intervention, an anti-dumping duty must be imposed (Articles 11 and 12). The amount of the duty may not exceed the dumping margin and should be less if a lesser duty would suffice to remove the injury (Article 13). Under the Basic Regulation, investigation and the imposition of provisional duty are matters for the Commission (Articles 5 to 7, 10 and 11); the imposition of definitive duty and definitive collection of provisional duty are matters for the Council (Article 12). It is convenient to refer to the Commission and the Council together, performing their respective functions, as the 'Community authorities' in the context of an anti-dumping proceeding.

Following a complaint lodged by the Committee of European Typewriter Manufacturers ('Cetma'), an organization representing substantially all Community producers of electronic typewriters, the Commission initiated an anti-dumping proceeding concerning imports into the Community of electronic typewriters originating in Japan, made by a number of companies including Tokyo Electric Company Ltd ('TEC').

TEC is a Japanese company engaged in the production and sale of cash registers, electronic scales, other products, and — since the end of 1982 — electronic typewriters. More than 50% of TEC's shares are owned by Toshiba Corporation, Japan's second largest electric machinery maker. In the Community, TEC has wholly owned subsidiaries engaged in the distribution of its products in France, Belgium, Germany and the United Kingdom. In other Member States, TEC distributes its products through independent distributors. A proportion of TEC's exports of electronic typewriters to the Community consist of 'OEM (original equipment manufacturer) sales' to European undertakings such as Utax GmbH in Germany or Esselte in Denmark, which resell TEC typewriters under their own brand name.

On 20 December 1984 the Commission adopted Regulation No 3643/84 imposing a provisional anti-dumping duty on certain imports of electronic typewriters originating in Japan (Official Journal 1984, L 335, p. 43) ('the Provisional Duty Regulation') and in particular a provisional anti-dumping duty of 6.9% on imports of electronic typewriters originating in Japan, manufactured and exported by TEC.

Under the Basic Regulation (Article 11 (5)), provisional duties have a maximum period of validity of four months, renewable under certain conditions for a further period of two months. The Provisional Duty Regulation (Article 3) applied for a period of four months from 23 December 1984 unless the Council adopted definitive measures before the expiry of that period, which it did not. However, by Regulation No 1015/85 of 19 April 1985 extending the provisional anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 108, p. 18; and corrigendum in Official Journal 1985, L 112, p. 59), the Council, acting on a proposal from the Commission, provided that the provisional anti-dumping duty imposed by Regulation No 3643/84 should be extended for a period not exceeding two months (Article 1).

On 19 June 1985 the Council adopted Regulation No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1) ('the Definitive Duty Regulation'), which imposed a definitive anti-dumping duty on imports of electronic typewriters originating in Japan, at a rate of 21% for those manufactured by TEC (Article 1) with effect from 23 June 1985 (Article 3). It also provided (Article 2) that the provisional duty imposed on TEC should be collected at its provisional rate (6.9%).

By an application lodged on 19 August 1985 TEC and its subsidiaries TEC Belgium SA of Belgium ('TEC Belgium'), TEC Elektronik GmbH of the Federal Republic of Germany ('TEC Germany'), TEC Europe Company Ltd of England ('TEC UK') and TEC France SA of France ('TEC France') brought an action (Case 260/85) against the Council claiming that the Court should:

(a) annul Articles 1 and 2 of Council Regulation No 1698/85 in so far as they apply to electronic typewriters manufactured by the applicant;

(b) order the Council to pay the costs.

By another application lodged on 22 August 1985 the same applicants sought an interim order suspending the definitive anti-dumping duty (Case 260/85 R). That application was dismissed by an Order of the President of the Court of 18 October 1985, which also reserved the costs of the interim proceedings ([1985] ECR 3467).

The Definitive Duty Regulation provides that certain 'small-size electronic typewriters' should be excluded from the duty because they fall into a different category from those produced and investigated in the Community (Recital 49), and it lays down a list of the models excluded (Article 1 (3)). That list has been extended from time to time: Council Regulation No 3002/85 (Official Journal 1985, L 288, p. 5), Council Regulation No 2127/86 (Official Journal 1986, L 187, p. 3) and Council Regulation No 547/87 (Official Journal 1987, L 56, p. 1).

The rate of definitive duty imposed on TEC by the Definitive Duty Regulation was changed from 21 to 24%, to rectify a miscalculation, by Article 1 of Council Regulation 113/86 (Official Journal 1986, L 17, p. 2). By an application lodged on 2 May 1986, TEC brought another action (Case 106/86) claiming: (a) the annulment of Article 1 of Regulation No 113/86 in so far as it applies to electronic typewriters manufactured by TEC, and (b) costs. The arguments raised in that case are in substance identical to those raised in Case 260/85, except that the Council contends that the case is inadmissible for duplication and lack of any separate argument directed specifically against Regulation No 113/86. It therefore asks for its costs in any event. The Court joined Cases 260/85 and 106/86 by an Order of 11 March 1987.

The Commission and Cetma have intervened in support of the Council. UTAX GmbH (a German company having no special ownership connection with TEC which *inter alia* imports TEC electronic typewriters on an OEM basis and sells them under its own brand) has intervened in support of TEC.

Much argument has turned on the Community Authorities' treatment of another Japanese producer and exporter of electronic typewriters, Nakajima All Co. Ltd ('Nakajima'), one of the companies which had been investigated. First, the Commission terminated the anti-dumping proceeding in respect of electronic typewriters produced and exported by Nakajima by Article 1 (2) of the Provisional Duty Regulation, having found a dumping margin of 1.2% which it regarded as *de minimis* (Recitals 28 and 29). Nakajima was also expressly excluded from the field of application of the Definitive Duty Regulation (Article 1 (2)), but at the same time the Commission reopened the proceeding in view of new findings about profitability on the Japanese market

(Official Journal 1985, C 149, p. 3). The Commission subsequently imposed a provisional anti-dumping duty of 28% on imports of Nakajima's electronic typewriters originating in Japan with effect from 10 October 1985 by Regulation No 2812/85 of 7 October 1985 (Official Journal 1985, L 266, p. 5). However, following representations by Nakajima and 'one unrelated importer', the Commission reviewed the position using 'an updated period of investigation' and a lower profit margin for the determination of normal value, and again terminated the anti-dumping proceeding in respect of electronic typewriters manufactured by Nakajima by Decision 86/34/EEC of 12 February 1986 (Official Journal 1986, L 40, p. 29). The result is that Nakajima is not liable to pay any provisional duty and any amount it had already paid by way of security for provisional duty becomes repayable pursuant to Article 11 (7) of the Basic Regulation; in the end it will not have had to pay any anti-dumping duty.

Finally it should be added that, after the close of written pleadings and before the hearing in the present case, the Court delivered a series of judgments (in Case 240/84 *NTN Toyo* v *Council* ECR 1809, Case 255/84 *Nachi Fujikoshi* v *Council* ECR 1861, Case 256/84 *Koyo Seiko* v *Council* ECR 1899, Case 258/84 *Nippon Seiko* v *Council* ECR 1923, and Case 260/84 *Minebea* v *Council* ECR 1975, the 'Mini ball-bearings' cases, all of 7 May 1987) which dealt with certain issues also arising in the present cases.

TEC advances four grounds of annulment. They concern:

(1) the profit margin used to construct normal value,

(2) the selling expenses included in constructed normal value,

(3) the treatment of the selling costs of TEC France, and

(4) the injury finding.

