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

Mr President,
Members of the Court,

1. The submissions made by Minolta Camera Co. Ltd (hereinafter referred to as 'Minolta') alleging illegality of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan [1] (hereinafter referred to as 'the contested regulation' or 'the definitive regulation') are in some respects different or indeed new by comparison with those relied on by the other Japanese manufacturers of plain paper photocopiers (hereinafter referred to as 'PPCs') in their respective applications. There are, on the one hand, submissions concerning miscalculation of the dumping margin and unreasonableness of the margin of profit included in the constructed normal value, which only Minolta has put forward. On the other hand, there is the submission concerning the Council's refusal to make, when comparing the normal value and the export price, certain adjustments to take account of differences in conditions of sale, a submission which, although based on arguments similar to those already put forward in other cases, concerns types of expenses which differ to some extent. Finally there are the submissions based on the inclusion of selling, administrative and other general expenses of the sales subsidiaries (hereinafter referred to as 'SGA expenses') and the amount of certain discounts (known as trade-in discounts) granted by those subsidiaries in the constructed normal value which, although put forward in other cases as well, are supported by arguments which are in many respects original.

2. I shall give details of the various submissions and arguments only to the extent necessary for my reasoning to be followed and for the rest I refer to the Report for the Hearing.

A — Determination of normal value

3. *1.* In its first submission Minolta claims that by including the SGA expenses of its sales subsidiaries in Japan in the constructed normal value, the Council did not make a valid comparison between the normal value and the export price since it did not compare them at the same level of trade. It maintains in particular that the Council thus included in the constructed normal value expenses corresponding to a stage beyond the ex- factory stage, which in its view, is the stage at which the export price was calculated. Minolta considers that procedure to be contrary to Articles 2(3)(b)(ii) and 2(9) of the basic regulation [2] and to the

* Original language: French.

1 — OJ 1987 L 54, p. 12.

2 — Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1).

relevant provisions of GATT and of the 1979 Anti-dumping Code.[3]

4. As far as the basic regulation is concerned, it must be observed that the Court has already rejected arguments similar to those put forward by Minolta in its judgments of 5 October 1988 in the electronic typewriter (hereinafter referred to as 'ETW') cases. In paragraph 19 of its judgment in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, the Court stated that

'the requirement of comparability laid down in Article 2(3)(a) is satisfied provided that the normal value and the export price are both determined by reference to the first sale to an independent purchaser'

and that

'the comparison must therefore be between the figures arrived at in that way, subject to the allowances and discounts expressly provided for in Article 2(9) and (10)'.

5. In the present case, the normal value and the export price were both established on the basis of the first sale to an independent purchaser. The normal value was constructed not only on the basis of the costs incurred by Minolta but also on the basis of those incurred by its sales subsidiaries. As regards the export price, it was determined in accordance with Article 2(8)(b) of the basic regulation, on the basis of 'the price at which the imported product is first resold to an independent buyer'. The allegation that *Article 2(3)(b)(ii)* was infringed is therefore unfounded. It is true that in *Canon* v *Council*, cited above, the Court referred expressly to Article 2(3)(a). I consider however that what applies to Article 2(3)(a) applies equally to Article 2(3)(b)(ii), since construction of the normal value is intended to make up for the absence of a normal value determined in accordance with Article 2(3)(a) and (b)(i), and the Court observed in paragraph 26 of the same judgment that

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

In addition, Minolta relied *inter alia* on the terms 'comparable price' in Article 2(3)(a) and (b)(i) in support of its view that Article 2(3)(b)(ii) requires the comparison between the export price and the normal value to be a proper comparison.[4]

6. It should also be noted that in its judgment of the same date in *TEC* v *Council* (Joined Cases 260/85 and 106/86, [1988] ECR 5855), the Court also applied to construction of the normal value on the basis of Article 2(3)(b)(ii) the theory of the 'single economic entity', which seeks to make certain that costs which are manifestly

3 — The Anti-dumping Code, entitled Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade, was approved on behalf of the European Economic Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973-79 trade negotiations (OJ 1980 L 71, pp. 1 and 90).

4 — See paragraphs 4.2 and 4.26 of the application.

included in the selling price of a product where the sale is made by a sales department forming part of the manufacturer's organization are no longer included where the same selling activity is carried out by a company which although legally distinct is financially controlled by the manufacturer (see paragraphs 25 to 29). Reference merely to the inclusion of SGA expenses of sales subsidiaries in the constructed normal value is not therefore a sufficient basis for showing that the amount added to the production costs in respect of SGA expenses is not 'reasonable' within the meaning of Article 2(3)(b)(ii) of the basic regulation.

