margin to all the producers concerned, corresponding to the average of all the profit margins realized on those products by all the producers concerned, is contrary to that objective. A higher average margin would be applied to a producer with only a small margin, whilst a producer with a high actual margin would benefit from a lower average margin.

REPORT FOR THE HEARING
in Case C-105/90 *

I — Facts and procedure

1. *Legislative background*

1. Article 2(4) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Official Journal 1980 L 71, p. 90, hereinafter referred to as 'the Anti-Dumping Code') provides that:

'When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.'

2. The Council adopted common rules for protection against dumped imports, in accordance with the Communities' international obligations arising from Article VI of the General Agreement on Tariffs and Trade ('GATT') and from the Anti-Dumping Code. Those rules were laid down by Council Regulation (EEC) No 2423/88 of 11 July 1988 (Official Journal 1988

* Language of the case: English.

L 209, p. 1, hereinafter referred to as 'the basic regulation').

3. Article 2(3) of the basic regulation concerns the normal value, which it defines as the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin. However, where there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison, the normal value is to be determined by reference to other factors, namely:

'(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price;

or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. 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. The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and the profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realized shall be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.'

4. According to the fourth recital in the preamble to the basic regulation, the condition relating to the ordinary course of trade is not met where a product is sold at prices which are less than the costs of production or where transactions take place between parties who are associated or who have a compensatory arrangement.

2. *The facts*

5. In response to a complaint lodged in June 1987 by the Committee of Mechoptronics Producers and Connected Technologies ('Compact') on behalf of manufacturers accounting for most of the Community production of compact disc players, the Commission initiated an anti-dumping proceeding concerning imports

into the Community of compact disc players falling under CN Code No 8519 99 10 originating in Japan and South Korea. It commenced an investigation into the alleged dumping covering the period from 1 June 1986 to 31 May 1987.

6. The South Korean company Goldstar Co. Ltd., established in Seoul, was one of the undertakings concerned by that investigation. The company is a member of the Lucky Goldstar Group and manufactures electrical and electronic products both for the Korean market and for foreign markets. During the period of the investigation Goldstar sold five models of compact disc players in Korea and in the Community. Those models comprised the GCD 613 and GCD 616, which Goldstar sold in the Community both under its own brand and to Original Equipment Manufacturers (OEM), and also the GCD 603, GCD 605 and GCD 606. Production of the last three models ceased in 1985. The quantities of those models which were sold in the Community during the period of the investigation had been exported to the Community before 1 June 1986.

7. On 12 July 1989 the Commission adopted Regulation (EEC) No 2140/89 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea (Official Journal 1989 L 205, p. 5, hereinafter referred to as 'the provisional regulation'). The rate of the provisional duty applicable to imports by Goldstar was 32.5% of the net free-at-Community-frontier price before duty.

8. In Goldstar's case the Commission determined the normal value according to three methods:

(1) It referred first to the weighted average domestic prices of all sales to independent customers (paragraph 23 of the provisional regulation). That method concerned the models GCD 603, GCD 605, GCD 606 and GCD 616.

(2) As regards the model GCD 613, the Commission determined the normal value on the basis of the normal value constructed according to the rules set out in Article 2(3)(b)(ii) of the basic regulation, because that model was not sold in sufficient quantities on the South Korean market. The criterion adopted by the Commission in order to determine whether the quantities sold are sufficient is a percentage: sales on the domestic market must represent at least 5% of the quantity exported to the Community. The amounts used in the constructed value were the weighted averages of the expenses incurred and profit realized by Goldstar for the sale of the models GCD 603, GCD 605, GCD 606 and GCD 616 in Korea (paragraphs 46 to 48 of the provisional regulation).

(3) A different normal value was constructed for the models GCD 613 and GCD 616, which Goldstar had sold in the Community to OEM, since there were no such sales on the Korean market. This normal value used the same amounts as those used in the second method. However, having regard to the differences between the OEM sales and those to other classes of customer, the Commission applied a profit rate corresponding to 30% of that realized on Goldstar's brand sales (paragraphs 28, 51 and 52 of the provisional regulation).