Ground 1: the profit margin used to construct normal value

During the investigation period used by the Commission (1 April 1983 to 31 March 1984), TEC had no sales of electronic typewriters in Japan. Therefore, under Article 2 (3) of the Basic Regulation, the normal value had to be either the comparable price of the like product when exported to a third country or the constructed value. The Community authorities chose the latter. Under Article 2 (3) (b) (ii) of the Basic Regulation, the constructed value is 'determined by adding cost of production and a reasonable margin of profit'. That provision further specifies: 'As a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin, the addition for profit shall not exceed such normal profit. In other cases, the addition shall be determined on any reasonable basis, using available information.'

In the Provisional Duty Regulation a profit margin of 10% was 'considered to be reasonable' (Recital 16) but, as the

Commission has told the Court, the figure was only an estimate and was revised in the light of further investigation. In the Definitive Duty Regulation 'it was considered reasonable to include in the constructed value of (TEC's) models a margin of 32.39% on turnover', i. e. 47.92% on cost (Recital 16).

At first sight, a margin of 47.92% on cost does not seem inherently improbable though it was much higher than the figure used in the Provisional Duty Regulation and the profit margins accepted in previous EEC anti-dumping regulations which had not exceeded 10%. Recital 16 to the Definitive Duty Regulation explains that where, for certain other manufacturers, normal value was determined on the basis of domestic sales (rather than constructed) very substantial profit margins were discovered. The lowest of these was 32.39% on turnover (47.92% on cost). It was thus thought reasonable to include that figure in the constructed value of, *inter alia*, TEC's models as a normal profit margin on the domestic market. In answer to the claim that the profit margin is excessive and results from special circumstances on the domestic market, the recital goes on to assert: 'No profit margin can be more reasonable to use than the actual margin'.

TEC is not content with that explanation and argues: (a) A profit margin as high as 47.92% cannot possibly constitute a 'reasonable margin of profit' nor a 'normal profit' within the sense of Article 2 (3) (b) (ii) of the Basic Regulation; (b) The use of a 47.92% profit margin violates the rule laid down in Article 2 (3) (b) (ii) that the addition for profit shall not exceed the profit 'normally realized on sales of products of the same general category on the domestic market of the country of origin'; (c) The method used by the Community authorities to determine the 'reasonable profit' in this case leads to arbitrary and unpredictable results in violation of the principle of legal certainty; (d) The use by the Community authorities of a 47.92% profit margin for the definitive determination of the normal value of TEC products is discriminatory, because Nakajima was treated differently; (e) The 47.92% profit margin used in the definitive determination is based on data which were not communicated to the applicant and therefore may not legally be relied upon by the Community authorities.

In considering these (and similar) arguments where the Council or the Commission is required to appraise complex economic situations (as in an anti-dumping proceeding), the Court limits its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (e. g. paragraph 21 of the judgment in Case 258/84 *Nippon Seiko* v *Council*, cited above).

The basic question here is whether it is a proper way of constructing normal value to take one company's actual profit margin on

domestic sales and attribute it notionally to another company which has no sales on the domestic market. The purpose of constructed normal value is to act as a substitute for domestic selling price as a basis for normal value where there are no domestic sales or where such sales do not permit a proper comparison. A way of constructing normal value which brings it closer to actual domestic prices is in line with that purpose. The texts (Article 2 (3) (b) (ii) of the Basic Regulation, which in this respect closely follows Article 2 (4) of the Code) provide for the inclusion in the constructed normal value of a reasonable amount for profit and provide that as a general rule the addition for profit should not exceed the normal profit (if there is one) on sales of products of the same general category on the domestic market of the country of origin. There is no express requirement here that the profit has to be realized by the same company, but only that it should be realized 'normally' on sales of products of the same general category. The 'same general category' in this case was taken to mean 'electronic typewriters'. In my opinion that was correct and I would not accept that it must be taken to mean any broader category of office equipment. If the Commission found that sales of electronic typewriters on the Japanese market normally gave rise to profit, I consider that it was in accordance with the wording of Article 2 (3) (b) (ii) of the Basic Regulation for such profit to be taken into the construction of normal value for companies which did not have sales on the Japanese market.

On the domestic market profits were found to be normally realized by three companies, each at a different rate: Brother (71%), Silver Seiko (61%) and Canon (47.92%). Where, as here, the profit was realized by several companies I consider it within the Commission's power of appraisal to deduce the normal profit figure from an average of the different profit margins found. In fact the Commission took the lowest of the three margins (47.92%) which is a more favourable hypothesis for the company concerned and is therefore *a fortiori* within the Commission's power of appraisal.

The submission that the principle of legal certainty in this connection has been violated is in my view unfounded. First it is suggested that the principle of legal certainty is breached because the models whose profit margin was used were sold in Japan in numbers too small to provide a statistically reliable basis. That suggestion falls in my view to be rejected. The models were sold in relatively substantial numbers, and the Community authorities used profit figures from sales on the Japanese domestic market only where those sales exceeded 5% by volume of exports to the Community, a threshold introduced precisely in order to safeguard legal certainty (Recital 4 to the Definitive Duty Regulation). Then it is suggested that it is arbitrary to assume that TEC would sell at Canon's profit margin. Whilst it is true that this is a hypothesis, the argument is deprived of any force by the fact that the hypothesis used by the Community authorities is the one most favourable to TEC. As I have just said, they were not bound to give TEC the benefit of the lowest of the three actual profit margins found but could as legitimately have used an

average of the three, which would have given a higher figure. Next it is said that this method of determining the 'reasonable margin of profit' is unpredictable. Inasmuch as one company (here, TEC) does not know precisely the profit figures of another company (here, Canon), it is true that this method of establishing a 'reasonable margin of profit' for the purpose of constructing normal value involves a degree of unpredictability for the first company. However, that is not to say that it amounts to a breach of the principle of legal certainty. The consequences of the alleged breach have to be considered. TEC asserts that the consequences are that an exporter would never know how to set its prices so as to avoid dumping and would find it impossible to take steps so as to avoid dumping. That is not wholly accurate. There will necessarily come a point at which the exporter is made aware that a finding of dumping is possible, and he can then offer to raise his prices so as to eliminate the dumping: Article 10 of the Basic Regulation. If he is too late to come within the time specified in Article 10 (1), he may still raise his prices voluntarily and request a review of the anti-dumping regulation under Article 14 of the Basic Regulation. Where, as here, an exporter persists in charging prices which have been found to be dumping prices he can no longer complain of a breach of the principle of legal certainty. Even as regards an earlier period, the principle of legal certainty has to be weighed against *inter alia* the principle of equal treatment. If, following TEC's argument, an actual profit margin may not be used where normal value is constructed, the alternative is to use a notional profit figure. For the reasons given in the next paragraph that could result in discrimination between two classes of exporters, and in such a case the principle of equal treatment outweighs or at least balances out the principle of legal certainty. In my view it has not been shown that the impugned method of determining a 'reasonable margin of profit' is in breach of the principle of legal certainty.

I would reject the contention that a hypothetical margin must be used for those models whose normal value was constructed, whilst actual margins are used for those models whose normal value is based on sales on the domestic market. Whilst hypothetical margins may be used for want of detailed information, e. g. at an early stage of the proceeding, once a figure has been established for normal profits on sales in the domestic market that figure must as a general rule, or at any rate may, be used in constructing normal value, pursuant to the penultimate sentence of Article 2 (3) (b) (ii). (In other cases the Commission has power under the last sentence of that provision to determine the profit margin 'on any reasonable basis', although that is not the present case.) Nowhere in the provision is there any requirement on the Commission to continue using a hypothetical profit margin once a 'normal profit' has been established. Moreover, to do so would risk creating inequality between the cases where normal value was constructed (using a hypothetical profit margin of, say, 10%) and those where it was based on domestic sales price (with a margin of between 47 and 71%).