7. It is apparent *inter alia* from paragraph 30 of the *TEC* judgment that where production and sale activities are divided within a group formed by companies which are legally distinct but are economically linked — the kind of arrangement also set up by Minolta — that

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

As the applicant itself does not deny that the export price, as constructed, corresponds to the "ex factory' level, it must inevitably be concluded that by proceeding as it did the Council likewise did not infringe *Article 2(9)* of the basic regulation which provides that 'they [the export price and the normal value] shall normally be compared at the same level of trade, preferably at the ex-factory level'.

8. It is true that Minolta is essentially arguing for the costs incurred by its Japanese sales subsidiaries not to be included in the normal value on the ground that those incurred by its subsidiaries in the Community were deducted from the price charged to the first independent purchaser when the export price was constructed. Moreover, it was the different treatment thus accorded to its subsidiaries' expenses, depending on whether they are established in Japan or in the Community, which prompted Minolta to conclude that whilst the export price is established at the ex-factory level, that could not have been possible in the case of the normal value.

9. I confess that at first sight one might be tempted to share the doubts and queries raised by the applicant. It would be easy to classify as 'ex-factory', as the Court did, the stage of sales to the first independent purchaser, specifically in the concern to ensure that economic reality prevails over legal fabrications. One might even take the view that in constructing the normal value by including in it all the SGA expenses involved in the sale to the first independent purchaser and by taking as a basis the price paid by the first independent purchaser in order to construct the export price, the same level of trade is taken as the reference point on both occasions. However, it must be stated that by treating differently in each case the costs incurred by the subsidiaries, that is to say by adding to them the production costs when constructing the normal value and deducting them from the price paid by the first independent purchaser when constructing the export price, the stage of the first sale to an independent purchaser is, in the first place, the conclusion of the operation but, in the second, the starting point.

10. The fact nevertheless remains that the export price thus determined includes the costs of the 'export department' of the manufacturer which correspond, *as regards the level of trade,* to the expenses of the company operating on the domestic market.

11. Furthermore, in paragraph 31 of its judgment in *TEC* v *Council,* cited earlier, the Court categorically rejected the argument, in relation to construction of the normal value, that SGA expenses should be treated in the same way when the normal value is constructed and the export price is constructed, simply referring to its judgments of 7 May 1987 in the 'ball-bearings' cases (Cases 240, 255, 256, 258 and 260/84, [1987] ECR 1809, 1861, 1899, 1923, 1975), according to which

'there are three sets of distinct rules, each of which must be complied with separately for the respective purposes of determining the normal value, establishing the export price and making the comparison between the two'.

Moreover, in paragraph 37 of its judgment in *Canon* v *Council,* above, it inferred from the independence, thus demonstrated, of the methods of calculating the normal value and the export price that

'the validity of the comparison provided for in Article 2(9) cannot . . . be conditional on calculation of the normal value and the export price by identical methods'.

12. As regards the *provisions of GATT and the Anti-dumping Code* relied on by the applicant, I consider it unnecessary to express any view regarding Minolta's theory that they may be relied on in a direct action brought under Article 173 of the EEC Treaty without being 'directly applicable' within the meaning of the judgment in *International Fruit Company*[5] or regarding their 'direct applicability' in the event of that theory having no basis. Article 2(3) and (9) of the basic regulation, under which the contested regulation was adopted, seem to me in any event to be wholly in conformity with the corresponding provisions of GATT and the Anti-dumping Code. Both Article VI(1) of GATT and Article 2(1) and (4) of the Anti-dumping Code refer, like Article 2(3) of the basic regulation, to the 'comparable price' in the ordinary course of trade for the like product destined for consumption in the exporting country, or else the cost of production in the country of origin plus a 'reasonable amount (or addition)' for administrative, selling and any other costs and for profits. As regards Article 2(6) of the Anti-dumping Code, it merely foreshadowed Article 2(9) of the basic regulation where it provides that

'in order to effect a fair comparison . . . the two prices shall be compared at the same level of trade, normally at the ex-factory level . . . '.

5 — Joined Cases 21 to 24/72 International Fruit Company v Produktschap voor Groenten en Fruit [1972] ECR 1219.

13. It is true that both Article VI(1) of GATT and Article 2(6) of the Anti-Dumping Code add that

'due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability'.

Even if it is thus necessary to compare prices, namely the price on the domestic market (the normal value) and the export price, it cannot be inferred from the foregoing, as Minolta wishes to do, that the expressions 'same level of trade' and 'ex-factory level' refer to the costs included in the price paid by the purchaser to the seller. On the one hand, that provision, which was reproduced in the first subparagraph of Article 2(10) of the basic regulation, is not intended to define what 'level of trade' must be taken to mean but relates in general to the allowances which should be made to take account of differences of all kinds affecting price comparability. On the other hand, determination of the level of trade by reference to the costs included in the price paid by the purchaser to the seller (and not by reference to the category of purchasers which pay the price) removes the differences between what are deemed to represent (in the context of GATT as well) the normal value and the export price, respectively, which are the two criteria for the identification of dumping. By contrast with the normal value which represents the price paid on the domestic market for the product in question intended for consumption in the exporting country, the export price does not represent the price paid *on* the export market but the price paid for the product sold for export *to* that market.