9. The Council also used those methods for determining the normal value when it adopted Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty (Official Journal 1990 L 13, p. 21, hereinafter referred to as 'the definitive regulation'). The definitive rate applicable to Goldstar was 26.1%.

10. During the administrative procedure Goldstar contested the use of those methods. With regard to the first method it argued that its sales on the Korean market could not be used as the basis for establishing the normal value, since the volume of its sales was very low in absolute terms and its selling prices, which were very high, could not be regarded as reflecting the general price situation. The sales were not therefore, according to Goldstar, in the ordinary course of trade.

11. The Commission took the view that a low volume of sales on the domestic market in absolute terms was not in itself a sufficient reason for considering that those sales were not in the ordinary course of trade and for departing from the normal practice of establishing normal values on the basis of the domestic sales of models which in quantity terms exceed 5% of export sales to the Community (paragraph 27 of the provisional regulation). The Commission established that Goldstar had charged the prices on that market in the normal course of trade. Consequently, the Commission could not accept Goldstar's claim. The Council accepted the Commission's findings (paragraph 21 of the definitive regulation).

12. As regards the use of the second method, Goldstar claimed that the Commission should not, in constructing normal values, apply the average profit realized on its profitable sales because the quantities, whilst exceeding 5% of export sales, were small in absolute terms and, consequently, the profit realized was unreliable and not suitable for the purposes of determining normal value. The Commission and the Council took the view, however, that the low absolute amount of domestic sales realized in the ordinary course of trade could not, by itself, justify the use of another general method of profit calculation (paragraph 50 of the provisional regulation and 37 of the definitive regulation).

13. Finally, Goldstar contested the use of the third method on two grounds. It argued first that the use of a profit rate equal to 30% of that realized on brand sales was inconsistent with the Commission's previous practice where a 5% flat margin was used. The Commission, however, considered that, at the level of a specific company, a necessary link existed between expenses incurred and profits realized for own-brand models and those incurred and realized for OEM models. It took the view that a profit rate of 30% of the own-brand profit constituted a reasonable estimate to reflect

the differences which could exist between prices of own-brand products and OEM products if sales of the latter had taken place on the Korean market. The fact that in some previous proceedings the Commission considered it appropriate to use a flat percentage is not inconsistent with a specific approach considered to be more accurate for a given product. Furthermore, according to the Commission and the Council, that percentage gives for the Korean market a profit rate which is more favourable to exporters who have no domestic sales than the flat rate used by the Commission in previous proceedings (paragraph 39 of the definitive regulation).

14. Goldstar argued further that, for the purpose of calculating the constructed OEM normal values, the Commission should have used the flat margin of 30% of profits realized by Korean exporters on brand sales rather than 30% of profits realized by Goldstar itself on its own-brand sales. The Commission considered that the link between OEM profits and own-brand profits must be established first at the level of each exporter if the company concerned has own-brand sales on the domestic market, since a company which can supply a market with high profits will normally try to benefit from those profits instead of supplying, with a very low profit, an OEM customer who in fact becomes a competitor. Consequently, reference to other exporters' profits may be made only if the exporter concerned has no own-brand domestic sales (paragraph 40 of the definitive regulation).

II — Written procedure and conclusions of the parties

15. Goldstar's application was registered at the Court Registry on 18 April 1990.

16. By orders respectively of 20 September and 5 December 1990, the Commission and Compact were granted leave to intervene in support of the conclusions of the Council.

17. By order of 5 December 1990 the Court granted Goldstar's application for confidential treatment and ordered that only the non-confidential versions of the application and the reply should be served on Compact. It also ordered the parties not to communicate to Compact the information described as confidential.

18. By order of 6 February 1990 the Court ordered that only the non-confidential version of the Commission's observations as produced by the Commission would be served on Compact.

19. *Goldstar, the applicant,* claims that the Court should:

(i) annul Council Regulation (EEC) No 112/90 of 16 January 1990, in so far as it affects the applicant;

(ii) order the Council to pay the applicant's costs.