I conclude therefore that it is permissible in principle to use one company's actual profit

margin on sales in the domestic market and attribute it to another company not having such sales for the purpose of constructing the normal value of its products. The next question is whether the particular profit margin attributed to TEC was correctly determined.

It has been alleged that the profit margin on domestic sales found for Brother and Silver Seiko are vitiated by errors. That matter is irrelevant in this case because those profit margins were not used for TEC, only Canon's was. It is alleged that Canon's profit margin on domestic sales was wrongly calculated, in substance because it included a large part which had been spent on advertising on an unusually large scale to launch the product. For the reasons given in my Opinion in Joined Cases 277 and 300/85 *Canon* v *Council*, to which I refer, I consider that the profit margin on Canon's domestic sales was calculated in a valid way, and therefore this submission fails. Even if, contrary to that view, the allocation of Canon's advertising costs were wrong, Canon itself asserts that the extra amount spent on advertising was exceptional and temporary, from which it follows that the profit margin found is still a valid indication of profits 'normally realized' on the domestic market and can in accordance with the Basic Regulation be used for constructing the normal value of the products of, *inter alia*, TEC.

Since, on this view, the 'normal profit' realized on the domestic market was validly ascertained, there can be no question that the margin of profit was so high that it was not 'reasonable' as required by the first sentence of Article 2 (3) (b) (ii) of the Basic Regulation, as well as Article 2 (4) of the Code. They lay down in detail what is to be understood as 'reasonable' and it is apparent from their terms and purpose that a validly ascertained actual profit margin on domestic sales is the primary example of what is to be considered 'reasonable'. As the 16th Recital to the Definitive Duty Regulation says, 'no profit margin can be more reasonable to use than the actual margin'.

Although the question therefore does not arise, my view on it is that there is nothing inherently excessive in a profit margin of 47.92%. The Council and Cetma admit that the margin seems high, but they assert that high profits are possible on the very protected Japanese market. TEC has not rebutted that assertion. It has contended that regard should be had to profit margins on office machinery generally. That contention must in my view be rejected: the range of such products is too vast and their characteristics (e.g. novelty and technological content) too variable to provide a workable basis of comparison. Under Article 2 (3) (b) (ii) such comparison is confined to 'products of the same general category', and it was a valid use of the Commission's powers to regard such category as consisting of electronic typewriters only.

I conclude on this point therefore that the 47.92% profit margin attributed to TEC was validly ascertained.

TEC also argues that since a profit margin of 10% was included in the target sales price of the Community product for the purpose of determining injury to the Community industry (Recitals 33 and 35 of the Definitive Duty Regulation), a similar figure should have been used for constructing the normal value of TEC's products. Target sales prices were used because actual prices realized by Community producers had been depressed by the low prices of Japanese imports (Recital 33). Since the target sales price was a wholly notional one the profit margin included in it could only be an estimate: unlike the situation with normal value, there were no actual sales at full price on the Community market which could be used for the purpose. Since the actual profitability of Community industry during the investigation period was below a level at which the existence of the industry could be guaranteed (Recital 31) the Commission had to fix a notional profit figure at a level adequate for such an industry to continue to exist. The Community industry contended for a level of 20% on pre-tax turnover but the Commission considered that a margin of 10% on sales was adequate, in the light of a number of factors set out at length in Recital 35 of the Definitive Duty Regulation. Necessarily, therefore, only an estimate could be used for the profit figure included in the target sales price of the Community product whereas no such restriction applied to the profit margin used to construct the normal value of the Japanese product. On the contrary, Article 2 (3) (b) (ii) of the Basic Regulation specifically indicates that actual profits normally realized on the domestic market should 'as a general rule' be used as an indicator.

Moreover, in the system both of the Basic Regulation and of the Code, the ascertainment of the dumping margin (which includes finding the normal value) and the determination of injury are distinct operations which have to be kept separate throughout the proceeding. They are the two basic conditions and both of them have to be fulfilled independently before an anti-dumping duty may be imposed. In view of this fundamental distinction, the system of the Basic Regulation (and the Code) does not require any correlation between the estimate of profit on Community products used in the injury finding and the margin of profit used in constructing the normal value of TEC's products. This argument must therefore be rejected.

As regards TEC's contention that the Commission and Council could not rely on certain information which was not communicated to TEC, Article 7 (4) (a) of the Basic Regulation provides that exporters such as TEC may inspect all information made available to the Commission by any party to an investigation subject to the provisos *inter alia* that it is not confidential within the meaning of Article 8 of the Basic Regulation and that they address a written request to the Commission indicating the information required. Article 8 of the Basic Regulation lays down the provisions governing the confidentiality of such information. The Council asserts that TEC was given all the information to which it was entitled under these provisions. That assertion is borne out by copies of telexes and letters produced to the Court, which show that TEC was given the profit margin used, then at its request was given further information about the models used, the individual profit margins found, the quan-

tities sold on the domestic market, the method used in arriving at the profit margin and the composition of the list of customers. The Commission explained that the remaining information requested could not be given as it was confidential. TEC has thus already received very broad information about the profit margin used to construct normal value. Its only specific complaint now is that it was not given information concerning the subtraction of costs incurred in the sales. That complaint must be rejected, first, because it does not appear from the documents produced that TEC asked for such information and, secondly, because the Commission could not have provided the information in such a way as to enable TEC to verify it without disclosing the name of the company concerned in breach of its obligation of confidentiality. I am satisfied that the Commission disclosed to TEC all the information it was required to, consistently with its obligation of confidentiality, and accordingly would reject this contention.

Finally, it is asserted that the Council and Commission have discriminated against TEC and in favour of Nakajima as regards the 'reasonable margin of profit' used in the construction of normal value. Discrimination consists in treating similar situations differently or different situations similarly. In the Definitive Duty Regulation a profit margin of '32.39% on turnover' was used to construct the normal value of TEC's products: in Decision 86/34 a profit margin of '26% on turnover' was used to construct that of Nakajima's products. That is plainly different treatment and would be discriminatory if the two companies were in a similar situation. TEC maintains that they are: the Council and the Commission contend that they are not. They largely repeat what is stated in Recital 5 to Decision 86/34, to the effect that Nakajima's 'particular structure' justified using a lower profit margin. The recital continues: 'For this purpose, Nakajima submitted evidence which showed that Nakajima, contrary to all other Japanese firms involved in the proceeding concerning electronic typewriters from Japan, was basically a factory only without a conventional sales force or sales structure for any of the very limited number of products it manufactured. Nakajima only sold to a handful of customers world-wide. It was therefore considered unreasonable to apply to Nakajima the same profit margin, as that referred to in Regulation (EEC) No 1698/85, which was determined for a firm with completely different characteristics'.

I consider this unpersuasive. For the reasons given above, I consider that it was compatible with Article 2 (3) (b) (ii) of the Basic Regulation to use the lowest profit margin found in the actual sales on the Japanese market for the construction of normal value. It is established that normal value had to be constructed for Nakajima. I am not satisfied that the structure of the company should alter the basis adopted for estimating profitability in constructing that normal value, so as to justify using a different margin from that used for the other exporters including TEC. However, I do not find it necessary to express a

concluded view on the matter, because if the profit margin used for TEC is in all other respects lawful (as I consider that it is) any discrimination in favour of Nakajima may go to vitiate Decision 86/34 but not the regulation contested in these proceedings. In these proceedings any such discrimination cannot in my view constitute an irregularity of such a kind as to provide grounds for annulling the Definitive Duty Regulation; neither can TEC claim to have applied to it the 26% profit margin when the one actually applied to it was in all other respects lawful.