14. Both thus reflect the amount received by the manufacturer/exporter. In that connection, the report of the group of experts on anti-dumping duties and countervailing charges published by GATT in 1961, to which the applicant referred on several occasions, is very revealing where it states that

'the essential aim was to make an effective comparison between the normal domestic price in the exporting country and the price at which the like product left that country — not the price at which it entered the importing country'

nor, *a fortiori*, on the domestic market of that country. It is therefore pointless to compare, as Minolta did, the actual prices charged by its Japanese subsidiaries to independent clients in Japan with the actual prices charged by its European subsidiaries to independent customers in the Community since, by definition, the normal value, which corresponds to the normal price paid to the manufacturer on the domestic market, includes all the costs (and profits) involved in the sale on that market,[6] whereas the export price *to* the Community does not, by definition, include the costs (and profits) relating to activities deployed *in* the Community and involved in the sale on the Community market. In its judgment of 14 March 1990 in Case C-156/87 *Gestetner* v *Council and Commission* [1990] ECR I-828, the Court relied on a similar consideration in dismissing a request by Gestetner, an OEM importer of PPCs produced by Mita, for the price which it paid to Mita Europe, a European subsidiary

6 — In that context it is interesting to note that in its judgment of 11 July 1990 in Case C-157/87 Electroimpex and Others v Council [1990] ECR I-3021, the Court rejected a definition of dumping based on a comparison of a sale price of a product with its cost price (see paragraphs 20 to 22).

of Mita involved in sales at a stage prior to importation into the Community, as the export price. In paragraph 31 of its judgment, the Court stated that 'the costs entailed by such activities effectively reduce the amount received by the exporting manufacturer inasmuch as they are normally borne by the importer'.

15. I conclude from the foregoing that the contested regulation likewise does not infringe Article VI(1) of GATT or Article 2 of the Anti-dumping Code any more than it infringes Article 2(3) and (9) of the basic regulation, by which the former provision is transposed into the Community legal order.

16. As regards, finally, the arguments based on misuse of power and breach of the principle of the protection of legitimate expectations, the principle of proportionality and the principle of equality, I consider that they cannot be disassociated from those considered earlier. They are all based on the premise that, by including the SGA expenses of Minolta's sales subsidiaries in the constructed normal value, the Council made a comparison not in conformity with the requirements of the basic regulation, GATT and the Anti-dumping Code. In the same way as the submissions alleging infringement of those provisions, they must therefore be dismissed.

17. 2. The applicant's second submission relates to the inclusion in the normal value constructed for its models of a profit margin of 14.6% which is not 'reasonable' or is higher than the 'normal profit' within the meaning of Article 2(3)(b)(ii) of the basic regulation.

It should be borne in mind that it is not disputed that all the Minolta PPC models which were sold in Japan and simultaneously exported to the Community were sold on the domestic market at prices which were on average lower than their cost of production (including SGA expenses), that is to say 'at a loss'. It was for that reason that the Council decided, pursuant to Article 2(4) of the basic regulation, to construct the normal value for those PPCs. It is apparent from the final part of recital 10 of the contested regulation that, as the profit margin to be included in the constructed value in accordance with Article 2(3)(b)(ii), it used the average profit obtained by the other exporters of PPCs on those of their models which, during the reference period, were sold in Japan at a price which on average was higher than the cost of production.

18. It should be noted first that Minolta does not challenge the actual figures used as a basis for calculating the average profit margin of 14.6%, but puts forward a number of arguments to show that the calculation method adopted by the Council inevitably led to determination of a profit which was neither 'reasonable' nor 'normal'.

19. In the first place, Minolta objects to the exclusion of sales at a loss from calculation of the average profit. In its view, since the Council concludes 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 words used in the penultimate sentence of Article 2(3)(b)(ii) of the basic regulation) despite the fact that some of them are sold at a loss, the 'normal profit' to be included in the constructed value must not exceed the profit normally

realized on *all* those products, including, therefore, those which are sold at a loss. In the present case, the Council excluded from its calculations machines sold at a loss and applied to *all* the Minolta models sold on the domestic market the profit calculated only on the basis of the remaining sales.

20. In response to that argument, it must first be stated that

'since the sales treated as profitable included all sales of machines sold *on average* at above production cost' (see the fourth paragraph of recital 10 of the contested regulation),

all the sales at a loss were not excluded: possible sales at a loss were also taken into consideration provided that, as a whole, a profit was made on sales of the model in question.