20. The *Council, the defendant,* contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to bear the costs of these proceedings.

21. By statements lodged at the Court Registry on 21 December 1990 and 25 February 1991 respectively, the Commission and Compact, the interveners, supported the conclusions of the Council.

22. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry.

III — Submissions and arguments of the parties

1. *First submission: sales in the ordinary course of trade or which permit a proper comparison*

23. *Goldstar* claims that the Council infringed Article 2(3)(b) of the basic regulation in so far as it did not recognize that the models GCD 603, GCD 605, GCD 606 and GCD 616 sold on the Korean market during the period of investigation were not sold in the ordinary course of trade and did not permit a proper comparison. The normal value of those models should have been based on the constructed value rather than on the prices on that market.

24. According to Goldstar, Article 2(3)(b) of the basic regulation requires that domestic sales should occur in sufficient quantities to provide the basis for the normal value and that the domestic market must be representative so that the sales may be considered to be in the ordinary course of trade or to permit a proper comparison. That requirement means that the volume of transactions on the domestic market must be sufficiently large to permit a proper comparison with exports. The Community institutions consider that that requirement is satisfied where the volume of those transactions amounts to 5% of export sales to the Community.

25. According to Goldstar, the Community institutions have committed a manifest error of appraisal by elevating the 5% practice to the stature of a general legal norm that stands alone, to the exclusion of all other factors, since it is merely one of a number of factors to be considered for the purposes of Article 2(3)(b) of the basic regulation. That provision requires not only that the volume of sales on the domestic market should be sufficiently large by comparison with the volume of exports, but also that such sales should be sufficiently large in absolute terms.

26. Goldstar states that the institutions themselves recognized the existence of that dual requirement in Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985 L 163, p. 1). In that regulation the Council considered

that: 'The Japanese market is not too small either relatively or absolutely to be used as a basis for comparison.' That approach is necessary in the light of the fourth recital of the basic regulation, according to which domestic prices should not be taken into account where for any reason they do not form a proper basis. The question whether domestic sales form a proper basis for determining the existence of dumping is linked to the characteristics of the domestic sales themselves rather than to the relationship between export sales and domestic sales.

27. Goldstar states in that regard that domestic sales of products below a certain minimal volume should be deemed to be *de minimis* and therefore not to constitute a proper basis for determining the existence of dumping. Such sales do not constitute such a basis where the domestic market is itself too small.

28. Goldstar considers that the need to take into account the size and characteristics of the domestic market is confirmed by Article 2(3) of the basic regulation, which refers to sales made 'in the ordinary course of trade on the domestic market' and which allows reference to be made to the profit realized by 'other producers or exporters . . . on profitable sales of the like product' on that market.

29. In the present case the characteristics and size of the Korean market are such that Goldstar's sales on that market cannot be taken as the basis for comparison. During the period of the investigation the total volume of domestic sales was limited to 5 000 units. Such a small market is immature and demonstrates that prices are not yet necessarily governed by the laws of supply and demand. The immaturity of the market is confirmed by the fact that there were only a few Korean language productions recorded on compact discs. This meant that prices on the Korean market remained artificially stable in 1986 and 1987 and that compact disc players were considerably more expensive there than in the Community.

30. Consequently, the Commission and the Council committed a manifest error of appraisal by refusing to depart from the 5% criterion and by failing to draw the appropriate conclusions from the situation prevailing on the Korean market. Goldstar considers, in addition, that the Council infringed Article 190 of the EEC Treaty because it failed to state the reasons for considering the sales in question to have been made in the ordinary course of trade and to permit a proper comparison.

31. That error of appraisal and lack of any statement of reasons also concerns the Council's failure to exclude models GCD 603, GCD 605 and GCD 606 from the determination of dumping. The sales of those models on the domestic market did not permit a proper comparison for the purpose of determining the normal value, since production of those models had been discontinued before the period of the investigation. That is particularly the case since the sales consisted of minimal quantities of outdated models on a fledgling market.