Accordingly, I would dismiss TEC's first ground of annulment concerning the 'reasonable margin of profit' used in constructing the normal value of its products.

Ground 2: the selling expenses included in constructed normal value

TEC's second ground of annulment concerns the other component of constructed normal value, the cost of production. In that regard, TEC alleges that in including in the cost of production of TEC products an amount for selling expenses at a level of trade beyond the ex-factory level and relating to sales of products other than that under consideration, the Community authorities have incorrectly applied the Basic Regulation in the following respects.

(a) The approach used by the Community authorities to inflate the cost of production of TEC electronic typewriters by the selling, administrative and other general ('SGA') expenses of TEC Electronics Co. Ltd ('TEC Electronics'), a subsidiary of TEC engaged in the distribution mainly of cash registers and electronic scales, but not electronic typewriters, primarily to end-users in Japan, is inconsistent with Articles 2 (9), 2 (10) and 2 (11) of the Basic Regulation.

(b) Constructed value is not designed to lead to a normal value 'as if' sales on the domestic market had taken place.

(c) Even if the Community authorities' basic premise were correct, it would still not justify the inclusion of the SGA expenses of TEC Electronics in the cost of production of TEC electronic typewriters.

(d) The only SGA expenses to be taken into account under Article 2 (3) (b) (ii) for purposes of establishing the constructed value of the product under consideration are those relating to such product, not those relating to sales of products other than the product under consideration.

Electronic typewriters, up to now at least, are made with alphanumeric keyboards (i. e. with arabic numbers and roman letters) but not with Japanese characters. Unlike many other products, therefore, (e.g. ball-bearings) they are not saleable in the same way both in Japan and in the rest of the

world. For these products there is only a very restricted market in Japan, typically companies trading with countries using a western alphabet or other organizations having correspondence with such countries. The product is essentially made in Japan for export, as is shown by the figures produced to the Court in the present series of cases and by the fact that the applicant in the present case sold exclusively for export. One of the main export markets for the product is of course the EEC.

In such circumstances little sacrifice is likely to be involved in a manufacturer refraining from making any sales of the product on his home market.

TEC argues that it is a wrong approach to construct normal value as if sales had actually taken place on the domestic market. That argument I would reject. If that had been the intention, the legislation need have provided only for the use of 'domestic price' as the term of comparison with export price. The fact that both the Code and the Basic Regulation take the wider concept of 'normal value' shows a recognition by the authors that the concept of 'domestic price' was too narow and an intention to adopt a wider concept capable of catching a broader range of situations with a view to ensuring the efficacity of the legislation. The basic notion none the less remains that of domestic price. This follows from the historical evolution of the legislation and from its present structure, e. g. the order of the subparagraphs of Article 2 (3) of the Basic Regulation. It is in my opinion right to maintain, as the Council does, that constructed normal value is an attempt to construct an equivalent to actual domestic price, on the supposition that there had been domestic sales in circumstances where the sale price provided a reliable guide. Proceeding as if sales had taken place in the ordinary course of trade on the domestic market seems to me a proper, indeed possibly the best, way of constructing normal value in accordance with the scheme and purpose of the legislation.

Equally, if it were possible for an exporter to escape a finding of dumping merely by refraining from marketing his product on his domestic market, the legislation would largely be rendered a dead letter. That, it seems to me, would be the effect of upholding TEC's argument. TEC did not make any sales of electronic typewriters in Japan, but both the Code and the Basic Regulation provide for the construction of a normal value precisely to allow an anti-dumping proceeding to go ahead efficaciously *inter alia* in such circumstances. Constructed normal value includes a 'reasonable' amount for cost of production, and what is 'reasonable' must perforce be ascertained by reference to the circumstances where sales are actually made in the normal course of trade on the domestic market. To construct normal value in this respect 'as if' sales had actually taken place on the domestic market seems to me not only within the powers of the Community authorities but the most obvious way of complying with the Basic Regulation. Moreover, it has the advantage of applying similar criteria to those manufacturers with relevant sales on the domestic market and those without, and thus avoiding the risk of discriminating between them. Apart from the risk of discrimination which it thus

entails, TEC's argument must, in my opinion, be rejected, particularly in the case of the present product (one mainly manufactured for export) because it would tend to stultify the operation of the anti-dumping legislation.

In view of the foregoing analysis I do not consider it possible to sustain the argument, advanced by TEC, that constructed normal value concerns the value of the product sold for export. It does not. It concerns the value of the product envisaged in relation to the domestic market. Council Regulation No 789/82 (Official Journal 1982, L 90, p. 1; the 'Turkish cotton yarn regulation') is of no assistance to TEC here. In that case the Community authorities lacked reliable data on sales on the domestic market and for the purpose of constructing normal value had to fall back on what information was available, to that end extrapolating from expenses connected with exports. That solution was dictated by the particular circumstances of the case and does not support the broader principle contended for by TEC. Moreover those special circumstances are not shared by the present case, so that it cannot be argued that the same approach should be adopted here.

I conclude therefore that it was lawful for the Community authorities to construct normal value for TEC 'as if sales on the domestic market had taken place' (Recital 15 to the Definitive Duty Regulation).

As to the exact elements which should be included in the 'cost of production' Article 2 (3) (b) (ii) of the Basic Regulation specifies: 'The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses'.

TEC argues that the selling costs of its sales company TEC Electronics should not have been used for this purpose. That argument must, in my view, be rejected. First, all three companies in the present series of cases which made sufficient numbers of domestic sales for them to be used as the basis for normal value (Brother, Silver Seiko and Canon) did so through their respective associated sales companies. Secondly, TEC sold other electronic products which it did sell in Japan, through TEC Electronics. There was good, or at any rate sufficient, reason to suppose that, if it had sold electronic typewriters in Japan, TEC would have done so through TEC Electronics. The hypothesis was not only within the discretion of the Community authorities, but on the evidence before the Court appears the most likely one.

On that hypothesis, the sales price of TEC to TEC Electronics could not have been used as a basis for normal value because they were associated companies. Article 2 (7) of the Basic Regulation provides: 'For the purpose of determining normal value, transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary

course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link'. It follows that the relevant sale price for establishing normal value would not be the transfer price from TEC to TEC Electronics but the price on the first arm's length sale, that from TEC Electronics to an independent buyer. For the Community authorities to construct normal value on that hypothetical basis is in accordance with Article 2 (7).