21. In the second place, even though the Council's finding that all the methods of determining normal value enumerated in the final subparagraph of Article 2(4) of the basic regulation, to which the Council may have recourse where there are sales at a loss, display the common feature of being based on sales, values or prices which include or may include a profit, is not sufficient to show what that profit must be if the Council chooses the method of constructing normal value provided for in Article 2(3)(b)(ii), it seems to me that Minolta goes too far when it states that Article 2(4) has no relevance in that context. In fact, it is because the conditions for applying Article 2(4) are fulfilled that the Council adopts one of those methods, which must accordingly contribute to the purpose pursued by it. Article 2(4) expressly authorizes the institutions to consider sales made at a loss — under certain circumstances which are not at issue in this case — 'as not having been made in the ordinary course of trade'. In such circumstances, the prices realized on such sales at a loss cannot therefore serve as a normal value within the meaning of Article 2(3)(a) of the basic regulation. The exclusion of them is therefore, in principle, an inherent result of applying Article 2(4). It would hardly be consistent with that purpose if the Council, in seeking to determine the normal value of products sold at a loss by using one or other of the methods provided for, were obliged to take them into account. If that were the case, there is no apparent reason why the Council should determine the normal value of products sold at a loss in accordance with one of the methods specifically provided for in Article 2(4): if it must take account of them in any event, why not determine an average normal value for all sales made at a loss or at a profit, relying simply on the prices actually paid or payable within the meaning of Article 2(3)(a)?

22. Moreover, the Council is right to emphasize that all the methods provided for, which are alternative to each other, should be applied so as to make it possible to arrive at values which are more or less similar, since the object in all cases is to establish a normal value as close as possible to the sale price of a product which would be charged if the product in question were sold in the country of origin or the

exporting country in the ordinary course of trade. The first of those methods, based on

'the remaining sales on the domestic market made at a price which is not less than the cost of production',

involves total exclusion of sales at a loss, so that if that method is used the Council may apply outright to sales made at a loss the profit realized on sales made at a price higher than the cost of production, thus transferring to sales at a loss the profit realized on other sales, without first having recourse to calculation of any average profit based on sales made at prices above and below the cost of production.

23. Furthermore, in its judgment in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, the Court accepted that the profit margin realized by a manufacturer of certain of its models on the domestic market and thus included in the actual price adopted as the normal value in accordance with Article 2(3)(a) should be used by the institutions as a 'reasonable' margin within the meaning of Article 2(3)(b)(ii), for construction of the normal value for other models produced by the same manufacturer (see paragraphs 21 and 22). It is true that in that case the normal value had been constructed because the models in question had not been sold in sufficient quantities on the domestic market. It is not apparent, however, for what reasons the same rule could not be applied where the normal value is constructed for other reasons, such as for example the fact that certain models are sold at a loss. In those circumstances, this example shows clearly that Article 2(3)(b)(ii) certainly does not preclude, for the purposes of determining the 'reasonable margin of profit' or 'normal profit' to be included in the constructed value, account being taken only of sales at a price higher than the cost of production.

24. It is also apparent from the ETW judgments that where the normal value of a company's product is constructed, the margin of profit may be based on the profit realized by another company. I refer in particular to the judgment in Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, in which the Court stated that

'nothing in that provision [Article 2(3)(b)(ii)] precludes the use of the profit normally realized by a company other than the one to which the anti-dumping investigation relates as the "reasonable margin of profit"' (paragraph 8).

In Joined Cases 260/85 and 106/86 *TEC* v *Council* [1988] ECR 5855, the applicant contested the application to it by the Council of a margin of profit of 47.92%, which corresponded to the profit realized by another manufacturer on sales on the domestic market of a limited number of ETWs. However, the Court confined itself to stating that

'TEC has not established that the profit margin in question was not achieved in the ordinary course of trade'

and concluded that

'there is nothing in Article 2(3)(b)(ii) of Regulation No 2176/84 to preclude the view that the profit margin adopted by the institutions could, in the context of their power of appraisal, be regarded as a reasonable margin' (paragraph 13).

25. Admittedly, the objection might be raised that the foregoing indicates at most that the Council could have applied to Minolta's sales at a loss the 'profit normally realized' or realized 'in the ordinary course of trade' by other companies, but does not make it possible to determine what those concepts mean and in particular does not give a direct answer to the question whether, if the other companies in question had also made sales at a loss, a profit margin taking account only of their sales at a profit would constitute a 'normal' profit within the meaning of Article 2(3)(b)(ii) of the basic regulation or whether, in such a case, only their profit margin achieved 'in the ordinary course of trade' could be applied to all Minolta's models.

26. The fact remains, however, that in order to justify the lawfulness of use of the profit margin of another company for the purpose of constructing the normal value, the Court expressly emphasized, both in paragraph 10 of the *Sharp Corporation* judgment and in paragraph 16 of the *TEC* judgment

'that if, in the case of manufacturers not operating on the domestic market, the normal value could be constructed only on the basis of a hypothetical profit, there would be a risk of discrimination against the other manufacturers whose profit margin on the models which they sell in Japan is used in constructing the normal value of their other models'.