32. The *Council* observes first that the objective of Article 2(3)(a)(b) is to ensure that the normal value corresponds to the true market value of the product in question and that it is free from artificial distortions. In that connection the provision imposes two distinct conditions, which Goldstar seems to confuse.

33. First, the sales on the domestic market must be made in the ordinary course of trade. That condition applies to the individual transaction concerned and entails the exclusion of sales which are not at arm's length, that is to say sales where the pricing does not reflect the normal commercial interests of the seller and the buyer. The Council points out that Goldstar does not dispute that the prices charged for the models GCD 603, GCD 605, GCD 606 and GCD 616 on the Korean market were arm's length prices generated from profitable sales. Those sales were therefore made in the ordinary course of trade.

34. Article 2(3)(b) of the basic regulation requires secondly that sales on the domestic market should permit a proper comparison. That requirement is concerned with the sales prices in question from a market perspective. Here the decisive factor is primarily whether or not the arm's length price is truly representative. For a price to be representative a certain volume of sales must be reached. The basic regulation itself does not fix any threshold for determining that volume; consequently, the institutions have done so by adopting the practice of a 5% threshold. According to the Council, that practice, which provides a higher degree of legal certainty, was expressly upheld by the Court in the *Canon* cases (judgment of 5 October 1988 in Joined Cases 277 and 300/85 [1988] ECR 5731).

35. That principle is sufficient to determine whether prices charged on the domestic market are representative. Article 2(3) of the basic regulation requires neither an examination of sales on that market in absolute terms nor an analysis of the volume of the domestic market. An obstacle to any quantitative examination in absolute terms would be the difficulty in finding a reliable parameter. In that connection it is significant that the applicant has failed to propose one.

36. As regards analysing the volume of the domestic market, the Council maintains that the representativity required by Article 2(3) of the basic regulation is linked to the selling prices and individual margins charged by the exporters concerned themselves and does not refer to the markets. The volume of those markets is therefore of no consequence, provided that the 5% criterion is met.

37. Moreover, a market of 5 000 units is quite substantial when compared with the 34 000 units exported given that there were only very few Korean language productions recorded on compact discs and that the prices of compact disc players remained artificially stable in 1986 and 1987.

38. Finally, the Council considers that the prices of the models GCD 603, GCD 605 and GCD 606 could be taken into account for the purpose of determining normal value

even if those models were produced prior to the period of the investigation. Article 2(3) of the basic regulation merely refers to sales and attaches no importance to the time of manufacture.

39. According to *Compact*, the sales of compact disc players on the Korean market in the period of investigation and Goldstar's market share were sufficient to establish a representative market corresponding to the ordinary course of trade and providing a reliable basis for calculating the normal value.

40. Compact states that the volume of the Korean market during the period of the investigation exceeded the 5 000 units sold. At the time the Korean market represented about 20 000 units. Such a market is sufficiently representative even if limited in comparison to the Community market. Compact considers that a time lag between the development of the two markets is perfectly normal.

41. Goldstar's share of the Korean market varied during the period of the investigation between 20 and 30%. Goldstar benefited at the same time from its strong position on the electrical appliances market in general.

42. According to Compact, the fact that the models GCD 603, GCD 605 and GCD 606 were no longer manufactured in 1986 and 1987 is irrelevant. Any minor change to a product is accompanied by a new model number. The products remain similar.

43. The *Commission* observes that, for the purpose of determining the normal value, the basic regulation refers primarily to prices charged by the exporter on the domestic market. Reference may be made to the other methods only if those prices cannot be used. That is the case where they are not representative because of the low volume of sales on the domestic market.

44. The 5% threshold, approved by the Court in the abovementioned *Canon* cases, is a good guide to whether domestic sales are sufficiently high to form a reliable basis for determining the normal value. However, that guideline, which ensures a degree of legal certainty for exporters, does not constitute a legal norm from which there may be no departure. The Commission considers that in this case there was no reason to depart from the guideline. Goldstar's sales represented 10% of the Korean market and were therefore substantial. In addition, the prices charged for those sales were not excessive, since they were in line with the general market trend.