Article 2 (9) of the Basic Regulation provides that the comparison between normal value and export price should 'normally be [made] at the same level of trade, preferably at the ex-factory level'. However, the construction of a normal value at ex-factory level does not, in my opinion, mean that the selling costs of a subsidiary sales company may not be added to the costs of the parent manufacturing company where, as here, the sales and manufacturing functions are split up within the same corporate group. I reject the argument that the selling price of the parent company to its subsidiary sales company (be it a hypothetical or an actual price) must necessarily be taken as the 'ex-factory price'. Quite apart from the exclusion of transfer prices as a basis under Article 2 (7) of the Basic Regulation, such an argument is contrary to the provisions of Article 2 (3) (b) (ii). That provision, as regards production costs, is posited on the notion of a single corporate entity which bears all the costs of placing a product on the market: research and development, general head office administration, advertising, packaging, sales force, sales ledger and invoicing, dispatching and all other costs involved. It is obvious that an ex-factory price includes all of these and not just the bare cost of the production line and the components, and Article 2 (3) (b) (ii) provides for them to be included. If by chance an undertaking splits up its manufacturing and its marketing activities between different companies in the same group, that cannot prevent this rule from operating. Such a peculiarity of corporate structure does not bring down a curtain at the gate of the manufacturing company, beyond which the Community authorities are not allowed to look. Cetma alleges that Japanese undertakings deliberately adopt such corporate structures in order to evade dumping findings: TEC asserts that it does so purely for reasons of business efficiency. I do not think it necessary to decide that point. Whatever the reasons for such a corporate structure, the Community authorities are plainly required by Article 2 (3) (b) (ii) to look beyond the purely formal division and assess the production cost on a reasonable basis, including the SGA expenses of the whole operation, no differently from the way they would if dealing with a single corporation.

I also reject the argument that SGA expenses must be treated in the same way in constructing normal value as in constructing export price. The two operations are different: constructing normal value is essentially an addition, adding up various production costs and an amount for profit to reach, as a general rule, an ex-factory price. Constructing export price in circumstances such as those of the present case is essentially a subtraction, 'netting back' the first sale at arm's length within the Community to reach, as a general rule, an ex-factory price. It is true that Article 2 (9) of the Basic Regulation in principle requires

comparison of normal value and export price at the same level of trade, but it cannot be read as requiring in the construction of each of them SGA expenses to be dealt with in the same way. The Court so held in the 'Mini ball-bearing' Cases, see e. g. Case 258/84 *Nippon Seiko* v *Council*, cited above, at paragraphs 14 to 18 and 44. Those judgments make it clear that Article 2 (3) to (7) of the Basic Regulation lays down one set of rules for ascertaining normal value, Article 2 (8) another set for ascertaining export price and Article 2 (9) and (10) another set for carrying out the comparison. They are three distinct bodies of rules, each of which has to be fulfilled separately. (The Code also treats the three matters separately: see Article 2 (4), (5) and (6)). In particular Articles 2 (9) and (10) of the Basic Regulation concern allowances to be made only after normal value has been established according, in this case, to Article 2 (3) (b) (ii) and (7).

I would reject any argument to the effect that Article 2 (9) and (10) impose an overriding requirement to treat SGA expenses in the context of Article 2 (3) (b) (ii) in any particular way. That would be contrary to the scheme of the Basic Regulation as I have just described it and as interpreted in the 'Mini ball-bearings' judgments (particularly the passages just cited).

TEC's objection that TEC Electronics' SGA expenses could not be used as they related to products other than electronic typewriters cannot, in my opinion, be upheld. Article 2 (3) (b) (ii) of the Basic Regulation requires a 'reasonable amount' for SGA expenses to be included in constructed normal value. The words cited obviously give the Community authorities a margin of discretion in assessing that amount. It would be alien to the purpose of Article 2 (3) (b) (ii) to hold that SGA expenses could only be used where they related to sales by the exporter of the actual product concerned, because by definition it provides for the construction of normal value in the absence of such sales. TEC Electronics did sell other electronic products, cash registers and scales, and the SGA expenses incurred on them may in my view serve as a guide to the SGA expenses that would have been incurred on electronic typewriters had any been sold. No cogent evidence has been adduced to show that they gave a substantially wrong guide as to the SGA expenses that would have been incurred had TEC actually sold electronic typewriters in Japan, and I conclude that it has not been demonstrated that the Community authorities have exceeded their powers in this respect.

That conclusion also entails rejection of TEC's argument that, because the turnover of TEC Electronics for electronic typewriters is zero, the costs allocable to typewriters is zero. Such a formalistic reading of Article 2 (11) of the Basic Regulation is not sustainable because it is contrary to Article

2 (3) (b) (ii). Article 2 (11) does not lay down an absolute rule but provides for allocation only 'where necessary', and of course it would not be 'necessary' where it would defeat the purpose of Article 2 (3) (b) (ii).

In my opinion therefore it has not been shown that the Community authorities' treatment of SGA expenses for the purpose of constructing normal value for TEC is unlawful.

Ground 3: the treatment of the selling costs of TEC France

TEC's third ground of annulment concerns the calculation of the export price for its products. Where its exports were made to its subsidiaries in the EEC, export price was constructed, pursuant to Article 2 (8) (b) of the Basic Regulation, 'on the basis of the prices at which the imported product was first resold to an independent buyer, suitably adjusted to take account of all costs incurred between importation and resale, including all duties and taxes' (Recital 20 to the Definitive Duty Regulation).

TEC argues in this connection that the definitive dumping determination is vitiated by an error in the allocation of the selling costs of the TEC subsidiary in France and by the imputation of the incorrectly calculated selling costs of that subsidiary to the TEC subsidiaries in Germany and the United Kingdom. The first limb of this argument is that the Commission has refused to correct an error in the allocation of the selling costs of TEC France.

As regards export price, Article 2 (8) (b) of the Basic Regulation provides *inter alia*: 'In cases where . . . it appears that there is an association . . . between the exporter and the importer . . . the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer . . . In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.'

Article 2 (11) of the Basic Regulation provides: 'In general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.' I take this to apply *inter alia* to the mode of calculating export price under Article 2 (8).

I take Article 2 (8) to mean that, in the case of electronic typewriters which TEC sold through its subsidiaries TEC Belgium, TEC France, TEC Germany and TEC UK, the Community authorities were entitled under Article 2 (8) to construct the export price on the basis of the price charged on the first resale to an independent buyer, and that is what they did: Recital 20 to the Definitive Duty Regulation. In thus constructing the export price, the Community authorities had to make allowances for 'all costs' incurred between importation and resale. Where one of the TEC subsidiaries sold goods other than electronic typewriters subject to the anti-dumping proceeding, their selling costs fell to be apportioned between those other goods and the typewriters. In that connection Article 2 (11) of the Basic Regulation lays down that in general the available accounting data is normally to be

allocated in proportion to the turnover for each product under consideration.

In answering the anti-dumping questionnaire sent by the Commission, TEC France suggested that expenses (such as overheads and salaries of administrative personnel) which related both to typewriters and to other products should be allocated 'on a basis which would reflect their importance to the various products.' For example, it suggested that the salaries of salesmen selling both typewriters and cash registers should be allocated on the basis of the amount of time devoted by the salesmen to the various products. That approach is contrary to the general rule laid down in Article 2 (11) of the Basic Regulation. The Commission was not prepared to accept that approach and allocated the mixed expenses on the basis of turnover. It explained this to TEC's representatives at a disclosure meeting on 9 January 1985, where it also stated that it had found a figure of 27.7% for the SGA expenses of TEC France although it had decided to use the lower figure (24.87%) which it had found for Belgium because quantities sold were similar.

TEC did not, and does not, challenge the Commission's carrying out the allocation on the basis of turnover. Indeed, in view of the terms of Article 2 (11), it could hardly do so. However, by a document of 31 January 1985 TEC submitted that the Commission had taken the total salary expenses of TEC France and allocated them whereas part of its staff did not deal with typewriters at all and should not have been brought into the calculation. It alleged that the majority of the staff whose expenses had been included in the calculation were located in branch offices and were engaged exclusively in sales of electronic scales to end-users. Excluding the cost of such staff, TEC calculated the SGA expenses of TEC France at 16.97%. TEC repeated the submission in a letter to the Commission of 10 May 1985. The Commission did not respond to that particular point, and the Definitive Duty Regulation was adopted on 19 June 1985 apparently on the basis of 27.7% for the SGA expenses of TEC France. TEC's case now is that that was not correct, because electronic typewriters were sold only out of the head office of TEC France and therefore the salary costs of staff in the branches of TEC France should have been left out of the calculation.