The same reasoning may be applied to cases where construction of the normal value is resorted to because certain products are sold at a price lower than the cost of production: whilst the Council may validly apply to companies which sell only some of their models at a loss on the domestic market the margin of profit realized on their 'other sales' (or an average margin of profit based on all their sales at an average price in excess of the cost of production),[7] it must also be able to apply that same margin of profit to other companies all of whose sales have been at a loss (or whose sales were at an average price lower than the cost of production). If that were not the case, to paraphrase the judgments of the Court to which I have just referred,

'there would be a risk of discrimination against the other manufacturers whose actual profit margin on the sale of certain models is used in constructing the normal value of other models sold at a loss'.

27. I would point out, finally, that the new basic regulation,[8] which superseded Regulation No 2176/84, expressly provides that

7 — That is what the Council did for three of Canon's models — see page 18 of the Report for the Hearing in Case C-171/87.

8 — Council Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1).

the profits to be included in the constructed value are to be calculated by reference to the 'profitable sales' of like products, whether made by the same manufacturer or by others.

28. In view of the foregoing, the maxim 'the greater power includes the lesser' may be applied to the present case: in so far as the Council could validly have applied to the Minolta models sold at prices lower than the cost of production the margin of profit actually realized by other manufacturers on their sales of similar or different models, it was without doubt entitled to apply to them an average margin of profit taking account not only of sales by other manufacturers at prices higher than the cost of production but also of their sales at a loss, particularly since, in Minolta's case, the Council did not apply the average margin of only one other producer, which could have been the highest margin found, but, as we have seen, it applied an overall average of all the individual averages determined (see the penultimate paragraph of recital 10 of the contested regulation). It cannot therefore be claimed that the calculation method followed by the Council led to the determination of a profit margin for Minolta which is not 'reasonable' or is higher than the 'normal profit' within the meaning of Article 2(3)(b)(ii) of the basic regulation.

29. The two theoretical examples given by the applicant are not such as to undermine that conclusion.

30. In the first place, the Council did not do what Minolta, by reference to those examples, criticizes it for. It did not adopt profits of 10% or 60% for models 1 and 2 of companies B or C or, therefore, a profit of 35% for the three models of company A. Likewise, according to the method which it actually used, it arrived at the same profit of 10% for the two companies Alpha and Beta, even though one of them had sold certain models at a loss. What is more, it is apparent from the foregoing considerations that the Council could lawfully have done what, on the basis of those examples, Minolta criticizes it for doing. Since Article 2(4) of the basic regulation expressly provides for determination of the normal value

'on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production',

the Council could have applied to models 1 and 2 of companies B and C and to the models of Beta sold at a loss the profit achieved by those companies on their models sold at a price higher than the cost of production. Moreover, since the Court recognized in particular in its judgments of 5 October 1988 in *Sharp Corporation*, *TEC* and *Canon*, cited earlier, that the profit margin achieved by the producers or by the same producer on other models of a similar product may be adopted under Article 2(3)(b)(ii) of the basic regulation, the Council could have proceeded in the same way if it had opted, as Minolta did, for the constructed value.

31. Finally, Minolta's reference to the method applied by the Council to determine, for the purpose of fixing the anti-dumping duty

'by how much each Community producer's revenues would have to increase in order for a 12% rate of return to be made for each type of transaction' (see recital 107(iii) of the contested regulation),

seems to me to be wholly irrelevant in the context of determination of the average profit margin of Japanese producers to be included in the normal value. Moreover, the statement made in the second paragraph of recital 10 of the contested regulation that 'this approach [followed in calculating profits in order to determine normal value] is entirely consistent with that adopted for injury calculations relating to the Community industry' relates not to the manner in which sales at a loss are treated but to the question whether the profits should be calculated by reference only to PPCs or by reference to all the activities of exporters in the photocopying sector.

32. As regards the other arguments put forward by Minolta regarding the manner in which the Council determined the profit to be included in the normal value, it need merely be stated that there is nothing to support them in the legislation. To require the 'reasonable' or 'normal' profit to be determined by reference to the profit realized throughout the period of existence of the PPCs in question, in order to take account of variations in their profitability with the passage of time, seems to me to go beyond the purport of Article 2(4) of the basic regulation whereby it is permissible to exclude sales at a loss provided, in particular, that they

'have been made over an extended period of time and in substantial quantities' (subparagraph (a].

I consider, in fact, that the Council is not required to appraise the fulfilment of that condition by reference to a period exceeding the period of the anti-dumping investigation which, pursuant to Article 7(1)(c) of the basic regulation,

'shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding'

and which, in the case of the present proceedings, cover the period from January to July 1985 inclusive (see recital 5 of the provisional regulation.[9] I would also point out that that interpretation corresponds to the interpretation provided for in the new basic regulation,[10] according to which sales at a loss

'may be considered as not having been made in the ordinary course of trade if they:

9 — Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1986 L 239, p. 5).

10 — Council Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1).