45. Goldstar's argument that reference may be made to prices on the domestic market only if that market is comparable to the Community market is contrary to the scheme of the basic regulation. Circumstances which affect the comparability of prices charged on the two markets must be taken into account under Article 2(9) and (10) of the basic regulation. If such circumstances were taken into account for the purpose of determining the normal value, this would favour exporters in smaller

countries to the detriment of those in larger countries.

46. The Commission fails to see why sales from stock are necessarily not in the ordinary course of trade, as defined in the fourth recital in the preamble to the basic regulation. Such sales represent perfectly normal business practice.

2. *Second submission: determination of the profit margin for the constructed value*

47. *Goldstar* considers that the Council infringed Article 2(3)(b) of the basic regulation by determining the constructed value of model GCD 613 by reference to the weighted average profit margins realized in respect of the selling prices charged for models GCD 603, GCD 605, GCD 606 and GCD 616 on the Korean market during the period of the investigation. Those margins were not suitable for use for two reasons.

48. First, the profit margin used by the Council for the GCD 613 was itself based on domestic sales which were not made in the ordinary course of trade and which did not permit a proper comparison with the export sales.

49. Secondly, the Council failed to interpret Article 2(3)(b) of the basic regulation in the light of Article 2(4) of the Anti-Dumping Code, under which the addition for profit is not, as a general rule, to exceed the profit normally realized on sales of products of the same category in the domestic market of the country of origin. That provision therefore refers to the general market situation and makes no reference to the profit realized on the sales of the individual exporter concerned. It follows that the individual profit margin of the exporter concerned is not suitable for use where it exceeds the profit generally realized on the domestic market.

50. Goldstar considers that its analysis of Article 2(3)(b)(ii) of the basic regulation is confirmed by the judgment of the Court of 5 October 1988 in the abovementioned *Canon* cases. In those cases the Court did not mean that a profit margin calculated on the basis of domestic sales of a specific exporter should be used to construct the normal value in all cases. In those cases the profits realized by Canon were not out of line with the domestic market, as other exporters had similar profit margins. Goldstar adds that it is apparent from the *Silver Seiko* cases (judgment of 5 October 1988 in Joined Cases 273/85 and 107/86 [1988] ECR 5927, paragraph 18) that the constructed value for two undertakings, namely TEC and Sharp, reflected the lowest of the margins achieved by other undertakings which had sales on the domestic market in the ordinary course of trade permitting a proper comparison.

51. Goldstar concludes that in order to determine the profit margin the Council should have referred to the profits realized from domestic sales by the other Korean manufacturers, since the profits realized on the sales of the GCD 603, GCD 605, GCD 606 and GCD 616 did not reflect the normal profit situation on the domestic market.

52. The *Council* observes that it has already refuted Goldstar's argument that sales of the said models on the Korean market were not representative. As regards the interpretation of Article 2(3)(b)(ii) of the basic regulation, the Council considers that Article 2(4) of the Anti-Dumping Code merely establishes a general rule whose detailed implementation and application are left to the discretion of the competent authorities of the contracting parties to GATT.

53. In addition, the underlying rationale of the Anti-Dumping Code and the basic regulation corroborates the view that the Code requires an investigation of individual exporters, which of course implies the determination of an individual normal value. This is also an effective means of protection for the producers concerned since it ensures that each business is judged on its own merits and that a finding of dumping regarding one producer does not affect another producer who does not engage in dumping practices.

54. According to the Council, the individual method is in conformity with the judgments of the Court of 5 October 1988 in the above-mentioned typewriter cases. It is apparent in particular from paragraph 18 of the judgment in *Silver Seiko* that individual profit margins were not determined for TEC and Sharp because, unlike Goldstar, they had made no sales on the domestic market.

55. The Council in addition draws the Court's attention to the fact that in adopting regulations the Council has consistently preferred to refer to the individual exporter's profit margins and in that regard cites paragraph 21 of Council Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot matrix printers originating in Japan (Official Journal 1988 L 317, p. 33).