The Council in its defence says:

'The Commission . . . allocated certain non-specific costs of TEC France on the basis of turnover. While the Commission is prepared to depart from the general rule laid down by Article 2 (11) whenever there is sufficient evidence that such a departure is justified, in the present case the Commission was not convinced that this was the case. It is therefore inappropriate for the applicants to refer to an error made by the Commission. There was a disagreement between TEC and the Commission on the appropriate method of allocation, and the Commission was not satisfied by TEC's arguments in this respect.'

This seems to me to refer to the Commission's decision to allocate the costs

in proportion to the turnover. However, that decision is not challenged here: what is challenged here are the figures which were so apportioned. The Council's defence taken alone does not appear to me to answer that challenge.

In the reply, TEC repeats its argument. It adds that, when the Commission visited TEC France for an investigation, TEC France offered to show the Commission a list showing the salaries and functions of all staff, and could have provided a copy of that list subsequently if it had been informed of its relevance.

In its rejoinder, the Council says, on this latter point: 'the applicants fail altogether to show how that list could have established what was in issue, namely whether the salaries concerned were partly allocable to sales of electronic typewriters'. That is true. It is a bare allegation. Moreover the list has not been presented to the Court. The Council goes on: 'In any event the allocation of costs was fully discussed both during the visit to TEC France in June 1984 and during the disclosure meetings in January and May 1985. If TEC considered that the salary list was of decisive importance, TEC could have provided it at any time during the Commission's investigation.'

The mere offer to show the Community authorities a list of staff salaries and functions establishes nothing relevant for present purposes. It was not in the hands of the Community authorities at the relevant time, and it has not been established that it would in fact substantiate TEC's present allegation. In my opinion it is not decisive of the present point.

On the other hand, the Council has failed to meet TEC's basic allegation. It does not deny that some of TEC's staff worked exclusively on other products. Neither does it deny that its officials were able to verify that during their investigation of TEC France. There is some evidence put forward by TEC that certain staff salaries may have been brought into the calculation of the SGA expenses of TEC France when they should have been excluded. I am not convinced that the separation is necessarily as clear or as complete as TEC alleges, but the point was raised with sufficient clarity in the submission of 31 January 1985 and it does not appear that the Community authorities have given it any consideration.

Although the Community authorities have to work through a vast amount of detail in the course of an anti-dumping proceeding, I do not think that it can be within their powers to leave such a material point completely out of account. There is not sufficient material before the Court to say whether there has been a mistake of fact or a manifest error of appraisal, but my view is that in this respect the relevant procedural rules have not been complied with.

Article 2 (11) of the Basic Regulation begins: 'In general, all cost calculations shall be based on available accounting data.' Article 7 (7) (b) of the same regulation provides *inter alia*: 'In cases in which any interested party . . . refuses access to, or otherwise does not provide, necessary information within a reasonable period . . . preliminary or final findings, affirmative or negative, may be made on the basis of the facts available.' I do not think that the Community authorities can rely on either of these provisions in the present

context. It cannot be said that TEC France 'refused access to' information relevant to the present question, and further information was offered to the Commission investigators in the form of the list of staff functions and salaries. Therefore I do not read either of these provisions as entitling the Community authorities to ignore the point raised by TEC concerning staff salaries.

Accordingly, the Definitive Duty Regulation should in my view be sent back to those authorities for them to review the calculation of the SGA expenses of TEC France for the purpose of constructing the export price, in so far as those expenses result from the staff salaries of TEC France. The regulation would have to remain in force pending the completion of such review, but I apprehend that an order to that effect would be within the Court's powers under Articles 173 and 174 of the EEC Treaty.

The second limb of TEC's third argument is that the Commission has arbitrarily imputed the selling costs of TEC France to TEC subsidiaries in Germany and the United Kingdom.

The Council answers that this second complaint is contrary to the facts: TEC proposed that the selling costs of TEC France were representative and should be used for the other TEC subsidiaries.

In its submission of 31 January 1985, after working out its own figure for the SGA expenses of TEC France as 16.97%, TEC went on to say: 'Tokyo Electric Company requests that the Commission use the figure of 16.97% to calculate SGA expenses for all of the TEC subsidiaries. In its provisional determination the Commission apparently took the position that the most reasonable basis for determining SGA expenses of European subsidiaries is to use the lowest expenses of the subsidiaries at which verification was carried out. At the stage of provisional determination, the Commission used the figure for TEC Belgium. In fact, the figure of 16.97% for TEC France would be a more reasonable basis for calculating SGA expenses for TEC Europe and TEC Germany than the Belgian subsidiary's figures.'

It is clear that TEC was content for the SGA figure of TEC France to be used by analogy for TEC Germany and TEC UK as long as there was a prospect (at least in their view) of it resulting in a figure lower than that provisionally used (24.87%, the figure found for the SGA expenses of TEC Belgium). TEC's complaint in essence is that, instead of ending up with a lower figure as it had hoped, the use of TEC France as a 'surrogate' has led to a higher figure for SGA expenses. That does not found a claim of arbitrary treatment. As the Council rightly says, TEC was prepared to accept that the expenses of TEC France should be taken as representative of the other European subsidiaries. TEC gives no reason to suppose that the expenses of TEC France as adjusted by the Commission were not representative. In such circumstances the Basic Regulation puts no obligation on the Commission to investigate separately the costs of each of an exporter's subsidiaries.

However, since in my view the procedure followed in ascertaining the SGA expenses

of TEC France was defective, that figure cannot stand in relation to the other two subsidiaries to which it was applied either, and the Definitive Duty Regulation falls to be reviewed to that extent as well.

Ground 4: the injury finding

TEC's fourth ground of annulment concerns the finding of injury to the Community industry.

The dumping margin and the injury to the Community industry have to be determined separately, and each of them constitutes a maximum limit on the rate of anti-dumping duty (if any) which may be imposed. Article 13 (3) of the Basic Regulation thus provides: 'The amount of such duties shall not exceed the dumping margin . . . ; it should be less if such lesser duty would be adequate to remove the injury.'

In answer to a question by the Court, the Council stated that the margin of dumping found for TEC was 44.30% and the level of injury which its products were found to be causing was 24.05%. The latter figure, being the lower, constituted the maximum rate of duty which the Community authorities were allowed to impose. In fact they rounded the figure down to the nearest whole number and imposed a definitive duty of 24% (Definitive Duty Regulation as amended by Regulation No 113/86).

Any recalculation of the margin of dumping will therefore have no effect on the rate of duty imposed on TEC's products unless it brings the margin down (from 44.3%) below 24%. Although the Court does not have precise figures and cannot anticipate the recalculation by the competent authorities, it seems to me unlikely that a recalculation of the SGA expenses of TEC France such as I have just recommended under the third ground of annulment would result in such a large diminution of the dumping margin. In those circumstances, the exercise would be nugatory.

TEC submits that the injury determination is unsupported. Its submission again has two limbs. First, TEC argues that there is no basis for the imposition of anti-dumping duties on imports of compact electronic typewriters corresponding to Nimexe Code 84.51-14, because Japanese market share in those products fell from 100% in 1980 to below 75% in 1983 (although the volume of exports increased) and because Olympia and Olivetti themselves imported them from non-member countries (including Japan).