(a) have been made in substantial quantities during the investigation period as defined in Article 7(1)(c);

(b) ...'.

Similarly, to require the 'reasonable' or 'normal' profit to be determined by reference to the sales of all models, including those sold at a loss, on the ground that manufacturers are obliged to offer their customers a complete range of models, including therefore unprofitable models, disregards the very wording of Article 2(4) of the basic regulation which deals with the treatment of sales at a loss without any reference to the reasons which prompted manufacturers to make such sales.

33. Minolta also claims that even if the Council could have taken account, when determining the 'reasonable' margin of profit, only of the profit on the (generally) profitable models *(quod non)*, it should nevertheless have done so by taking account of the turnover of all sales, including unprofitable sales. However, as the Council rightly pointed out

'If ... a weight is given to loss-making sales, then such sales would *de facto* be included in the calculation (of the profit normally realized on domestic sales) when Article 2(4) of Regulation No 2176/84 says that they should not' (see paragraph 58 of the defence).

Moreover, it seems to me that no argument in that regard can be based on the method adopted by the Council in calculating the dumping margin, which is an operation distinct from that of determining the profit margin to be included in the normal value (see Article 2(13) of the basic regulation).

34. As regards, finally, the inclusion of the profit made on [11] the Japanese sales subsidiaries in the 'reasonable' profit margin, I need only point out that it is apparent from paragraph 17 of the judgment in Joined Cases 273/85 and 107/86 *Silver Seiko*, cited earlier, that where there is a 'single economic entity', the institutions are not required to choose the profit margin of the manufacturer rather than of its sales subsidiary and that they may lawfully adopt the combined profit margins of the two companies.

35. The argument that the profit included in the normal value is unreasonable must therefore be rejected in its entirety.

36. *3.* The applicant's third submission is that the Council wrongly included in the SGA expenses included in the constructed normal value an amount corresponding to the value of certain discounts granted by Minolta's Japanese sales subsidiaries to their customers.

37. In its application, Minolta particularly criticized the Council for treating the discounts in question in the same way as the discount payments referred to in recitals 13 and 14 of the contested regulation, although it had no evidence for classifying them as

11 — See paragraph R.5.25 of the reply; the profit at issue is doubtless that realized by the Japanese sales subsidiaries.

such. It is clear from the notes taken by Minolta's lawyers at the verification meeting held by Commission officials at Minolta's offices in February 1986 that, in any event, the applicant's representatives acknowledged in particular that

'when users buy new, dealers take old ones, Minolta gives subsidy to dealers' (see page 11 of those notes, Annex IV B to the application).

Moreover in a letter addressed to the Commission in July 1986 (Annex II to the defence), Minolta's lawyers, although stating that in their view the discounts in question 'are not really trade-in discounts' affirm, by way of explanation for their being so termed in the past, that they were

'designed to assist MJS's dealers to sell new PPC machines and at the same time pay their customers something for their old machines'.

The institutions thus certainly had evidence as to the existence of discounts granted to take account of trade-ins of old machines.

38. In its reply, moreover, Minolta concentrated its observations on the legal issues relating to the treatment of those discounts in the anti-dumping investigation (see paragraph R6.2). Its reason for so doing is that it thought that it perceived in the Council's defence express confirmation of a factor which in its view, from the outset, militated against classification of the discounts in question as trade-in payments and, therefore, inclusion of them in the normal value, namely that it 'never received or sought to receive the machines which were handed in' (see paragraph 111 of the defence). However, as we have already seen in my opinion in Case 175/87 *Matsushita* v *Council*, that finding and the fact that the discount at issue was granted to dealers irrespective of whether they had actually agreed a trade-in with their customers or whether a trade-in had actually taken place (see paragraphs 6.27 of the application and R6.1 of the reply) are not sufficient to disprove that it was intended to enable them to make discounts and withdraw used PPCs from the market or that the — undisputed — absence of a second-hand market in Japan, resulting therefrom, conferred on Minolta the same advantages as those enjoyed by the other manufacturers, which are described at the end of the second paragraph of recital 13 of the contested regulation. As regards the finding that the discounts in question are granted on the basis of a uniform scale and do not therefore vary from one transaction to another, that does not show that the grant thereof is unconnected with the fact that a transaction involving a trade-in took place, but rather tends to confirm that it is intended to secure for Minolta advantages which, as in this case, are not connected with the recovery or resale value of the traded in machines.

39. It follows from the foregoing that the trade-in payments must be included in the normal value, whether the latter is determined on the basis of Article 2(3)(a) of the basic regulation, as in the case of Matsushita, or whether it is constructed in accordance with Article 2(3)(b)(ii), as it was in Minolta's case.

40. Finally, for the reasons set out in my opinions in Cases C-171/87 *Canon* v *Council*, and C-174/87 *Ricoh* v *Council*, it is also necessary to dismiss Minolta's alternative submission, namely that although the cost relating to trade-in payments could be included in the normal value under Article 2(3)(b)(ii), it should have been deducted from that value under Article 2(10)(c).