56. Finally, in so far as Goldstar argues that its profit margins were unrepresentatively high, the Council states that the basic regulation does not require profit margins to be representative but only sales and prices. These are the decisive factors to be compared in determining any dumping margin.

57. *Compact* observes that Goldstar is responsible for its own marketing strategy and, consequently, its profit rate. That profit rate depends *inter alia* on Goldstar's overall position on the Korean market. Goldstar is present in all sectors of the electronic and electrical domestic appliance market and has a captive distribution network. It is therefore very likely that selling costs for all these products, including compact disc players, are noticeably lower and profits substantially higher than those of other Korean manufacturers specializing in certain of these sectors.

58. In those circumstances Article 2(3)(b) of the basic regulation required the Community institutions to refer to the profit margins realized by Goldstar itself. Before those institutions use the profit realized by other exporters in the country of origin — something which was criticized by the applicants in the typewriter cases — they must use the profit margins realized by the individual producer on his sales if that data is available, reliable and suitable for use, as was the case here.

59. According to the *Commission,* Article 2(4) of the Anti-Dumping Code does not support Goldstar's view in view of the contractual context in which that provision must be placed. GATT and the Anti-Dumping Code are agreements between States. Article VI of GATT and the Code are therefore concerned with relations between States. That is particularly so if consideration is given to the fact that the provisions on dumping constitute an exception to one of the fundamental principles of GATT, namely the Most Favoured Nation principle. Article 2(4) of the Anti-Dumping Code therefore concerns the situation on a market of a contracting party.

60. However, Article 8(2) of the Anti-Dumping Code provides that dumping should be established and duties imposed in respect of individual suppliers in so far as is possible. The specific application of Article 2(4) of the Anti-Dumping Code therefore relates to individual suppliers.

3. *Third submission: calculation of the profit margin for the purpose of determining the constructed value of models sold to OEM purchasers in the Community*

61. *Goldstar* claims that the Council infringed Article 2(3)(b)(ii) of the basic regulation in so far as the constructed value of the models sold to OEM purchasers was established by determining the applicable profit margin to be 30% of the profit margin applicable to own-brand sales. In that regard Goldstar states first that the use of the profit margins realized on sales of the GCD 603, GCD 605, GCD 606 and GCD 616 is in itself an infringement of that provision, as it has already shown in connection with its second submission.

62. Goldstar adds that its principal objection in the context of this submission is that there is no basis whatsoever, in law or in fact, for basing the profit margin for the purpose of calculating the constructed value of OEM sales on the profits imputed to the constructed value for own-brand sales. This objection is based in substance on four grounds.

63. First, there is no link between the costs and profits for own-brand sales and those for OEM sales. OEM purchasers are a special type of customer and selling costs are considerably lower than those for own-brand sales. Unlike own-brand sales, OEM sales involve neither significant adver-

tising costs nor the sales effort normally required. In addition, other general and administrative costs are normally lower for OEM sales owing to the economies of scale achieved on a sales volume that is normally larger than that of own-brand sales.

64. Goldstar argues that those differences in costs should be taken into account in determining the normal value. Whilst Article 2(9) and (10) of the basic regulation provides for an adjustment in respect of such costs, that adjustment is made only at a later stage of the procedure, namely in connection with the comparison of the normal value and the export price.

65. In addition to those differences in costs, there is also a fundamental difference between OEM sales and own-brand sales with respect to profit margin. In fixing OEM selling prices the manufacturer does not have the benefit of brand image. Consequently, price competition is the essential factor determining the profit which may be realized from OEM sales.

66. The special characteristics of OEM sales therefore mean that the profit margin realized on such sales cannot be determined on the basis of the margin achieved in the different context of own-brand sales. The Council therefore made a manifest error in its appraisal of the facts.