The definitive anti-dumping duty was imposed on 'imports of electronic typewriters, whether or not incorporating calculating mechanisms, falling within subheadings ex 84.51 A or ex 84.52 B of the Common Customs Tariff and corresponding to Nimexe codes 84.51 ex 12, ex 14, ex 19, ex 20 or 84.52 ex 95 originating in Japan' (Article 1 (1) of the Definitive Duty Regulation). Of the different Nimexe codes cited here, TEC singles out Code 84.51-14 to define the category of typewriters which it describes as 'compact'. That code covers 'conventional typewriters with ordinary characters weighing not more than 12 kg (excluding case), electric', as opposed in particular to

such typewriters 'weighing more than 12 kg (excluding case)' which come under Code 84.51-19.

The injury finding in this case was made in relation to electronic typewriters under all the Nimexe codes cited. TEC's submission is based on the proposition that separate injury determinations should have been carried out for what it calls 'compact' electronic typewriters on the one hand and what it calls 'professional' electronic typewriters on the other. That point had already been put to the Community authorities in the course of the proceeding and rejected in the following terms: 'Two exporters claimed that there were two distinct markets for electronic typewriters; one for what was called "portable" or "compact", and the other for "professional" typewriters. With regard to the latter the exporters claimed that no injury was caused by Japanese imports. The exporters have not offered any support for this claim. In fact it was established during the investigation that Community production covered all the models of electronic typewriters in question and, in consequence, all models were investigated. . . . In addition, with further technical development, the borderline between different groups of models, if it has ever existed, is disappearing so that it is not appropriate to artificially divide the electronic typewriter market into groups of models.' (Recital 30 to the Definitive Duty Regulation).

This is the line of defence which the Council, supported by Cetma, maintains in the present proceedings. It seems to me that the position described in Recital 30 must be regarded as a proper use of the discretion of the Community authorities in carrying out the injury determination, unless cogent evidence to the contrary is provided. Such evidence is lacking.

It appears that imported electronic typewriters are most often cleared under one of three Nimexe codes: 84.51-14, 84.51-19 (both mentioned above) and 84.51-20 'Typewriters: Other' (i. e. other than conventional typewriters with ordinary characters). If the 12 kg threshold allows a distinction to be drawn between the first two Nimexe codes, the same cannot be said of the third, in relation to which weight is irrelevant. No weight threshold is used in the CCT. In any event the Nimexe classification does not purport to represent market conditions for a particular product: it pursues other purposes. I do not think therefore that the existence of a Nimexe code more or less corresponding to a notion of a 'compact' typewriter can be relied upon in itself to invalidate the Community authorities' approach.

It cannot be said, in my view, that the existence of separate markets for 'compact' and 'professional' machines is self-evident. While weight is a factor which may allow a distinction to be drawn, the functions performed by the machines must also be at least as important a factor, and here it has not been shown that there is any substantial difference between the two alleged categories.

TEC seeks to rely on the Commission and the complainants having referred on occasion to 'compact' typewriters. First, TEC takes such references out of context:

while such a distinction was used for convenience, e. g. for compiling statistics, it was not systematically used. Thus Cetma in its complaint said: 'The complaint is directed against all kinds of electronic typewriters . . . The electronic typewriters range from small-sized and low-weight portable typewriters up to professional featured office machines. The borderline between the various models is vague . . . All electronic typewriters are "like products" because they have closely resembling characteristics and basically similar functions'. Secondly, there can be nothing in the nature of an estoppel against the Council because the whole injury determination for the Definitive Duty Regulation was clearly based on the concept of a single market including all models of electronic typewriters.

Application of the view that injury could only be evaluated and assessed in relation to the total market for electronic typewriters led the Community authorities to examine specifically every single typewriter model. As a result they found that a model which TEC regards as 'compact' was comparable to a model produced in the Community by Triumph-Alder. TEC has not denied that they were comparable. The dumping of TEC's model was found to be causing injury to Triumph-Adler's sales of its Community-produced model. When, on the other hand, it was established that particular 'small-size electronic typewriters' imported from Japan fell into a different category from those produced and investigated in the Community, a list of models excluded from the duty was established (Recital 49 and Article 1 (3) of the Definitive Duty Regulation) and has been extended from time to time. In my view that was a permissible way of dealing with the question of small models not competing with Community production, and it has not been shown that such a model-by-model approach to the injury determination exceeded the discretion of the Community authorities.

I conclude therefore that no requirement has been made out for the Community authorities to approach the injury determination on the basis that there was a separate market for 'compact' electronic typewriters, however defined. Even if there had been, the market share held by Japanese imports over the relevant period, referred to by TEC, is but one of several indications of injury to which the Community authorities must have regard in assessing injury, none of which is necessarily decisive: Article 4 (2) of the Basic Regulation. TEC itself alludes to another such factor, this one pointing in the opposite direction, i. e. volume of imports. That point alone is in my view inconclusive.

As regards models sold by Olympia and Olivetti in the Community but manufactured outside it, the Council admitted that one of the allegedly Community-produced models with whose target price the TEC model TW 1000 was compared to determine the margin of injury was in fact produced in Singapore, and it stated that steps would be taken to correct the error. The Council then adopted Regu-

lation No 113/86 amending the Definitive Duty Regulation. It recited *inter alia*: 'Following the imposition of the definitive duty it has come to light that certain calculations had to be revised. These calculations do not concern the dumping margins but the level of duty necessary to eliminate injury: — in the case of Brother Industries Ltd, Silver Seiko Ltd, TEC Tokyo Electric Company Ltd and Towa Sankiden Corporation, the comparison between their sales prices in the Community and the target prices described in Recital 36 of Regulation No 1698/85 had erroneously included some data concerning models of electronic typewriters manufactured by a Community producer outside the Community. These data should be excluded from the comparison.' That revision led to the result that the definitive duty on TEC's products was increased from 21 to 24%. TEC brought its second action, Case 106/86, against Regulation No 113/86, but its pleadings contained no fresh arguments concerning the present point. In the circumstances it appears that the Community authorities have corrected the error complained of in the course of the proceedings.

The fact that during the relevant period Olympia and Olivetti imported certain models from Japan and sold them under their own name cannot of itself deprive them of protection against injury caused by dumped imports. That could only result where the Community producer concerned itself imported the dumped imports which allegedly caused it injury (in which case such a producer could be left out of the definition of 'Community industry' for the purpose of assessing injury: Basic Regulation, Article 4 (5), first indent). That, however, is not the case here. The models which Olympia imported from Japan were to fill gaps then existing in its product range and were not in competition with models which it manufactured itself. The same is true of Olivetti. Triumph-Adler, for its part, did not import any electronic typewriters from Japan. Therefore none of the complainants has inflicted injury on itself by importing dumped Japanese typewriters. I apprehend that, if one of them had inflicted injury on another by so doing, that would not deprive the injured complainant of entitlement to protection from injury under the Basic Regulation. But that question does not fall to be decided because the Council has found that neither Olympia's imports from Japan nor Olivetti's injured their fellow complainants. That finding is supported by the facts that few models were imported, that they were confined to models at the smaller end of the range and that the total volume of imports remained relatively low at all relevant times. TEC in my view has not produced evidence sufficient to rebut that finding. Accordingly the Community authorities were not required to exclude Olivetti and Olympia from the injury finding because they imported certain models from Japan, and it has not been established that the injury determination in the Definitive Duty Regulation is defective in this regard.

Therefore in my view the first limb of TEC's submission concerning the injury finding falls to be dismissed.