B — The comparison

41. In its fourth submission, Minolta claims that, in breach of Article 2(10)(c) of the basic regulation, the Council refused to make appropriate allowances in respect of the normal value to take account of certain types of expenses which, nevertheless, bore 'a direct relationship to the sales under consideration'.

42. As regards the exclusion of the *salaries of 'sales leaders'* from the allowance made in respect of salesmen's salaries, I consider that the Council was entitled to consider that no such direct relationship existed, since the inquiry had shown that their principle role was to manage and direct a sales force and not to make sales directly themselves. I do not wish to express a view on the Council's argument that salesmen's salaries were included under the expenses listed in Article 2(10)(c) 'as an exception' and that the term 'salesmen' should therefore be strictly interpreted. I must however observe that the applicant's view that nothing in that provision justifies such a strict interpretation involving a distinction between the various categories of 'salesmen' seems to me to be excessively general. It overlooks the fact that in order to qualify for an allowance, the 'salaries paid to salesmen' must, just like all the other types of expenses, bear a direct relationship to the sales under consideration, which implies that such salaries exist which do not bear such a direct relationship. [12]

43. As regards the *expenses relating to salesmen's vans*, it should be noted that according to Minolta itself

'the vehicle costs were *principally* freight costs as *one of the main uses* of the vehicles was for the delivery of PPC machines to the applicant's customers',

but that

12 — It is to be noted in Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1), which is the basic regulation at present in force, salaries paid to salesmen are expressly defined as those paid to personnel wholly engaged in direct selling activities. In the first recital in the right hand column of page 3 of the relevant Official Journal, the new regulation also states for reasons of clarity, ... no allowance should be made for general selling expenses since such expenses are not directly related to the sales under consideration with the exception of salesmen's salaries which should not be treated differently to commissions paid.

'the vehicles were also used by salesmen when selling and demonstrating products to customers' (see paragraph 7.15 of the application).

As is clear from the Council's reply to the question put by the Court, it was in order to take account of those two different uses that the Council made an allowance only for two-thirds of those expenses, which were incurred in respect of deliveries of PPC's and were regarded as relating to the transport of the products. [13]

44. As regards the remaining third, it was considered to relate to salesmen's ordinary travel costs and therefore as falling under the heading of overheads, for which 'allowances generally will not be made' and which, normally, are not directly linked to the sales under consideration, since they are incurred whether or not a sale is made (see, in that regard, in particular paragraph 19 of my Opinion in Case C-174/87 *Ricoh* v *Council*, and paragraph 46 in my Opinion in Case C-171/87 *Canon* v *Council*). Since the applicant expressly agrees to the apportionment of two-thirds to one-third thus made (see paragraph R7.7 of the reply), it follows from the foregoing that the Council did not commit any error by granting an allowance only for part of the expenses arising from the use of vans. For the same reasons, it was also entitled to refuse to grant an allowance for all the *salesmen's travel costs* incurred for travel by train, taxi or aeroplane.

45. As regards, finally, the *costs* of warehousing, transport, insurance and credit *incurred by MO* (Minolta's manufacturing company) and the *costs* of transport, vehicles and credit *of MJS* relating to its sales to other sales subsidiaries of Minolta, I need merely refer to paragraph 45 of my Opinion in Case C-171/87 *Canon* v *Council*, which shows that costs of that kind do not bear 'a direct relationship to the sales under consideration', since they are incurred at a stage prior to those sales which, in the case of a manufacturing and selling organization of the kind established by Minolta, are those made to the first independent purchaser.

46. The submission concerning the Council's refusal to deduct certain allowances from the normal value under Article 2(10)(c) of the basic regulation is thus likewise unfounded.

C — Calculation of the dumping margin

47. Since Minolta is the only applicant to have alleged that the dumping margin was unlawfully calculated, I should remind the Court that pursuant to Article 2(13)(b) of the basic regulation

'where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average prices'.

48. Minolta claims that by using, in the present case, the 'weighted average' method for calculation of the normal value and the

13 — It should be noted that the new basic regulation states specifically that an allowance may be granted for directly related costs incurred for conveying the product concerned . . . .

'transaction-by-transaction' method for calculation of the export price, the Council did not make a valid comparison between those two items as it is required to do by Article 2(2), (9) and (13)(b) of the basic regulation.

49. However, the Court has already rejected the same arguments in its judgments, cited earlier, in the 'ball-bearings' cases. In paragraphs 15 and 18 of its judgment in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, for example, it expressly stated that neither Article 2(13)(b) nor Article 2(9) of the basic regulation impose any requirement that the methods chosen for calculating the normal value and the export price should be similar or identical. It added, in paragraph 24 of that judgment, that

'the freedom to choose one of the methods specified in Article 2(3)(b) ... is specifically intended to ensure the application of the method most appropriate to the purpose of the anti-dumping proceeding'.