67. Secondly, the rate of 30% fixed by the Council is arbitrary. The Council cannot rely on the experience which it acquired in connection with serial-impact dot-matrix printers originating in Japan (Council Regulation (EEC) No 3651/88 of 23 November 1988, cited above), in which it established a ratio of 3: 1 between OEM and own-brand profits. That argument, which was raised by the Council for the first time in the proceedings before the Court, provides no explanation as to why the same ratio should be adopted for compact disc players, which are entirely different products.

68. Thirdly, the approach adopted by the Council in this case is contrary to its previous practice. In the cases concerning plain paper photocopiers originating in Japan (Council Regulation (EEC) No 535/87 of 23 February 1987, Official Journal 1987 L 54, p. 12) and video cassette recorders originating in Japan and the Republic of Korea (Council Regulation (EEC) No 501/89 of 27 February 1989, Official Journal 1989 L 57, p. 55) the Council, in the absence of a domestic OEM market, constructed a normal value by including a single profit margin of 5% for all the companies concerned. That approach of adopting a flat profit margin was also followed by the Commission in the case concerning small screen colour television receivers originating in the Republic of Korea (Commission Regulation (EEC) No 3232/89 of 24 October 1989, Official Journal 1989 L 314, p. 1).

69. The principle which emerges from those cases is that there is no link between the profit margins on sales by the producer of

own-brand products and profit margins on OEM sales and that, consequently, the same flat profit margin should be applied to all companies operating on the domestic market where there have been no domestic OEM sales by any of the companies. The Council's claim that the profit margin used in those cases would represent a greater percentage than 30% of the own-brand profit margin on sales by those companies is irrelevant.

70. The same applies to the Council's claim that the institutions apply the basic regulation to each case on its own merits. In Goldstar's view, that argument suggests that a precedent can never be used in anti-dumping matters and that the Community institutions are not bound to act in a consistent manner. Moreover, the fact that the institutions considered it appropriate to apply a single rate of 5% in different sectors of different countries (Korean small screen colour television receivers and Japanese plain paper photocopiers) clearly demonstrates the existence of an administrative practice.

71. Fourthly, the Council has infringed the principle of equality before the law, as recognized in the Court's case-law (judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg* [1977] ECR 1753; judgment of 19 October 1977 in Joined Cases 124/76 and 20/77 *Moulins Pont-à-Mousson* v *Office Interprofessionel des Céréales* [1977] ECR 1795). That principle demands that any distinction made between comparable situations must be based on objective factors.

72. According to Goldstar, all Korean producers are in entirely similar situations, in so far as none of them has sold compact disc players to OEM purchasers on the domestic market. Each Korean producer should therefore be treated similarly in calculating the profit margin for the purposes of the constructed value of OEM sales. The Council consequently infringed the principle of equality by applying different profit rates to producers who were in exactly the same situation.

73. The Council observes that it has already explained in dealing with Goldstar's second submission that the profit margin constructed for the GCD 613 was perfectly appropriate.

74. The Council considers that the four grounds put forward by Goldstar in support of its third submission are not valid. As regards the first ground, the Council claims that there is a link between own-brand sales and OEM sales as regards both expenses and profits. Since both types of sale consist of the same products, the production costs are necessarily similar. For the same reason there is a link between the expenses entailed by OEM sales and sales to ordinary customers. The Council states that certain differences which may exist between the costs relating to the two types of sales may be allowed for by way of an adjustment under Article 2(9) and (10) of the basic regulation, so as to permit a comparison

between the export price and the normal value. Finally, the Council challenges Goldstar's claim that OEM sales account for larger quantities and permit economies of scale to be made. On the Japanese market, for example, it has been found that many customers purchase relatively small quantities of products.

75. As regards profits, the Council states that it has never claimed that Goldstar necessarily determines the margin realized on OEM sales on the basis of the margin achieved on own-brand sales. There is simply a link between the two margins, particularly when the profit margins are not determined independently of considerations relating to costs, which are more or less identical for OEM sales and own-brand sales. In addition, the competition on the OEM market is not limited to profit margins, but also extends to production costs and in particular productivity. It follows that manufacturers may very well control profit margins on both the OEM and own-brand markets.