The second limb of TEC's submission on the injury finding is to the effect that the

method used by the Community authorities to determine the level of price undercutting is invalid. The use of hypothetical 'target prices' is contrary to Article 4 of the Basic Regulation: see Advocate General VerLoren van Themaat's Opinion in Case 53/83 *Allied Corporation* v *Council* [1985] ECR 1621, at p. 1631. The passage cited refers to Article 4 of Regulation No 3017/79, which has now been replaced by Article 4 of the Basic Regulation in identical terms. It can therefore be taken to apply to the latter. In the passage cited he said:

'According to [Article 4 (2) (b)], it must be investigated in particular "whether there has been a significant price undercutting as compared with the price of a like product in the Community". In my view, that price must be understood as meaning the comparable actual market price of the producers in the importing country. I do not consider it compatible with the working of Article 4 or with the market-economic aspect of its background if, for the purpose of that price comparison, the Commission — according to the information provided by the Council at the hearing — determines a model market price for Community producers on the basis of production costs plus a normal profit margin.'

In spite of these strictures, however, Advocate General VerLoren van Themaat upheld the injury finding in that case because in his view it had been shown that actual comparable prices within the Community had been undercut. Two pages later, he also said by way of conclusion on the point:

'Even if the downward pressure on the prices of the French producers was mainly due to the prices of the Netherlands producers (as the applicants contend), this would still not help the applicants. As I have pointed out, the prices of the Netherlands producers are almost certainly exposed to downward pressure from the import prices in question so that downward pressure on the prices of the French producers also seems to come indirectly from the import prices of the applicants. In the context of the margin of discretion which must also be accorded to the Commission in interpreting Article 4 (1) of Regulation No 3017/79, that appears sufficient.'

Reading the relevant section of his Opinion as a whole I would understand Advocate General VerLoren van Themaat to admit the use of model prices for injury determinations in certain circumstances; but if his words in the first passage cited are to be taken literally, I take the view that they were addressed to a different situation from the present and were not intended to cover the one at issue here.

The present situation is characterized by large-scale dumping sustained over a considerable period, which necessarily had the effect of depressing prices of the products concerned within the Community. To attempt to measure price undercutting by reference to already depressed prices is unlikely to yield a meaningful result, and in order to achieve the purpose of Article 4 (2) (b) of the Basic Regulation a suitable alternative means of comparison has to be

found. In my view the construction of the price within the Community as it would have been if not depressed by dumped imports is a valid alternative, one consistent with the wording and purpose of Article 4 (2) (b).

It remains to be considered whether the notional price was properly constructed or whether there was some defect in the way it was constructed, in particular pertaining to the use of 'target prices'. (It is true that the comparison described in Recitals 33 to 36 to the Definitive Duty Regulation served not merely to determine whether there had been 'significant price undercutting' for the purposes of Article 4 (2) (b) but actually to measure the injury caused to the Community industry, which measure sets the maximum limit on the rate of duty pursuant to Article 13 (3) of the Basic Regulation. This other function of the comparison, however, was not contested by TEC in its application and therefore does not fall to be considered.) As regards the use of target sales prices in the Definitive Duty Regulation, TEC states in its Reply in Case 260/85 that it has discovered since lodging the application that three models for which target prices had been fixed were manufactured not in the EEC but in Singapore. The Council answered that the Community authorities had recognized that mistake and corrected it by Regulation No 113/86. Once again the pleadings in Case 106/86 provide no grounds for considering that Regulation No 113/86 had failed to rectify the error initially complained of.

TEC also alleges defects in the price undercutting comparison made by the Commission in the Provisional Duty Regulation (Recital 31). That is relevant to the present case, which seeks the annulment not of that regulation but of the Definitive Duty Regulation, only if Recital 32 of the latter has the effect of incorporating in it Recital 31 of the earlier regulation. Recital 32 reads: 'No fresh evidence regarding the other injury factors referred to in Recitals 30 to 33 of Regulation (EEC) No 3643/84 has been submitted. These conclusions are therefore confirmed'. At first sight, the words 'these conclusions' seem to refer to the findings on profitability made in the preceding recital of the Definitive Duty Regulation, Recital 31. It is also a possible reading, as the Council and the Commission contend, that Recital 32 of the Definitive Duty Regulation was intended to confirm the injury findings in Recitals 30 to 33 of the Provisional Duty Regulation, in respects other than profitability. That, I think, is the natural meaning of the words in their context.

TEC contends that the examination of price undercutting undertaken by the Commission for the purposes of the Provisional Duty Regulation was flawed: first, none of the three 'Community' models compared to the TEC model TW 1000 was manufactured in the EEC during the investigation period. Secondly, the price undercutting was based on a comparison with EEC models more expensive than those later found to be comparable with the TEC models.

That contention in my view falls to be dismissed: First, TEC's model TW 1000 was in fact found to be comparable to a model produced in the Community by Triumph-Adler. Secondly, the defects in the Commission's comparison were eliminated in the entirely revised comparison made for the purpose of the Definitive Duty Regulation. There the Commission compared other models, and that later comparison has not been criticized by TEC.

Accordingly, I am of the view that TEC's fourth ground of annulment, concerning the injury finding, should be dismissed in its entirety.

TEC annexed to its Reply in Case 260/85 a submission common to the applicants in that case and Case 250/85, Joined Cases 273/85 and 107/86, Joined Cases 277 and 300/85 and Case 301/85, which mainly concerned the comparison between export price and normal value. Issues raised therein which were not raised in TEC's application are inadmissible under Article 42 (2) of the Rules of Procedure and do not fall to be considered.

Costs

The Council has submitted that TEC's second application (Case 106/86) was inadmissible because all the matters complained of pertained to the Definitive Duty Regulation not Regulation No 113/86, of which it sought the annulment, and it contained no new arguments specifically relating to the latter regulation. Whilst there is force in that argument, I think it was useful for the Court to be seised of the amending Regulation and I think it fair to allow the applicant to cover itself against the eventuality of its original claim being partially frustrated by an amendment to the contested legislation adopted in the course of the proceedings. The Council has also submitted that a repetitious application is an abuse of the process of the Court so that TEC should be ordered to pay the costs of its second application in any event. I should certainly have inclined to that view had the parties insisted on submitting repetitious pleadings *in extenso*, but as they agreed to plead (after the application) by simple reference to their pleadings in Case 260/85 I think it proper for the costs in Case 106/86 to follow those in Case 260/85.

In my view TEC has succeeded only on one out of the four grounds of annulment which it has advanced and that ground can justify only a partial annulment of the contested regulation in the circumstances. I think it appropriate that TEC should pay 75% of the Council's and the Commission's costs, and of Cetma's costs. As for the proceedings for interim measures, I consider that since TEC failed completely it should be ordered to pay the costs of the Council, of Cetma and of the Commission under Article 69 (2) of the Rules of Procedure, with UTAX to bear its own costs.

Conclusion

Accordingly I consider it is appropriate for the Court to:

(1) annul the Definitive Duty Regulation in so far as it concerns the inclusion of staff salaries of TEC France in the constructed export price of TEC products sold through TEC France, TEC Germany and TEC UK;

(2) state that the Definitive Duty Regulation shall remain in force in its entirety until the Community authorities have recalculated the export price in that respect and amended that regulation accordingly;

(3) for the rest, dismiss the applications;

(4) in the proceedings for interim measures, order TEC to pay the costs of the Council, the Commission and Cetma, and order UTAX to bear its own costs;

(5) in the main actions, order TEC to pay 75% of the costs of the Council, the Commission and Cetma and UTAX to bear its own costs.