50. Minolta infers from the latter passage that only the existence of special circumstances could render the transaction-by-transaction method the 'most appropriate' for calculating the export price where the normal value has been calculated according to the weighted average method. In that regard, it seeks to rely on the following paragraph of the judgment just cited, according to which

'the transaction-by-transaction method is the only method capable of dealing with certain manoeuvres in which dumping is disguised by charging different prices, some above the normal value and some below it'.

According to Minolta, it follows that the application of the transaction by transaction method is justified only if it is proved that the exporter negligently or intentionally attempted to disguise the dumping.

51. I do not think that that argument can be upheld. In the first place, it must be noted, as the Court did in paragraph 21 of the *Nippon Seiko* judgment, that the choice between the different methods of calculation specified in Article 2(13)(b) requires an appraisal of complex economic situations. It is not sufficient therefore to show that the application of a method other than that adopted would have been perfectly possible in the circumstances of this case — it would be necessary to prove that, by adopting the contested method, the Council committed a manifest error in its appraisal of the facts of the case.

52. Furthermore, Minolta's argument implies that among the calculation methods indicated, there is one which would take precedence over the others, and would, so to speak, set a standard so that the others could only be applied exceptionally. However, that is not the case, so much so that the Court was able to rely, in paragraph 33 of the judgment cited earlier, on the simple fact that

'the transaction-by-transaction method is one of the methods which may be adopted by the institutions in order to calculate the dumping margin where ... prices vary',

and conclude that the principles of the protection of legitimate expectations and of legal certainty do not preclude a change in the calculation method, even without notice being given.

53. Finally, Minolta's interpretation of the passage cited earlier from paragraph 25 of the *Nippon Seiko* judgment does not seem to me to be correct. The existence of 'manoeuvres in which dumping is disguised' is not laid down as prior condition for application of the transaction-by-transaction method. In the present case, moreover, no such manoeuvres were alleged. In my opinion, the Court simply wished to describe the *effects* arising from application of the transaction-by-transaction method, by virtue of which, it will be remembered, export prices higher than the normal value are fictitiously reduced to the level of the normal value before being incorporated, together with export prices lower than the normal value, in the calculation of the weighted average of export prices as a whole.

54. That interpretation seems to me to be supported by the second part of paragraph 25 of the judgment in which the Court compares the contested method with the weighted average method which, 'in such a situation', that is to say where the export prices are sometimes higher and sometimes lower than the normal value,

'would in essence mask sales at dumping prices by those at what are known as "negative" dumping prices'.

55. It may also be based on the specific link which the Court established between the choice of 'the most appropriate' method of calculating the dumping margin and the purpose of the procedure for imposing an anti-dumping duty which, according to

'Articles 2(1) and 4(1) [of the basic regulation] . . . is to eliminate the injury or threat of injury caused by dumping to an established Community industry' (see the end of paragraph 24 of the judgment).

That criterion seems to me to exclude any subjective consideration concerning the intention of the exporter concerned: according to the Court, it is not because the exporter was guilty of any manoeuvre intended to disguise dumping that the Council was entitled to apply the transaction-by-transaction method and not use the weighted average method but because the application of the latter

'would . . . in no way eliminate the injury suffered by the Community industry concerned' (see the end of paragraph 25 of the *Nippon Seiko* judgment).

56. It follows from that conclusion that there can likewise be no question of any infringement of the principle *audi alteram partem* in such circumstances: in so far as the Council was entitled to apply the transaction-by-transaction method even in the absence of intentional manoeuvres to disguise dumping, it was not obliged to give the applicant an opportunity to present its observations on such evidence as it might have at its disposal in that connection.

57. Finally, as regards the alleged infringement of Article 190 of the EEC Treaty, it must first be noted that both the application of the weighted average method for calculation of the normal value and that of the transaction-by-transaction method for calculation of the export price are clearly mentioned in recitals 5 and 26 of the definitive regulation, read in conjunction with recitals 6 and 29 of the provisional regulation, which they merely confirm. Furthermore, since the transaction-by-transaction method is included among the methods for calculating the dumping margin on the same basis as the other methods listed in Article 2(13)(b) of the basic regulation, I consider that the Council was not obliged to give special reasons, in the preamble to the contested regulation, for its recourse to that method. The fact that the regulation contested in the ball-bearings cases was more prolix in that regard is accounted for by the fact that, at that time, the choice of the transaction-by-transaction method represented a departure from the previous practice of the institutions.

58. As regards the figures given in the confidential set of tables which the applicant appended to its application and to which it refers in the present context as well, they are wholly irrelevant since they are based on calculation methods different from those which, as we have seen, the Council properly used.

Conclusion

59. Since the none of the applicant's submissions can be upheld, I propose that the Court dismiss the application and order Minolta to pay the costs, including those of the interveners.