76. The Council states, with regard to the second ground, that it has never stated that the profits generated by OEM sales always represented 30% of profits generated by own-brand sales. The Council considers each case on its own merits, but that policy does not exclude the adoption of comparable attitudes in comparable situations.

77. In the present case the Council considered that 30% reflected the ratio between OEM profits and own-brand profits. In making that finding the Council took into account experience acquired in the case concerning serial-impact dot-matrix printers (see Regulation No 3651/88, cited above), in which an identical ratio was found to exist between the two margins. In those circumstances the Council cannot be criticized for determining the rate of 30% arbitrarily.

78. Nor can the Council be criticized for acting inconsistently (the third ground given by Goldstar in connection with this submission). The Council repeats that its practice has always been to consider each case on its merits and that it did so in this case. That practice is entirely consistent since it treats similarly cases whose essential facts are similar.

79. The facts of the cases to which Goldstar refers (see paragraph 67 of this Report) differ considerably from those of this case. In those proceedings the institutions determined the profit margins for the companies' own-brand sales on the domestic market to be 14.6% in the case of plain paper photocopiers, 7 to 14% in the case of small colour television receivers and 8 to 12% for video cassette recorders. Those figures are in no way comparable to the profit margin obtained by Goldstar on own-brand sales on the Korean market.

80. In those cases the 5% margin almost always represented a percentage of the profits realized by the companies on own-brand sales, which was much higher than the 30% adopted for Goldstar in the present case. If the Council had followed the same approach in this case as it did in those cases, it would have been obliged to adopt an even higher percentage of the profit margin realized by Goldstar on own-brand sales in Korea.

81. Finally, as regards the fourth ground put forward concerning the principle of equality, the Council considers that the similarities referred to by the applicant are irrelevant. The fact that Korean producers do not make OEM sales in Korea is a prerequisite for the application of Article 2(3)(b)(ii), third sentence, of the basic regulation and has no impact on profit margins. The only similarity which could lead to the application of comparable profit margins would be where comparable profits were realized by companies on own-brand sales. The applicant has made no such claim.

82. According to *Compact*, there exists a link between OEM sales and own-brand sales, since the main reason for OEM sales lies in the manufacturer's concern to increase total sales volume and thereby reduce unit costs. Consequently, profitability in the own-brand product business is increased by OEM sales. Compact states that competition on the OEM market does not generally occur at lower prices and lower profits than for the exporter's own-brand sales. Since OEM supplies compete with own-brand products, excessively low prices and profits for OEM sales would harm the exporter's own-brand sales.

83. Compact observes, in addition, that the 30% margin adopted by the Council is extremely favourable for Goldstar since the profit margin for OEM sales is not substantially different from the margins achieved on own-brand sales. There is a certain difference between the margins with regard to advertising costs, but the margin on OEM sales depends mainly on the market price, selling costs in general and the negotiating abilities of the supplier and purchaser. On the latter point Compact observes that Goldstar, as one of the three large companies on the Korean electronic and household appliances market, is in a very strong position.

84. Compact argues further that the institutions are not bound by an approach which they have followed in previous anti-dumping proceedings. Any comparison with the Community decision in the plain paper photocopiers cases is therefore erroneous. Moreover, the market in office equipment is totally different to the market in compact disc players.

85. The *Commission* observes first that the basic regulation does not require separate normal values to be determined according to variations in prices over time or different types of sales. The institutions therefore have discretion in adapting normal values in that respect. In this case they established a separate normal value for hypothetical OEM sales on the Korean market by adopting a profit margin which was considerably lower than that realized on own-brand sales.

86. The Commission considers that the use of a 5% margin, as suggested by Goldstar, would be entirely out of line with the profits which the company would have been able to achieve if it had made OEM sales on the Korean market. In addition, the institutions consider each case on its merits and in the light of its own facts; one case is not therefore necessarily to be appraised in the same way as a previous case.

P. J. G Kapteyn
Judge-Rapporteur